



# COUNSELING

Stefan H. Krieger, Richard K. Neumann, Jr., Kathleen H. McManus & Steven Jamar, *Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis* (Aspen 1999)

# CHAPTER 15

## WHAT HAPPENS WHEN A LAWYER COUNSELS A CLIENT

### §15.1 COUNSELING AND ADVICE IN LEGAL WORK

It is no accident that when judges talk to lawyers or when lawyers talk to each other, they use the word “counselor” as a form of address.<sup>1</sup> Some clients hire a lawyer to get advocacy, but *all* clients need and expect advice. For that reason, “[c]ounseling lies at the heart of the professional relationship between lawyer and client.”<sup>2</sup> For many lawyers, it also dominates their workday. “Surveys suggest that lawyers spend most of their time in activities that the lawyers themselves describe as ‘counseling.’”<sup>3</sup>

What exactly is counseling? Simply put, it is “the process in which lawyers help clients reach decisions.”<sup>4</sup> How do lawyers do that? There are two parts to counseling. The first, preparation, includes identifying the client’s goals and developing two or more alternative potential solutions that, to varying degrees, might accomplish those goals. (Chapter 17 explains how to do that.) The second is a meeting with the client in which the lawyer explains the potential solutions

1. For example: “Good morning, counselor, when will you be ready to proceed?”

2. Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, (Issues 3 & 4) 58 L. & Contemp. Probs. 5, 8 (Summer/Autumn 1995).

3. Thomas L. Shaffer & James R. Elkins, *Legal Interviewing and Counseling in a Nutshell* 7 (2d ed. 1987). “Lawyers spend less time in court or in the library than one would think. . . .” *Id.* at 8.

4. David A. Binder & Susan C. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* 5 (1977).

so the client can choose between or among them. (Chapter 18 explains how to conduct that meeting.) A simple example occurs when a defendant makes a pretrial offer to settle. For the plaintiff, one potential solution is to accept the offer. Another is to go to trial in hopes of getting more there. (A much more complex example is given in Chapter 16.)

"Advice" is a broader concept. Counseling is a form of advice, but not all advice is counseling. For example, suppose a judge has just preliminarily enjoined a client; the client asks you whether such an order can be appealed; and you say yes. You have provided advice because you have decoded some of the mystery of the law for a layperson. But you have not counseled because you have not helped the client make a decision (whether to appeal this particular preliminary injunction). The decision would require weighing the advantages, costs, risks, and chances of success of one option (in this instance, appealing the injunction) against the advantages, costs, risks, and chances of success of another option (not appealing). Counseling is working out those variables and explaining them to the client in a way that will help the client decide.

Clients want counseling and other advice in two kinds of situations. The first is transactions, such as business contracts, when the client wants to know how to accomplish a given goal at minimum cost and risk (see §15.2). The second is dispute resolution, which is dominated by conflict and where litigation is at least an option and might already be happening (see §15.3).

These two categories can overlap. In part, that is because a transaction-focused client wants to avoid conflict. For example, a client buying land on which to build a shopping center would want to know how to structure the transaction so as to cause the least amount of disagreement with the tax, land use, and environmental authorities. Another reason for overlap is that one method of resolving conflict is to find a way for both parties to improve their situations by collaborating (which often involves a transaction). For example, two home owners feuding over who pays for the care of trees that overhang both plots of land might be able to get a volume discount if they ask tree care companies to bid on working on all the trees on both plots. (This solves conflict and requires two transactions: one between the property owners themselves and the other between them and the tree care company submitting the best bid.)

Counseling and interviewing can overlap, too. Where a deadline or an emergency threatens, you might need to counsel a client on some questions during the initial interview. And if interviewing is for the most part learning facts orally, you will need to do that many times during the representation of a given client, sometimes in preparation for or in the midst of counseling.

Bear in mind three other things if the client is an organization (which usually means a business but might mean a nonprofit organization): First, as you learned in §2.2, the more you know the client's business and industry, the better you can perform all of this work. Second, organizations might look monolithic from the outside, but they are not really "cold, impersonal, and rational decision-makers."<sup>5</sup> Instead, organizations "are composed of people, and a merger or acquisition is as likely to occur because someone is empire-building as for any completely

---

5. Robert F. Seibel, LAWCLINIC listserv posting dated Nov. 16, 1994.

rational business reason.”<sup>6</sup> Third, organizations speak to their lawyers through managers, executives, and other employees, who may have their own personal worries. But the lawyer represents the organization and not any of the people who work for it. When the interests of employees diverge from those of the organization, the lawyer owes an entire duty of loyalty to it and little, other than some warnings, to the people involved. See §19.3 for an explanation of what the law expects you to do in this situation.

Finally, to be a good counselor no matter who your client is, you have to be able to combine empathy and detachment, two things that do not naturally exist side by side. Empathy helps you understand the client’s goals and needs. Detachment helps you see the problem as it really is, without delusion. “The wise counselor is one who is able to see his client’s situation from within and yet, at the same time, from a distance, and thus to give advice that is at once compassionate and objective.”<sup>7</sup>

## §15.2 TRANSACTIONAL COUNSELING

When organizational clients want transactional counseling and advice, it is most typically about how to structure deals with other organizations and how to conduct their affairs so as to minimize their taxes and their legal liability (say, in tort). When an individual or a family wants counseling and advice, it might, for example, be about how to plan an estate or buy a home.

Chapters 16 through 19 explain how to do full counseling of individuals and organizations. But much of what lawyers add to transactions is in the form of advice that might fall short of full counseling. In an organizational setting, the advice might be given in varying degrees of formality:

*Answering a point-blank question from the client, often over the telephone.* You sit in your office writing or reading. The phone rings, and you pick it up. A client describes a proposed transaction and asks pointedly about several concerns, among them perhaps: “whether the transaction is lawful, whether it is consistent with loan or other commitments that the corporation has previously undertaken, whether it will lead to a desired tax treatment,”<sup>8</sup> and so on. Or the client asks a single general question: “Do you see any problems with this?” When you answer, you are not doing full-blown counseling because your role is not to structure the decision as described in Chapter 18. But your answer is advice, and there is a technique to giving it. Take careful written notes of what the other person is telling you. Before answering, make certain that you understand the facts. Summarize them as you think you have heard them and ask the person at the other end of the line whether you have got them right (“Let me make sure I’ve got the facts right . . .”). Do not answer the other person’s questions until you are confident that you know exactly what the law is, and if that involves delay, estimate how

6. *Id.*

7. Anthony Kronman, *Living in the Law*, 54 U. Chi. L. Rev. 835, 866 (1987).

8. Robert W. Hamilton, *Fundamentals of Modern Business* 517 (1989).

long the delay will be (“I want to check a few things, and I’ll get back to you later this morning”). Make a written note of the advice you gave over the phone, and keep all of your notes in the client’s file in case a misunderstanding later occurs about what you said or why you said it.

*Participation in business planning.* This often happens in a meeting in which the lawyer is only one of several people in the room. Depending on the situation, the lawyer might figuratively sit on the sidelines, interjecting advice about legal concerns as they become relevant, or the lawyer might counsel by framing alternatives and estimating their effectiveness, as described in Chapter 17.

*Counseling about a transaction that is in the formation stage.* The client and another business have talked about how each could earn some money buying or selling something to the other. They have already agreed to some of the terms—perhaps price, quantity, delivery dates, and so forth. You have not been part of these discussions because you would not be able to add value to them. At a point when the deal seems to be jelling, the client consults you to “run it past our lawyers” (find out whether the deal would create legal problems) and “reduce it to writing” (have you produce a document, such as a contract, that will govern the transaction). After you and the client talk things over, you write a draft of an agreement. (This is not the final version.) After you and the client review the draft, you rewrite it and send it to the other business’s lawyer. (Or if the other business’s lawyer has already written a draft, you rewrite that instead.) Negotiations ensue. Afterward, you rewrite the agreement again to reflect the results of the negotiations. At some or a number of points in this story, you and the client have conversations in which you frame alternative ways of solving problems and estimate each alternative’s effectiveness, as described in Chapters 17 and 18.

Section 6.3.1 listed a number of things you should be curious about when a client brings you a business transaction. In addition, ask yourself what *practical* problems you see as a disinterested observer. This does not necessarily have anything to do with law, but it is among the most valuable things a lawyer can provide for a client. A lawyer who confines her- or himself to legal questions is a technician. A lawyer who also goes beyond the legal questions is a problem-solver.

In sum, “The mark of a successful corporation lawyer in giving advice can be simply stated: He or she must consistently give advice that the client believes it can rely on, and that, when followed, usually leads to the desired result (which may simply be that nothing bad happens when the advice is followed).”<sup>9</sup>

## ■ §15.3 DISPUTE RESOLUTION COUNSELING

If you were asked to imagine dispute resolution counseling, you would probably visualize either or both of two scenes. One would be a prelitigation conversation

---

9. *Id.* at 517.

in which the lawyer helps the client decide whether a lawsuit would be worth the effort, stress, and expense. The other would be a conversation during litigation: the other side has offered to settle, and the question is whether to accept or go to trial. But litigation is not the only way to settle disputes, and, although these scenes are very common, they are not the only ways in which dispute resolution counseling occurs.

When litigation has not yet commenced, it is too simple and too narrow to think of the counseling question as "Should we sue?" The real question is "What method of dispute resolution is best suited to this problem?" These are among the things you might think about:

- Should we negotiate *without* suing? The other side will usually negotiate if you have leverage, and in some circumstances, you might have economic or other leverage even if you do not have a provable cause of action.
- Should we negotiate *before* suing? This might be worthwhile if the other side is confident that you will sue if negotiation fails, and if you are confident that to negotiate you will not need to depose witnesses or pose interrogatories to the other side (which you can do only after suing).
- Should we *arbitrate*? Arbitration is essentially private litigation. The parties can create their own rules of procedure, making them as simple or as complicated as they like. They can choose their own judge (the arbitrator). Or, if they want a panel of three arbitrators, each party names one arbitrator, and those two choose the third. The parties can stipulate that the arbitrator or arbitrators have experience in the subject matter of the dispute. (If the dispute involves a collision of ships at sea, the parties can make sure that the arbitrators all have admiralty experience.) Not all arbitrators, however, are lawyers. With very narrow exceptions, the decision of the arbitrators cannot be appealed. (Some clients find that frightening; others find it reassuring.) Arbitration can be private in another sense as well: the parties can agree that neither they nor the arbitrators will tell anybody else that the arbitration ever happened. Arbitration includes no juries, which makes it unattractive to a client whose case has jury appeal (many tort plaintiffs, for example) but especially attractive to a client (such as a large corporation) distrusted by ordinary people. Arbitrators tend to award less in damages than juries.
- *Can* we arbitrate? By law, some issues cannot be arbitrated. For example, in many states an arbitrator cannot dissolve a marriage or award child custody, but an arbitrator can determine the money and property issues in a divorce.
- *Must* we arbitrate? In some industries, arbitration is difficult to avoid. For example, most stockbrokers and many health maintenance organizations will not do business with you unless you agree in advance to arbitrate any dispute that might subsequently arise. Has the client signed anything that contains an agreement to arbitrate disputes like the one before you? And in some court systems, certain cases are diverted to arbitration rather than to the courtroom.
- Should we *mediate*? Rather than adjudicating a dispute, a mediator tries to help the parties work it out themselves by suggesting possible solutions or helping the parties brainstorm them and by helping the parties to understand each other's point of view. Mediation can be useful where the parties have had and want to continue a relationship important to both of them. It is sometimes

attractive where the parties do not anticipate a continuing relationship but for some reason want to resolve their dispute in a way that does not create an obvious “winner” and “loser.” Mediation can, however, create hidden winners and losers. If one party is psychologically powerful and the other is psychological vulnerable, the former might intimidate the latter despite the best efforts of the mediator. An example might be where one party has a conciliatory and accommodating temperament and the other is by nature stubborn and unyielding. Another might be a divorce where the money and property issues are being mediated and where one spouse is bullying and manipulative and the other lacks self-confidence. In both situations, one of these parties needs the advice of somebody who owes a total duty of loyalty to that party—a lawyer who will participate in the mediation on the party’s behalf.

- Does your jurisdiction provide or permit some other form of dispute resolution? For example, in California retired judges known as referees will conduct trials at the parties’ convenience and will render appealable judgments in exchange for an often sizeable fee paid by the parties. This is a cross between litigation and arbitration. The parties get a trial and can appeal, but they can choose the judge and have to pay for the judge’s services. Perhaps the biggest advantage is speed: trial can begin as soon as you can hire a judge (if you can afford to hire the judge).

Arbitration and mediation are categorized as alternative dispute resolution, or ADR. Businesses are finding them increasingly useful as ways to settle disputes without incurring the expense and delay of litigation. That does not mean that a business client will be eager to mediate or arbitrate. The proportion of business disputes that are arbitrated or mediated is probably still relatively small, although it will likely grow in the future. And although arbitration and mediation are overall cheaper than litigation because they are simpler and faster, they include two expenses that litigation does not. The parties pay arbitrators and mediators for their services, and the parties provide the site at which the arbitration or mediation occurs. (In litigation, the taxpayers provide the judge and courtroom.)

If the client does not have a provable cause of action and has no leverage or other means of getting the adversary into dispute resolution, tell the client that as soon as you know it (see §19.1 for how). Delaying unpleasant news makes it harder on the client to hear it and harder for the lawyer to say it. But do not reject a case just because the means for winning it are not immediately apparent to you when you hear the client’s story in the initial interview. Effective theories and strategies take time to develop.

Advice without full counseling can happen inside a dispute resolution situation. Suppose that a corporation has been sued. The complaint alleges that the corporation has dumped lead and mercury in a river, destroying the fishing industry there. The answer denies everything. You represent the corporation, and you receive a phone call from the factory manager, who says, “Environmentalists are in a boat in the river next to our drain pipe. They’re sampling the water. Can we have them arrested for doing that?” You read the corporation’s deed to the factory land and note that the corporation’s property stops at the water’s edge. “The answer is no,” you say. In this conversation, you are only answering a question about how the law treats certain facts.

### §15.4 "DECISION MAKING IS AN ART"<sup>10</sup>

A well-made decision of any kind is a product of professional creativity operating through the six steps laid out in §4.1.2. In client counseling the steps can be stated as follows:

1. Identifying the problem (in counseling, focusing on the client's goals as described in §17.1);
2. Gathering and evaluating information and raw materials that can be used in resolving the problem;
3. Generating potential solutions to the problem (in counseling, as described in §17.2);
4. Evaluating each potential solution to measure its advantages, costs, risks, and odds of success (in counseling, this means predicting what each potential solution would cause, as described in Chapter 17, explaining those predictions to the client, as described in Chapter 18, and incorporating the insights of the client, as described in §18.3);
5. Choosing the best potential solution (in counseling, asking the client to choose as described in §18.5);
6. Acting on the solution chosen.

You will become better at this as you develop an effective problem-solving style and learn the thinking described in §4.2.2: Identify the few things that really matter; identify the decisive event; and organize strategy around the decisive event. In dispute resolution, plan to prevent the adversary from achieving her or his own decisive event. Treat the entire problem or conflict as an integrated whole. Protect against weaknesses. And resist the temptation to act on motivations that are not strategic, such as your own emotional needs.

### §15.5 THE PROCESS OF HELPING ANOTHER PERSON MAKE A DECISION

Counseling falls into two parts.

The first is preparation before meeting with the client. You identify the client's goals; gather and evaluate relevant information about both the law and the facts; generate alternative potential solutions that, to varying degrees, might accomplish those goals; and analyze the advantages, costs, risks, and chances of success of each potential solution. In other words, you go through the first four steps of decision-making listed in §15.4. Chapter 17 explains how to do this preparation.

In generating and evaluating potential solutions, consider both the legal and the nonlegal aspects and ramifications of the decision. In some settings, business or financial considerations matter. In others, political considerations might matter. And in most settings, interpersonal or emotional factors are important, even if not immediately apparent.

10. Warren Lehman, *The Pursuit of a Client's Interest*, 77 Mich. L. Rev. 1078, 1094 (1979).

(In referring to alternatives available to the client, this book sometimes uses interchangeably the terms “potential solutions,” “choices,” and “options.” But not all options are potential solutions. Where the client has suffered a loss, doing nothing is one of the options, and sometimes it is the only realistic option. But it does not solve the client’s problem.)

If this were your own decision to make, you would continue through the fifth and sixth steps listed in §15.4 and then be done. But it is not your decision to make. You are designing a decision, but you will not make it. Because someone else will, counseling has a second part, the meeting with the client, in which you give the client your preparation in a way that helps the client make the decision.

In the meeting that is the second part of counseling, you go back through the first four steps. You ask questions to make sure that you have understood the client’s goals and that they have not recently changed. If any facts or aspects of the law will dominate the decision, you describe them to the client (or remind the client of them if she already knows). You list the options available to the client and explain what each one is together with its advantages, costs, risks, and chances of success. Then you ask the client to choose an option (the fifth step from §15.4). After the client decides—which might not happen until after the meeting—the counseling job is complete, and you and the client act on that decision (the sixth step from §15.4). Chapter 18 explains how to conduct the meeting with the client.

## CHAPTER

# 16

## AN EXAMPLE OF COUNSELING: THE PLANT CLOSING

You have been hired by a labor union that represents the 432 employees of a local manufacturing plant. They were told last week that the plant will close 21 days later (two weeks from today) because the huge corporation that owns it is no longer satisfied with the modest profit earned by the product the employees make and because the corporation has been unable to persuade anybody else to buy and operate the plant. The corporation wants to concentrate its efforts only in product lines where the profits are spectacular. The employees want to continue working in this plant. They have families to support and are unlikely to find equivalent work in the local economy. The corporation says that such things are not relevant to bottom lines on balance sheets, and that the employees' paychecks will end on the day the plant closes.

### §16.1 PREPARING TO COUNSEL THE EMPLOYEES

*Identifying the union's goals.* The union members want to keep their jobs. You have spoken with many of them individually and it seems that, aside from the obvious and paramount need to preserve income, the workers want these jobs for three reasons: (1) most of them have worked in this plant for years, know each other, and feel a sense of community which they do not want to lose; (2) most of them are in middle or late-middle age and fear that they will not be able to find equivalent work elsewhere or adapt to it if it is available; and (3) many of them say that the work, although hard, is satisfying. (It would have been easy for you to just take the union's goal as "save jobs," but you learned so much more when you looked beyond that.) The workers are not interested in revenge.

And although they think it would be nice if the world were to operate so that this kind of thing did not happen, they are not out to change the world.

*Gathering and evaluating relevant information about both the law and the facts.* You check the law and find the following:

Your state is one of the few with a plant-closing statute, and it might be the strongest statute in the country. It requires employers to give 120 days notice to employees before permanently closing an employment site at which the work force has exceeded 250 people at any time during the preceding 24 months. An employer who does not do so is liable to affected employees for triple the wages not paid between the time the plant does close and a date that occurs 120 days after notice is given. Nothing in the statute requires an employer to pay employees after the 120-day notice expires, and nothing requires the employer actually to operate the plant during the 120 days. The statute is relatively new. Business groups claim that it violates the interstate commerce clause of the federal constitution as well as the due process and equal protection clauses of the fourteenth amendment. No court in your state has ruled on the question, but in other states courts have upheld weaker plant closing statutes against similar challenges.

The federal Worker Adjustment and Retraining Notification Act (WARN) requires notification 60 days before a plant closing. There are big exceptions, but these facts are not within them. The penalty for violations is much softer than under your state's statute. An employer who violates both statutes pays only the larger penalty (not both).

Nothing else in state or federal law requires an employer to give employees any severance payments of any kind.

The federal Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) provides that—under the circumstances that exist here—an employer must arrange for discharged employees to continue their health insurance coverage, but at the employees' own expense. Insurance through COBRA has two advantages. First, it can be, but is not always, cheaper than insurance bought on the open market. Second, because it is a continuation of, rather than new, insurance, employees with chronic illnesses, which the insurance industry calls "preexisting conditions," will not be discriminated against.

Your state's unemployment compensation plan will pay the equivalent of one-third of each employee's wages for 26 weeks after they cease to be employed.

Some lawyers would stop here on the idea that lawyers apply law to facts and do not do not much else. But you know that lawyers are problem-solvers and not mere technicians, so you go further and find out the following:

The land on which the plant sits is zoned only for industrial use and is surrounded for some distance in every direction by similar land. Some other neighboring plants have also closed within the past few years, and several of them are now dilapidated shells. There are few buyers for this kind of real estate locally. Most of the dilapidated factories are still owned by the companies that once operated them, and these companies continue to pay property taxes on them. A few are now owned by the local government because bids at tax foreclosure sales were insufficient to pay taxes the owners had stopped paying.

Most of the equipment in the plant will be serviceable for at least a decade. It is not new, but it is not obsolete either. The manufacturing process is labor-

intensive. That means that although the equipment is essential, not much of it is in the factory. There is a market for used equipment of this kind, but it is erratic. That means that if the corporation tried to sell the equipment, it might find a buyer right away or never.

The product manufactured in the plant is bought by other businesses for use in their own work. It is the kind of product that one buys continually rather than only once in a while. Because the brand made in this factory is known for its high quality, many customers habitually buy it rather than competing brands. But profits in manufacturing this product will never be more than modest because customers will not pay more than a certain price for it, no matter how good it is.

None of the workers has any significant savings. All are blue or pink collar, and many are literally the working poor. None has any managerial experience or knows anything about finance or marketing.

The corporation is exclusively profit-minded. (It does whatever earns or saves money.) It operates no other plant in this state.

(Visiting the plant and using a telephone, a law library, either Lexis or Westlaw, and possibly the World Wide Web, a lawyer would probably need between 12 and 20 hours of work to collect all this information.)

*Generating potential solutions.* You come up with the following list. (These are not alternatives. The union could decide to do more than one of them.)

1. Take action to get the corporation to obey the state's plant closing statute;
2. Advise the workers of their COBRA rights and give them the information they would need to file unemployment compensation claims;
3. Organize protests, lobbying efforts, and media exposure to persuade Congress, the state legislature, or both to adopt remedial legislation; and,
4. Find a way for the workers to buy the plant and keep on manufacturing the product.

*Evaluating potential solutions.* When you tally up the advantages, costs, risks, and chances of success for each of these options, this is what you get:

1. *Action under the plant closing statutes.* Under the state statute, this would get the workers an additional 99 days of income but would accomplish nothing else. The corporation's obligation is clear under the statute. Although there is a possibility that the corporation might be able to get the statute held unconstitutional, that seems unlikely, given the case law. And the corporation is unlikely to try. It has little motivation because it owns no other plant in the state, might be accruing triple penalties while challenging the statute, and, even if the state statute were struck down, the federal statute would still impose some penalties, although they would be weaker. The chances of success here are high. (A prudent lawyer does not promise that a particular result is 100% certain: facts that you do not yet know about might defeat a client's claim.) The cost to the union would be anywhere from your hourly rate for a few hours of work (if the corporation voluntarily agrees to obey the statute) to a very high sum (if the corporation challenges the statute in court). You predict

that the cost will be toward the low end of that scale, although the corporation will not agree easily.

2. *Advising the workers of their COBRA and unemployment compensation rights.* There is no reason to believe that the workers do not qualify for COBRA and unemployment compensation, both of which are better than nothing. But that, too, does not accomplish the union's goals. Unemployment compensation is not a job; it is not the job each worker now has; it is temporary; and it will provide less money than a paycheck would. The unemployment benefits for these workers might be so low that they might not be able to afford COBRA insurance. Although the value of this option is low, the cost of obtaining it is also low. It would take you no more than a few hours to make sure that all the workers are fully informed of what they are entitled to and how to get it.
3. *Lobbying, etc.* The state already has perhaps the strongest plant closing statute in the country. You might be able to imagine other legislation, but it would not be applied retroactively to these workers. Although legislation applied prospectively might improve society, this option does nothing to advance the goals of the workers, who are worried about their families.
4. *Buying the plant.* If it were possible, this option would satisfy nearly all the union's goals and also give the workers more control over their lives than they have had as employees. It would require capital to buy the plant; managerial, financial, and marketing expertise to keep it going and sell the product; and a transition plan that would maintain the existing market for the product, keep raw materials coming in, and keep the new worker-owners from being overwhelmed immediately by snafus and operating expenses.

Taken together, that seems impossible. But you break it down into its parts:

The plant and its equipment will not easily find any other ready buyer, and if the corporation does not sell the real estate soon, it will have to continue to pay property taxes on it. You have already established that the corporation owes each worker 99 days more wages than the corporation thought it did. This is not a huge expense for a giant corporation, but you have increased the cost to the corporation of closing the factory. And you might be able to show the company that it would be cheaper to help the workers buy the place.

An operating plant pumps money into a local economy that a closed plant does not. From the local government's point of view, it might be a good investment to give the new worker-owners, all local voters, a temporary or long-term rebate on the plant's property taxes to help get the plant established in their hands.

You see the germ of something here, although you also see problems. Things can get harsher when workers own the business. For example, it is always true that some employees are less efficient than others. Will the more efficient employees resent the less efficient ones when profitability affects everybody's income? Right now, this is at best an incomplete option. You have not been able to create a plan that would make it work. For that reason, you are not yet in a position to estimate costs for this option.

## ■ §16.2 MEETING WITH THE STEERING COMMITTEE

This is an unusual counseling session because you are meeting not with one or two people, but with the nine that the union members have elected as their steering committee to address this problem. You begin by stating your understanding of the union's goals so that if your understanding is wrong, it will be corrected. (It is not.) You then describe some of the facts that you consider especially important: the difficulty the corporation will have selling the plant and equipment, the loyalty of the plant's customers, the reputation of its product, and so on.

You say that you have thought of four options, but before you list them you would like to ask for patience. You will list them all first and then afterward describe how each would work and its advantages, costs, risks, and chances of success. You add that three of the options will sound inadequate and the fourth will sound impossible, but you ask for patience because you think that you and the steering committee might be able to brainstorm the fourth option into something the union could find acceptable.

You then list the options, and body language tells you that the group is not pleased. "You mean there's nothing in the law," someone asks, "that says they have to keep this plant open as long as we are making a profit for them?" You say, "No," but this question makes you realize that if the workers buy the plant, they do not have to make any profit at all. If they borrow money to buy the plant, all profit, or what used to be profit, can go to debt repayment.

You then go through the options one by one, describing their advantages, costs, risks, and chances of success. You present the last option (buying the plant) as an incomplete idea and point to the problems: The workers would need to hire managers and financial and marketing people. It would be awkward because hired managers would be supervising the owners of the business. And where would the money come from to buy the plant?

"I've worked for this company for 37 years," says one of the steering committee members, "and in the last 5 or 6 years they did nothing to make this plant work. They didn't like the product and treated it like a stepchild. They sent us dumb managers who belong in a Dilbert cartoon, probably rejects from other factories. We made this place work, and now they throw us out in the street!"

"I know of a manager who probably does not belong in a Dilbert cartoon," says someone else. "Ezekiel Joyner's daughter got a couple of college degrees in business, works in some high stress job in a big city, and hates it. Think she'd like to come back here?"

This meeting goes on for a long time. At the end, the steering committee votes to make a conditional recommendation to the union membership that they negotiate with the corporation to buy the plant, using the severance that the corporation would otherwise have to pay as part of the purchase price and borrowing the rest from the corporation itself or elsewhere.

There are two conditions. The first is that a business plan be developed first demonstrating that the workers could buy and operate the plant while retaining its customers. The second condition is that the county and municipal governments commit themselves to rebate most of the property taxes for several years if the workers buy the plant.

The steering committee also votes that if these conditions are not met, the recommendation to the union membership will be to get what they are entitled to under the state plant closing statute, COBRA, and unemployment compensation and start looking for other jobs.

The business plan would have to be developed very quickly because not much time is left before the corporation otherwise will close the plant. The next morning you pick up the phone to call Ezekiel Joyner's daughter. As you dial, you hope that she is very capable, has time to spare right now, can help you estimate the costs of the buy-out option and its chances of success, and would like to come back to live in your community.

# CHAPTER 17

## PREPARING FOR COUNSELING: STRUCTURING THE OPTIONS

The process of preparation is outlined in §15.4: You identify the client's goals and preferences; gather and evaluate relevant information about both the law and the facts; generate alternative potential solutions that, to varying degrees, might accomplish those goals; and analyze the advantages, costs, risks, and chances of success of each potential solution.

### §17.1 FOCUSING ON CLIENT GOALS AND PREFERENCES

*Transactional goals.* Make sure that you have clear answers to the following questions: "What do you [the client] want to gain out of this transaction? What should we try to make sure that you get? How does this transaction fit into your overall plans for the future?"

Do not assume you know the client's goals. Even two clients who want the same kind of transaction might want it for very different reasons and therefore have very different goals. A client whom you are helping to buy land last week might have wanted it to preserve wilderness (you might have represented the Nature Conservancy). Another client whom you are helping to buy a different plot of land this week want it for reasons that would have the opposite effect (you might be representing a developer of shopping centers).

Clients who do not use lawyers very often are sometimes unsure of their goals and instead seem to have a vague feeling that the transaction at hand is just called for by the circumstances. This is especially frequent in estate planning. It sometimes helps to ask the client to imagine the scene after the transaction and

its effects and consequences have run their course: "This may seem indelicate, but could I ask you to imagine how the people in your life would be managing if you were to pass away? What would be their needs? Is there anything you would like to do about what you imagine?" It can also help to mention the sorts of things that clients generally seem to want in such situations: "People with young children usually want to designate a guardian in case both parents were to pass away. Is that something you would want to do?"

Virtually all transaction clients will want to minimize any taxes or legal liability that might grow out of the transaction.

**Dispute resolution goals.** If the client has suffered a loss, what might she want? The possibilities include money or other measures to make up for that loss (damages, etc.); something that would prevent the defendant and others from causing similar losses in the future (punitive damages, an injunction, legislation); an official and public finding that the defendant acted wrongfully (a favorable judgment); and punishment for the defendant (punitive damages, publicity from the judgment). One client might want one or two of these things, while another client might want them all.

If the client is being sued or prosecuted, the primary goal usually is a successful defense. But the client might want more than a technical victory. The client might want victory in a form that clears the client's name. Often, a name-clearing victory can be gotten only with more risk—such as at trial—than a technical victory, which might come out of negotiations or pretrial motions that are hard for the public to understand.

**Ranking client goals.** You need to know how important each goal is to the client. Sometimes it is necessary to sacrifice what the client wants to get what the client needs. You are not in a position to counsel until you know where the client would draw the line between those two things.

**Client preferences.** A goal is what the client hired you to get. A preference is something the client would like you to do or not do while pursuing goals. "If you can avoid it, don't call my Aunt Sally as a witness" is a preference. The client did not hire you to prevent Aunt Sally from testifying. The client hired you to obtain something else and would prefer that the cost not include Aunt Sally's testimony. Some common client preferences include avoiding trials and other confrontations, avoiding taking time off from a job or other occupation, and avoiding publicity (although some clients want publicity). You can assume that all clients would prefer to get money owed to them sooner rather than later and to pay as little as possible in attorney's fees and other expenses.

Client preferences are important because they will affect each potential solution's value to the client. You need to know not only the preferences, but also how intense they are. There is a big difference between "If you can avoid it . . ." and "Under no circumstances . . ." And you need to know why the preference exists. One client might prefer to get money soon because, once invested, early money earns more in interest, dividends, and capital gains than late money does. Another client might prefer to get money soon to pay mounting medical bills—a much more compelling reason.

For many clients, the most important preference is represented by their tolerance or intolerance for risk (see §17.4).

## §17.2 DEVELOPING POTENTIAL SOLUTIONS

Notice that the solution developed in §16.1 (buying the factory) did not leap out of a law book. The lawyer created it by combining a number of raw ingredients. Some of the raw ingredients came from law books, and some came from common sense and an understanding of the business practicalities of the situation.

The lesson is this: Do not simply itemize the solutions that are obvious ("the law will let you do X, but it will not let you do Y"). Find ways to *create* solutions that—without your imagination and strategic skills—would not otherwise exist. More than anything else, that is what clients believe they are paying you to do. Chapter 4 explains how, especially in §4.1 (solution-generation). Inclusive solutions (explained in §4.3) may have special attractiveness for the client and are often the most long-lasting and satisfying solutions.

## §17.3 PREDICTING WHAT EACH POTENTIAL SOLUTION WOULD CAUSE

Benjamin Franklin said that complicated decisions are hard to make because:

all the reasons pro and con are not present in the mind at the same time; but sometimes one set present themselves, and at other times another, the first being out of sight . . . [and] uncertainty . . . perplexes us.

To get over this, my way is to divide half a sheet of paper by a line into two columns; writing over the one Pro, and over the other Con. Then, . . . I [write] down under the different head[ing]s short hints of the different motives, that at different times occur to me, for or against the measure. When I have thus got them all together in one view, I endeavor to estimate their respective weights . . . and thus proceeding I find at length where the balance lies. . . .

And, though the weight of reasons cannot be taken with the precision of algebraic quantities, . . . when each is thus considered, separately and comparatively, and the whole lies before me, I think I can judge better, and am less liable to make a rash step. . . .<sup>1</sup>

This is solution-evaluation as explained in §4.1.2 You estimate—in detail—the advantages, costs, risks, and chances of success of each option. That requires you to make predictions. You can express a prediction either in descriptive phrases (such as "a good chance of success" or "highly likely") or in numbers ("odds of about two out of three" or "a 50/50 chance of success"). Both methods have problems.

1. Letter from Franklin to Joseph Priestley, from *The Benjamin Franklin Sampler* (1956).

Descriptive phrases might be too vague to be meaningful to the client, or even to you. An optimistic client might hear “the chances are good” as “we are definitely going to win.” And how much probability do we have when there is “an excellent chance of success”? A client making one of the most important decisions of her life should want a more meaningful measurement of probability.

On the other hand, numbers can imply a precision that is not really there. Predictive estimates are by nature inexact, and a prediction that something is 65% likely to happen is not significantly different from a prediction that it is 60% or 70% likely to happen—although a client could easily think otherwise because you are using exact numbers. It would be better to avoid predicting in percentage terms and instead limit yourself to more general statements expressed in fractions, such as “odds of three in four.” You cannot really be more accurate than odds expressed in fifths (“one chance in five”), and you should resist the temptation to use smaller fractions. The only exception is where you believe the odds are even: it is hard to say that without using a phrase like “a 50/50 chance.”

Predicting is frightening business. How can you possibly assure a client that you know what the future will bring? You cannot, but you have to predict anyway. It might help to remember that every day trillions of dollars are invested, lent, or otherwise committed based on predictions of whether customers will like a product or hate it, whether stocks or interest rates will rise or fall, whether Congress will do this or that, or even whether there will be lots of rain or only a little over the next few months in the wheat belt or the corn belt or the cotton belt or some other place where crops are grown. Many of those predictions turn out to be wrong. The earth will not swallow you up if a prediction you make turns out to be inaccurate. But people whose predictions tend mostly to be right gain the loyalty and respect of their clients, both in investing and in law.

Out of fear of being wrong, you want to hedge, which might be either bad or good. One form of hedging—waffling—makes your advice less useful to a client, who must make a decision and needs the best prediction you are capable of. From the client’s point of view if you waffle, you are not really predicting. Another form of hedging—adding qualifications or conditions—makes your prediction *more* precise because qualifications and conditions identify variables that might change and alter your prediction (“we stand less than a 50/50 chance at trial unless we can get the Britz letter into evidence”).

Often, you will have to predict without complete knowledge of the facts or the law. Some facts might not become available to you until later, or only at some expense, or only after fighting with an adversary, or never. And as you well know, some parts of the law are unsettled. When you predict, you need to identify not only what you know, but also what you do not know. And where you see a gap, you need to define exactly how the gap would influence the prediction and estimate how and when that gap can be filled and how much it would cost to do so. (Sometimes the cost of filling the gap will exceed the value to be gained in making the prediction more accurate.)

Predictions cannot be set in stone. They evolve as you learn more about the facts and as other things change. Your prediction about the results at trial might change when you find out who the judge will be, and it might change again after you have chosen a jury. Even the law itself can change in the midst of your representation of a client. But when a client has to make a decision, the client

has to work with the predictions you are able to make at the time the decision must be made.

To make a good decision, the client will need to know what variables might change enough to alter your prediction as well as any gaps in the facts or the law that qualify your prediction. If you fail to make these qualifications clear to a client, you risk the kind of misunderstanding that leads to ethics complaints and malpractice actions.

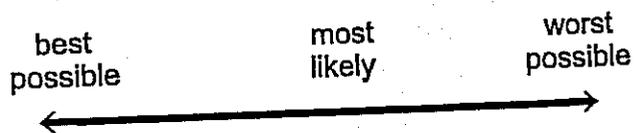
And your predictions should be frank and disinterested. If there is bad news, the client needs to know it. Hiding it from the client does neither her nor you a favor (and again, risks the kind of misunderstanding that can turn into an ethics complaint or a malpractice action).

You should be able to articulate a reason for each prediction. When you meet with the client, you will have to explain that reason. And if you force yourself to articulate it now, while preparing, your predictions will be more accurate because the act of articulating will force you to bring your unconscious thinking out in the open where you will notice its gaps and inconsistencies.

For two reasons, it may be a good idea to reduce to writing your predictions and the reasoning behind them. The first is preservation for the future, in case there is any later misunderstanding about the advice you gave the client. The second reason is that the act of writing improves the quality of the prediction. The writing process and the thinking process are inseparable: when an idea is spoken about, it might be half-formed, but if it is written about with care, it will have to become fully developed. The number of variables to be considered can make predictive judgments so complex that a lawyer can easily become lost unless thoughts can be worked out on paper. It is not unusual for an attorney to start writing on the basis of a tentative prediction already made, only to find, after much writing—and rewriting—that the prediction “won’t write” and must be changed. Depending on the complexity and importance of the issues, the writing could range from handwritten (but careful and complete) notes for the file to a formal office memorandum of law.

### §17.3.1 THE POTENTIAL SOLUTION'S CHANCES OF ACHIEVING THE CLIENT'S GOALS

Construct three scenarios for each option: the best case, the worst case, and the most likely case. Imagine the best result that could *reasonably* happen and the worst result that could *reasonably* happen. Neither of these should be far-fetched. They should define the range of what is genuinely possible—the range of things that really could happen to the client. Now imagine the result you think most likely to happen.



In especially important situations, you might want to construct five scenarios: the three above, plus two more that define a range of *probability*. What is the



to rule otherwise, you will not help your client by counseling with false optimism.

Thus, you need to evaluate not only the strength and weakness of the case in terms of legal abstractions, but also predict what the actual court involved would decide. For example, in a high-volume eviction or consumer credit court, although case law may support the dismissal of a complaint for failure to plead a specific element, a particular trial judge may ignore this precedent to expedite the trial of cases. Or, in a criminal case, while appellate cases may strongly require the suppression of certain evidence, many trial court judges will find ways of ignoring this authority if a ruling to suppress would lead to dismissal of the case. These kinds of predictions are fairly easy if you have had experience with a particular judge or with typical local juries.

If you know who the judge will be but have never litigated before that judge, ask the advice of lawyers who have. Use Lexis or Westlaw to find and read the judge's opinions on similar issues. And visit the judge's courtroom to get a sense of her personality.

If you do not know who the judge will be, try to think realistically about judges and how they view the world. You might respond that all law school has taught you is legal argument and that you do not know any judges, or at least enough judges for you to be able to generalize about what they would do in the infinite variety of cases that clients will bring you. Certainly, it will take a long time for you to understand fully how "the trained intuition of the judge" operates. But you can, in a rudimentary way, test your predictions for realism by thinking of one or more persons you do know very well who seem typical of respected and responsible people in their 40's, 50's, and 60's (which is the age of most judges). It would help if these people were lawyers, but that is not essential. It is much more important that these people are instinctively responsible and that their good common sense naturally gains the respect of others. After you have worked out the legal reasoning, ask yourself how these people would react to the result. Would they scoff at it? Or would they say that it is nice to see the law coming to the result it ought to? This is not going to give you the same feel for judicial realism that a good lawyer has after ten years of experience. But it can help you break out of the abstract view of law that legal education sometimes inadvertently encourages.

For issues to be decided by a jury, you have a different problem. Juries are randomly selected groups of people and often behave in unpredictable ways. But over time, juries from the same community tend to render verdicts in a range that roughly reflects some of the values of the community. And you can make approximate predictions by (1) "determining the distribution of verdicts in similar claims" tried in the same community, (2) "adjusting the distributions of verdicts in similar claims to reflect the unique facts of" the client's claim, and (3) "adjusting the revised distribution to reflect transaction costs."<sup>6</sup> In addition, if the client is deciding whether to settle or go to trial, the two options have to be compared in terms of expected value, the time value of money, and the effect of taxes. All of this is explained below.

---

6. Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. Dispute Resol. 1, 7. The next six paragraphs in the text rely heavily on pages 10-31 of Professor Hoffman's thorough article.

How do you find out what *verdicts juries have returned in similar cases*? Lawyers who practice in large urban areas can subscribe to verdict reporting services. There are also some national services,<sup>7</sup> but the verdicts they report might be more or less generous to plaintiffs than juries typical of your community might return. If you are on the defense side of a tort action and are being paid by an insurance company, the company itself might have a database on past verdicts. If none of these sources produces the information you need, you might ask the advice of a lawyer who has long experience litigating your kind of case in your community.<sup>8</sup> In predicting personal injury verdicts, some attorneys use “rule of thumb” formulas such as “three times specials” or other multiples of the plaintiff’s out-of-pocket expenses. In many instances, these rough estimates ignore the unique facts in the case and over-simplify.<sup>9</sup>

Once you have gotten data on other jury verdicts, how do you *adjust to get something comparable to your case*? Ask yourself the following questions: Are the facts of your case more or less favorable than the facts of prior verdicts? Are the injuries being remedied more or less egregious than the injuries in your case? How do the jurisdictions and communities involved compare with yours? (Other jurisdictions might have different law, and other communities might produce different kinds of jurors.) How recent are the verdicts you are comparing to your case? In some communities, juries have over time grown more generous to plaintiffs, while in others the opposite has happened. And how many verdicts are you comparing? The smaller the number, the less reliable the sample is as a basis for prediction. The most reliable sample would be a large one in which most of the juries appear to be behaving consistently with one another.

How do you *adjust to reflect transaction costs*? The most obvious transaction cost is what the client would have to pay to go to trial and get the verdict you predict. How much would the client have to pay you (assuming you were not hired on a contingency basis), and how much would your client have to pay for things like expert witnesses and deposition transcripts? (These estimates merit precision, at least within a range. When a lawyer gives an off-the-cuff guess and costs steadily mount until they greatly exceed that guess, the client can justifiably become distrustful and angry.) If there is an appeal, how much would the client have to pay to defend the verdict? If the client is a plaintiff and if the judgment would not be chargeable to an insurance company or some other party that promptly satisfies judgments, how much would the client have to pay to enforce the judgment you predict? (Some defendants go to elaborate lengths to hide their assets.) For that matter—and this is critically important—do you have good reason to believe that the defendant actually has the assets or insurance to satisfy the judgment you predict? And how much of the client’s time and effort would all this consume?

---

7. See, for example, Association of Trial Lawyers of America, *Jury Verdicts & Settlements* (available in the Lexis Verdict library) and *National Jury Review & Analysis* (available in the Lexis Verdict library).

8. If you have to go outside your law firm to get this kind of advice, you might have to pay for it. You are taking up another lawyer’s time, although some lawyers will talk to you informally for free as a professional courtesy.

9. Donald G. Gifford, *Legal Negotiation: Theory and Applications* 53 (1989).

A predicted verdict can be compared to a proposed settlement by computing the *expected value of the verdict*. "Expected value is arrived at through multiplying the anticipated verdict by the probability of liability."<sup>10</sup> If you predict that there are two chances in three that a jury would return a verdict in a plaintiff's favor, and that such a verdict would be for \$100,000, the verdict's expected value is \$67,000. This is more meaningful to frequent litigants such as insurance companies, because over time their bets even out. But it can still be meaningful to an individual client who otherwise would have no real way of comparing the worth and risk of a predicted verdict with the certainty of a settlement offer.

Moreover, the *value of money differs over time*. Money delivered now is worth more than the same amount delivered later because the money you get now can be invested and will grow in the meantime. Even a smaller amount of money now can be worth more, depending on anticipated returns on investment, than a larger amount later. If the client is choosing between going to trial and accepting a settlement offer, you have to estimate how long it would take to get payment on a judgment and what investment income the amount offered in settlement would earn in the meantime. A safe assumable investment income is the current annualized rate paid by Treasury bills and money market funds, which can be found in the business sections of daily newspapers.

Because some kinds of awards are *taxed* and others are not, the effect of taxes might be different in a verdict than in a settlement. In a verdict, the client is taxed according to the kind of award the jury provides. For example, compensatory damages for personal injury or property loss are not taxable. But the client will pay taxes on damages for breach of contract, compensation for lost income, or punitive damages. In a negotiated settlement, on the other hand, the parties themselves can decide whether what the defendant pays the plaintiff is compensation for lost wages (taxable) or compensation for damaged property (not taxable), assuming that the plaintiff sued on both theories.

If the options are valued in monetary terms, even only partially, you *must* do the math to determine what each option is really worth. For example, if in a damages lawsuit the client will decide whether to accept a settlement offer or go to trial, the client has no way of choosing between the two unless you place a value—in *numbers*—on each option.

### §17.3.2 SIDE-EFFECTS—DESIRABLE AND UNDESIRABLE

In dispute resolution counseling, consider the following:

- Would a lawsuit or other confrontational option disrupt relationships the client considers important? Would it give the adversary an opportunity to impugn the client's character? If the client's honesty or another character trait could be made an issue, you can be sure that the adversary will do so.
- Would continued conflict build up stress to a level that the client would want

---

10. Hoffman, *supra* note 6, at 31.

to be relieved of? Most individual clients experience litigation as “emotional turmoil,”<sup>11</sup> but some do not care.

- Could litigation compound harm the client has already suffered? For example, if the client has been defamed, but the damage to reputation has been limited to a small circle of people, litigation—and especially a trial—could give the defamatory claims much wider circulation.
- Could a verdict provide a public vindication important to the client?
- Is vengeance (“making them pay”) important to the client? One of law’s functions is give people an avenue of vengeance more socially acceptable than murder or mayhem. But there are limits. You already know that in federal court you may not use a paper filed in court “for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”<sup>12</sup> Nearly all state courts have similar provisions. And ethical rules everywhere impose other constraints and provide mechanisms for you to decline to pursue client goals under some circumstances.
- If the client is a frequent litigant (such as an insurance company) or an attractive target for litigation (such as a newspaper that aspires to print the truth no matter whom it offends), is it important to force plaintiffs to trial in order to discourage the impression that the client is a “soft touch”?
- In a criminal case in which the client is being offered a plea bargain, what problems, aside from the sentence itself, would the resulting conviction or other disposition cause the client? Does the client risk deportation or loss of a license or a job?

## §17.4 ADAPTING TO THE CLIENT’S TOLERANCE FOR RISK

Some people will bet small amounts of money—\$5 on a lottery ticket or \$25 on the office World Series or Superbowl pool. Some people will not bet at all; they have no taste for it, or it violates their convictions. Some people feel comfortable staking relatively large bets, such as \$1,000 in a poker game. Some people bet with money they cannot afford to lose.

If you think of gambling as limited to lotteries, office pools, poker, and the like, you will probably say that you do not gamble often or that you never gamble. But the fact is that every time you make a decision based on a prediction of the future, you are gambling.

You gamble every day in small ways. If it takes you 20 minutes to drive to school and if your first class of the day is with a teacher who will not tolerate people who walk in late, you are gambling that you will have no trouble finding a parking space when you leave home 25 minutes before class. And you have gambled in very big ways. When you decided to go to law school instead of medical school or business school or forestry school, you were gambling that you would enjoy the work, that it would pay what you need or want to earn, that at

11. *Id.* at 33.

12. Fed. R. Civ. P. 11(b)(1).

graduation the job market would be favorable, and that it would stay favorable enough to accommodate you throughout your career.

We win a lot of the small gambles of everyday life, but we also lose a lot of them. In the end, it does not matter much because both the benefits of winning and the costs of losing are not terribly great. You are embarrassed if you walk into class five minutes late, and the embarrassment might cause you to stop making that particular gamble. But you still have your family and friends, your net worth is unchanged, and you have not significantly added to the amount of injustice in the world. Even if you win, what have you won? Maybe an extra five minutes at home.

The big gambles are much more frightening. What happens if after graduation you find that there are things about the practice of law that you cannot stand? What happens if the demand for legal services begins to decline so that the number of jobs, or the size of salaries, or both also decline? If you lose this gamble, the cost in time and money (including borrowed money) could be staggering. On the other hand, if you win this gamble, you might acquire the largest thing most people could own: an emotionally satisfying career that also produces a lifetime of reasonable income. (And that career might be more satisfying and more profitable than another that you rejected when you chose law.)

A person who is comfortable making substantial bets is said to have a high tolerance for risk. This might be either realistic or foolish. Some investment managers and some bettors at horse races know how to find the long shot that pays off. There are also others who think they know how to do that but really do not have the skill.

Most people do not have high tolerances for risk. They might instead have a medium amount of tolerance, only a little, or none at all. Sometimes this reflects a prudent reluctance to bet things that one cannot afford to lose. Sometimes it just reflects fear.

Tolerance for risk decreases as the stakes get bigger. A person who will casually bet \$20 on a horse race might be a lot more hesitant if three zeros were added to that amount. And the size of the stake is always relative. To some people with very large financial resources, even a \$20,000 bet is not significant enough to cause anxiety. And to others in precarious circumstances, \$20 can be a lot of money.

Whatever the client's tolerance for risk, it is entitled to your respect. The client, after all, must live with the consequences of the decision long after you have disappeared from the client's life. (You do, however, have an obligation to point out the disadvantages of betting to clients with high tolerances for risk and the disadvantages of not betting to clients with low tolerances.)

How can you structure the options to take the client's level of tolerance into account? First, you can make sure that the menu of choices you offer addresses the client's level of tolerance. If you offer four risky options and one safe one to a client who has a low tolerance, your creativity may have been focused on the wrong end of the scale. Might there have been more than one safe option?

Second, if money or something else quantifiable is at the heart of the matter, you can calculate the expected value of each option. (See §17.3.1.)

Third, you can help a client understand whether her or his tolerance for risk is realistic *in this situation*. A client with a high tolerance who wants to make an

unrealistic gamble might gain insight if you explain that you think most clients would not bet that steeply against the odds, and *why* most clients would not do that. (But do not claim more than you know. If you do not have much experience with client decision-making, ask a senior attorney whether most clients would make that bet.) On the other hand, it might be overbearing, if not oppressive, to tell a person with a low tolerance for risk that most clients would make a bet the client does not want to make.

# CHAPTER 18

## THE COUNSELING MEETING WITH THE CLIENT

### §18.1 MOOD, SETTING, AND THE LAWYER'S AFFECT

A client who is making a momentous decision will be presented with a large amount of information while under stress. Remembering that *how* you say something has an enormous effect on how people respond (see §2.2), what should you be careful about in this situation?

*Involve the client so that you have a genuine conversation.* This is collaborative decision-making. Do not be a talking head. Suppose you are at home, looking at the television, surfing channels with the remote control in your hand. On the screen you see two or three people sitting in easy chairs in a television studio, talking about the great issues of the day. How long will you watch this before moving on to the next channel? They might be marveling at the recent discovery of an unlimited number of superb jobs for recent law school graduates in a place with a wonderful climate and local laws that make student loans uncollectible. Why, as soon as you see the talking heads, will you change the channel so fast that you will never learn of this remarkable place. Because, like most people, you hate being put in a passive position while somebody talks at you.

In client counseling, a lawyer who is a talking head might explain the choices nonstop for perhaps a half hour and then ask the client whether she has any questions. The client then says her first word: "No." The lawyer concludes by saying, "Well, go home, think about it, and call me when you've decided."

Be an active listener, using all the techniques you learned in Chapter 6.

*Give the client helpful respect.* You may know some things the client does not, but the client hired you, can fire you, and therefore is your boss. Moreover, the client has to live with the consequences of this decision long after you have forgotten about it.

Why do some lawyers forget this and patronize clients? “[I]n almost every advisory relationship, the client is usually untrained in the professional’s specialty, while the professional may have seen the client’s problem (or variants of it) many times before. There is thus an almost natural tendency to come across to the client as patronizing, pompous, and arrogant. . . . Although advising clients sometimes feels like explaining things to a child, the secret to becoming a good adviser is to do exactly the opposite: Act as if you were trying to advise your mother or father. . . with immense amounts of respect. . . .”<sup>1</sup>

*Consider in advance how you will explain legal concepts and terminology.* If you try to find the right words off the cuff, they will either be incomprehensible or sound condescending. You want plain words that accurately describe the concept without implying that you are talking down to the client. Compare three examples, two of which satisfy those criteria:

**1. A doctor, speaking to a patient with a neurological disorder.**

You feel a tingling in your knee sometimes, but nothing is really happening in the knee. When that tingling happens, it is because of something going on in your brain. Every part of your body is controlled by nerves that report to some specific part of your brain. The nerves use low levels of electricity to report, and your brain also uses low levels of electricity. The part of your brain that controls your knee sometimes has a kind of short-circuit in which the brain thinks it has received a signal from the knee, but it hasn’t. That part of your brain, which is very small, probably has been slightly damaged in some way. But even if that weren’t true, the brain can still fool itself. People who have had a leg amputated sometimes report that shortly afterward they can still feel their toes wiggling.

**2. A lawyer, speaking to a client who owns a gas station and who has just been served with a temporary restraining order.**

A TRO can be granted while a motion for a preliminary injunction is pending for the purpose of preserving the status quo until the motion can be decided. You have been restrained from selling gasoline from the pumps alleged by the Department of Environmental Protection to be an environmental hazard, and violation of the order is punishable as a contempt. The order is effective until it is vacated, which probably will not be before the court decides the pending motion for a preliminary injunction, which has a return date of next Friday.

**3. Another lawyer, conveying the same information to the same client.**

A judge can command you not to do something for a short period, which is what has happened here through this order, which lawyers call a temporary restraining

1. David H. Maister, *How to Give Advice*, *The American Lawyer*, Mar. 1997 57, 57–58.

order or TRO. This TRO orders you not to sell gas from the pumps that the DEP complained to you about last week. If you do that anyway, the judge can make you pay a fine or even lock you up in jail. The DEP has also asked for another kind of order called a preliminary injunction, which would do the same thing but for a much longer period of time. The judge has not given DEP a preliminary injunction, although she might do so later. The TRO—the order you were served with yesterday—will last until the judge decides whether to issue the other order, the preliminary injunction. We go to court on that next Friday, but the judge will not decide on that day.

Do doctors usually talk to you the way the doctor in the first example does? Do you wish they would? In the third example, has the client been given all the information contained in the second example?

*Ignore your own emotional needs.* Do not show off. Be patient even if you have a lot of other things to do. If the meeting is taking longer than you thought it would and if you are due in court or elsewhere, break off the meeting and reschedule as soon as possible. Do not try to do an hour job in a half hour.

*Explain the options neutrally.* Remember everything you've already learned about client-centered lawyering in §§3.1–3.3. Do not let your wording or body language convey that you like some options better than others. That would put pressure on the client to make a choice she might not make otherwise. If the client wants your recommendation, the client will ask for it (see §18.4 for how to answer that question). If the client has not asked for your recommendation, keep it to yourself and do not even hint at it.

*Give the client empathy.* If you were in the client's position, you would want the person advising you to be supportive and understanding, but you would not want that person to be unctuous and insincere about it.

*Face the harsh facts.* If the client gets an unrealistically optimistic picture, the decision will probably be the wrong one. And clients poorly advised in this way are tempted later to consider ethics complaints and malpractice actions.

*Use an appropriate seating arrangement.* You should not be behind a desk, where you look authoritative, distant, and uninterested. (If you were interested, why would you put a big piece of furniture between you and the client?) Sit together at a conference table or in upholstered chairs together so you can talk close at hand. The best seating arrangement lets you and the client look at pieces of paper at the same time. The seating arrangement should allow you to use a large note pad or a whiteboard on the wall or an easel, or some other way of outlining the options visually.

## ■ §18.2 BEGINNING THE MEETING

When scheduling the meeting, you undoubtedly told the client what decision you would be asking the client to make, and you probably also explained the reason

for the decision and its importance (unless the client already knew anyway). If not, now is the time to do so. Even if you have said these things before, it helps focus the client's attention if you at least summarize them as you begin the meeting.

Depending on how experienced the client is in dealing with lawyers, you should explain that this is the client's decision; why it should be the client's decision; how you can help the client make the decision by framing choices and working out their advantages, costs, risks, and chances for success; and how you and the client can work together at doing this. You can dispense with much of these explanations with repeat business clients, who would find them pedantic. But if a client has dealt with lawyers only infrequently, or has dealt in the past with lawyers who have not been very good counselors, the client might really need an orientation.

Before explaining the choices, make sure that you have understood the client's goals and that they have not recently changed. If they have, you will need to adapt. If they have changed greatly, you may be able to do only some of the counseling job in this meeting because you may need a break to prepare some things anew.

If any facts or aspects of the law will dominate the decision, you can describe them to the client (or remind the client of them if she already knows). Do not give a detailed recitation unless the client asks for it. (You are trying to avoid being a talking head.) But if something will be a theme from option to option, it helps to explain it early.

Warn the client against premature judgment (see §4.1.2). Brainstorming will happen only if the client keeps an open mind.

Then, simply outline the options, letting the client see the outline on paper or on a whiteboard. Describe each one only enough so that the client knows what it is. Then go on to the next option. (Do not evaluate the options yet. You are just trying to give the client an overview before you go into the details.) In what sequence should you mention the options? Put yourself in the client's position and ask yourself which sequence would help this client understand the nature of the decision. For example, you might start with the options the client already knows about and work toward the ones that would be news to the client. Or you might start with the most serious options and then mention the more marginal ones.

In preparing for this meeting, you worked out in detail each option's advantages, costs, risks, and chance of success. The client can better see how these all fit together if you show the client something visual. It can be as simple as a handwritten list on a notepad. If the choices and their ramifications are complicated, you might want it typed to get everything on a single page. (If the client has to turn from one page to the next, the big picture can disappear.)

Afterward, ask the client whether she sees any additional options. Clients can be pretty creative about this. Sometimes they can change some of your ideas into new and additional potential solutions (as the steering committee did in §16.2). Sometimes they can remember ideas that you have mentioned in the past but have unaccountably forgotten about now. (You are not perfect.) And sometimes they can think of potential solutions that have escaped you. Clients are closer to the problem than you are, and many of them spend more time than you can thinking about the problem.

You are now ready to explain each choice's advantages, costs, risks, and chances of success.

### §18.3 DISCUSSING THE CHOICES AND WHAT THEY WOULD DO

The best transition is to ask the client which options she would like to talk about first. If the client has no preference, you might discuss them in the same sequence in which you introduced them earlier.

Brainstorming with a client is different from brainstorming with another lawyer. Many clients will assume that their problem-solving skills are inferior to yours, and they will need your encouragement to believe otherwise. The best encouragement is not flattery, but instead a sincere interest in how the client thinks and feels about the problem and how it might be resolved. Treat the client as an equal whose views you respect.

Seek additional insights from the client frequently. Every time you find yourself finishing some aspect of a particular option (its risks, for example), ask the client whether she sees something else. If the client offers something, ask again until the answer, finally, is no. As you learned in Chapters 5 and 7, a person with several related pieces of information will usually offer them only one at a time when being asked questions. If you ask once, get one piece of information, and then go onto something else, the client might not tell you the others. After going through all the options, you might ask the client whether any new ones have occurred to her during the conversation. Do not be surprised if the answer is yes.

Because hope springs eternal and can delude, when you explain the three or five predicted scenarios to the client (see §17.3.1), the "best possible" should not be the first one you describe or the last one you describe. When speaking to anybody on any subject, the first thing you say and the last thing you say usually make stronger impressions than whatever you say in the middle (assuming that what you say in the middle is not particularly scandalous).

Be clear about what will happen upon success or loss. Suppose your client has read in the newspaper of multimillion dollar jury verdicts. You have drafted a complaint seeking two million dollars in damages. You fail to tell the client that a complaint customarily asks for the most the lawyer thinks the client could possibly get from a jury. You also do not tell the client that a typical jury verdict in this kind of case would be less than half a million; that local judges might reduce a verdict like that by one-third or even one-half; that nothing will be paid during the pendency of an appeal; and that a reasonable settlement offer by the other side—before or after a verdict—would probably be less than you predict that a jury would award. You are not treating your client fairly, and you are asking for trouble.

Also be clear about what your efforts will cost the client. For the client, cost is not limited to your fee. In litigation, the client will also have to pay some itemizeable costs within your office (photocopying and messenger expenses, for example, and perhaps fees for court reporters at depositions). The client also might have to pay court costs. And even in regard to your fee, when does it end?

Many clients are astonished to learn that even if they win at trial, they will have to keep paying your hourly rate while the other side appeals.

There are also less tangible costs to the client—in time, missed vacations, annoyed employers, and pure stress. Intangible costs are too often overlooked in counseling. Clients who have never been litigants sometimes find it hard to imagine the frustrations and anxiety litigants suffer, or the ways in which the opposing side in litigation might try to impugn their motives or character.

People dislike admitting that they do not understand something you have said. Rather than ask “Do you understand?,” ask instead “Have I explained it clearly enough?” You are more likely to draw the client out with the second question, which puts the onus for any misunderstanding on you.

### ■ §18.4 IF THE CLIENT ASKS FOR A RECOMMENDATION, SHOULD YOU GIVE ONE?

In the client-centered lawyering explained in §§3.1–3.3, the lawyer helps, but the client decides. In counseling, that means laying out the choices neutrally—without telling the client which ones you like.

This book assumes that most clients want client-centered counseling, and that client-centered counseling produces better decisions. Some clients, however, really do want to be counseled in a different and more traditional way, and a client is entitled to have advice given in a style with which the client is comfortable. If the client is uninterested in an array of options and wants to focus immediately on the one you would recommend, you should try to persuade the client to choose without your recommendation.

If the client persists and wants your recommendation at the beginning, then the client is making a decision about how she wants to be counseled, and that decision is one you should respect. But be very careful not to let your own needs—your ego or your tight schedule—delude you about what a client really wants. *If it is absolutely clear, despite your attempts to persuade otherwise, that this really is what the client feels most comfortable with*, you should counsel the client in the manner the client prefers. In client-centered lawyering, the client is, after all, the boss. Recommend a solution while explaining its benefits and drawbacks, but mention the alternatives and explain why they are worth considering.

Clients who want to hear only your recommendation tend, paradoxically, to be either very sophisticated or very unsophisticated.

Some unsophisticated clients might not function well in a participatory relationship with a professional and might want guidance from an authority figure in the old tradition where “[t]he client is expected to stand by passively while the lawyer lays out what he considers to be all the relevant legal considerations and selects for the client’s rubber-stamping the course of action” that the lawyer thinks best.<sup>2</sup> But, in our experience, that is *not* true of most unsophisticated clients. Some unsophisticated clients have very good problem-solving skills which you

2. Martin J. Solomon, *Client Relations: Ethics and Economics*, 23 Ariz. St. L. J. 155, 181 (1991).

will, with pleasure, learn to respect. For some, brainstorming with you is an opportunity to awaken skills and thus gain some mastery and empowerment. And for some, when you presume to recommend, your "opinions may tend to silence and dominate"<sup>3</sup>—rather than enlighten.

At the opposite extreme, a repeat business client who has dealt with lawyers often and who knows you and trusts your judgment might not want to hear about other options because she is confident that the one you would recommend is the best one. Successful business people know how to use time efficiently, and to them a 30-minute conversation seems to be a mistake if a 5-minute conversation would yield the same result.

Only with caution should you accede to a client's preference for "recommendation only" counseling. Three things disappear when you give your recommendation and mention the alternatives only as an afterthought.

The first is an opportunity to brainstorm the options with the client. Not only are two minds better than one, but the client usually knows more than you do about some or most of the factual situation as well as the kinds of solutions the client feels more comfortable with. If you suspect that brainstorming might improve the options in a significant way, say something like: "If we can work together for a few minutes to think about the options, it might be a good investment of time. Before I make a recommendation, I want to be sure about the situation."

The second is a process that can give both you and the client assurance that the right decision is being made. People sometimes think of a process as an inconvenient thing one has to go through in order to get a certain result. But a good process often has its own value even if the same result might be obtained without it. Among other things, a good process creates or deepens confidence that the result is the best one available.

For example, you meet with a client on a Monday. At the client's request, you state your recommendation, and the meeting lasts only ten minutes because the client makes a fast decision on the spot. On Tuesday, you and the client act on that decision, and the action is irrevocable. (No matter how hard you try, you will never be able to undo it.) On Wednesday and Thursday, lots of unexplored issues keep popping into the client's mind. Finally, on Friday, the client cannot stand it any longer and calls you, listing all these issues for you. You explain how, although they are reasonable concerns, none of them would change your recommendation. You have very good reasons, and the client is completely persuaded. After that conversation, the client thinks of a few more unexplored issues. The client might call you again. Or the client might be too embarrassed to do so and might go for a very long time wondering whether what you recommended was really the right thing to do.

Some lawyers would dismiss this client as antsy, but the real problem is that you did not insist on a process that was thorough enough to give this client confidence from the very beginning that your recommendation was the right thing to do. Some things are too important to be settled on your recommendation, even if at the time that is how the client wants to handle decision-making.

The third thing that disappears when you give "recommendation only" coun-

---

3. Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 U.C.L.A. L. Rev. 697, 710 (1992).

selling is full disclosure sufficient to protect you from the law of malpractice if your recommended solution fails. You recommend option A and do not mention option B. Based on what you and the client know at the time, option A is so much better than option B that no reasonable person would seriously consider option B. (In other words, you have given exactly the right advice.) But later the situation changes. New facts cause option A to fail and to make option B much more attractive. The client hires another lawyer, who sues you in malpractice because you never mentioned option B. You say that it would not have made any difference because the client would still have chosen option A, which was the better choice at the time the client had to make a decision. The client says otherwise. You might win at trial, or you might lose, or your liability insurer might settle before trial. Even if you “win” this dispute, you will lose an enormous amount of time (probably in hours that would otherwise be billable) as well as peace of mind. You may suffer some bad publicity. Your insurance rates will probably go up. *And*, you might not win.

In addition, “recommendation only” counseling creates a potential for confrontation, which might be either open or hidden. You describe option C and recommend it, telling the client that it is the only thing that will work. The client dislikes option C and says, “But what about option D? There are things about it I like, and I really hope it will work.” You have researched this thoroughly and know that the last time option D worked for anybody was in 1919, and even then on distinguishable facts. You try to explain why option D will not work. You might persuade the client, and the conversation might end with sincere friendliness on both sides. But two other things are just as likely, or even more likely. One is that you and the client argue about it. The other, which is worse, is that the client does not argue, but you see some stiffening body language, after which the client goes away and follows your advice reluctantly, or does not do anything, or hires another lawyer. The problem is that you have taken a position, and once you do that, conflict rather than brainstorming is the usual result. An assertive client might argue with you, and it is difficult to convert arguing into brainstorming. An unassertive client would rather go away than argue, but the problem remains.

Everything said in this section is different from the scene in which the client asks you what you would do if you were in the client’s situation. In our experience, that is a very good question from a smart client.<sup>4</sup> The client is not really asking for your recommendation. The client wants to know how other informed and responsible people—for example, you—deal with problems like the client’s. You can answer while at the same time explaining exactly how your values, goals, tolerance for risk, taste, and situation in life are different from the client’s. If you have enough experience to be able to describe how most people in your community decide similar questions, the client might also find that helpful.

---

4. You should ask the same question of a mechanic who tells you that your eight-year-old car needs a valve job (“if this were your car, what would you do?”) or a home contractor who is giving you a quote on an expensive but not urgent repair (“if this were your home, what would you do?”).

## §18.5 ASKING THE CLIENT TO DECIDE

Ask the client to decide among the options. Understandably, the client might want time to think about it. In fact, you ought to encourage that unless there is some reason for an immediate decision. And do not be surprised if the client telephones with one or two follow-up questions before deciding.

If the decision will be delayed, try to work out a "soft" (flexible) deadline before the client leaves the meeting. Legal work seems to go on interminably because few of the people involved impose deadlines on themselves. A client faced with a tough decision may delay making it but then regret the delay. You can help by asking the client if she wants to set a date by which she will get back to you.

After the client decides, the counseling job is complete, and you and the client then act on that decision.

# CHAPTER 19

## OVERCOMING SPECIAL PROBLEMS IN COUNSELING

### §19.1 WHEN THE CLIENT'S GOALS CANNOT BE ACCOMPLISHED

Suppose the client wants something that the legal system will not deliver, and you are unable to find or create any other solution to the problem. This is much worse than the situation in which some of the client's goals cannot be accomplished but others can.

How do you break this bad news to the client? After examining the research on how doctors do a bad job of delivering bad news and how they can do it better, Linda F. Smith made some suggestions for lawyers in similar circumstances.<sup>1</sup> Among them are the following:

*Do not deliver bad news without thinking long and hard about what you will say and how you will say it.* If in the initial interview, you think that the client cannot have what the client wants, do not say so then. There are three reasons. First, if you give yourself a few days, you might be able to think of a way of accomplishing at least some of the client's goals. Even if you can deliver only 10% of what the client is after, that is better than nothing. Second, clients can accept bad news better if they are told all the reasons why it is bad, and in an

---

1. Linda F. Smith, *Medical Paradigms for Counseling: Giving Clients Bad News*, 4 *Clinical Law Review* 391 (1998). The next eight paragraphs in the text rely on pages 418–24 of Professor Smith's thorough article.

initial interview you are usually not prepared to do that. It can take more time to prepare a solid explanation that a layperson will understand. Third, for the client it can be traumatic to be told immediately in an initial interview that what she wants is impossible. It can feel as though the lawyer is not willing to take some time to try to solve even a part of the problem. If in the initial interview you feel that the client will not get what she wants, it would be more appropriate to say that it will be difficult to do so while empathizing with the client's needs.

*When you do give bad news, allow plenty of time to explain it.* A thorough explanation helps the client accept the situation. And the client will need time to talk about frustration and disappointment.

*“Be clear, direct, and candid in giving information.”*<sup>2</sup> Sometimes lawyers communicate bad news ambiguously because they are afraid of a client's negative reaction. But clients are entitled to truth rather than misleading ambiguities. And it is part of a lawyer's job to help clients deal with negative reactions.

Begin by saying that what you have to report is disappointing. Then give a quick summary (“Your great-aunt's will cannot be successfully challenged even though she left you nothing in it”) and explain in detail why it is so. To avoid ambiguity, keep the discussion focused on the news you are delivering and what it means for the client. Although in other situations you would invite the client to choose which option to discuss first (see §18.3), a client might not like doing that if all the options are bad; instead, give your explanation and cover each option as it logically comes up.

*Listen to the client's reaction and empathize with it.* It can be brutal to hear bad news from a person who does not seem to care about its effect. Legal rules are designed to do the fair thing in most situations. No rule can cause justice 100% of the time. And many situations are themselves unfair because they cannot be resolved without hurting someone. Your client deserves the same human response that you would give a friend in similar circumstances.

But if you overdramatize your empathy, a resilient client might become depressed because you are treating as tragic something that for the client is only frustrating and disappointing. Listen carefully to what the client says and match it with empathy. If, on the other hand, the client reacts harshly, do not change your prediction for that reason alone. If the news really is bad, you will not do the client a favor if you imply false reassurance in order to avoid the client's fury or anguish.

*Before ending, develop a plan for handling the situation.* What is needed to keep matters from getting worse? Even if the client's goals cannot be accomplished, could anything be done that might benefit the client?

---

2. *Id.* at 419.

## §19.2 WHEN THE CLIENT MAKES A DECISION THE LAWYER CONSIDERS EXTREMELY UNWISE

Looking at the client's interests alone, a decision is *extremely* unwise if it would cause a *great deal more* difficulty for the client than it would solve, or if it would do a *much* less effective job of solving the client's problems than other options that the client does not choose.

This is not the same as a decision that you would not make if you were in the client's position. The client, not you, has to live with the consequences of the decision. If the decision reflects the client's tastes and values rather than yours, there is nothing troubling about that.

Why might a client choose an option that would cause many more problems than it would solve or that would do a much less effective job of solving the client's problems than other options would? Here are the three most common possibilities: The client might be ineffectual at making decisions in general. Or the client might be either much less willing or much more willing to take risks than you expected. Or the client might disagree with your predictions of what the various options will cause.

Among the things clients hire us for is to warn them of trouble, and the client who makes an extremely unwise decision is entitled to warning. That client is also entitled to ignore your warning after hearing it. It is not just that the client has to live with the consequences of the decision: The client also decides whether to make risky bets or safer ones. And sometimes clients are right when they disagree with their lawyers' predictions.

How can you deliver this warning? First, do not give a lecture. Instead, raise the matter through questions and through statements of concern about the client's needs. The questions should probe so you can find out why the client is making this decision. You are looking for the places where the client's thinking diverges radically from your own. (The client's thinking might diverge radically from your own in only a very few ways, but you do not understand the client's reasoning unless you find those points of disagreement.) Second, do not argue with the client. Arguing accomplishes nothing in this situation, and most clients will experience arguing as abuse. Third, check your own thinking to make sure that you really do accept the client's goals and values and are not substituting your own. And fourth, make it clear that you will act faithfully on whatever decision the client makes, but because of the matter's importance, you want to make sure that the client understands the risks and consequences.

Here is an example. The client is a plaintiff, and the defendant has offered to settle on the eve of trial. The lawyer believes that the client has only two chances in five of winning.

*Client:* I want to reject their offer to settle. They are not offering enough money.

*Lawyer:* I am fully ready for trial. Our witnesses are ready, and we can start picking a jury in the morning. But this might be the most important decision you'll make in this case. Let me ask some ques-

tions so that I understand not only what you want me to do, but also why you want me to do it.

**Client:** OK.

**Lawyer:** Are you more optimistic than I am about what will happen at trial?

**Client:** I'm a little more optimistic. I don't feel like I'm losing. I feel as though it's a toss up now, a fifty-fifty shot.

**Lawyer:** That is just a little more optimistic than I am. What worries me is that you expressed real concern last week about getting money for you and for your family. How comfortable do you feel risking all or nothing like this? Because if we lose at trial, there will be nothing. . . .

This conversation would probably go on for some time.

### §19.3 ETHICAL ISSUES IN COUNSELING

*Candid and complete advice.* Rule 2.1 of the Model Rules of Professional Conduct requires lawyers to “render candid advice,” and in doing so, the “lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” The Comment to Rule 2.1 elaborates:

A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially when practical considerations, such as cost or effects on other people, are predominant. . . . It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

Rule 1.4 requires you to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions.” The Comment to Rule 1.4 notes that, in many instances, the client can make an informed decision only if you explain the damage that some of the options under consideration might cause to others:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. . . .  
 . . . In litigation a lawyer should explain the general strategy and prospects

of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

If you receive an offer of compromise from an opposing party, you must inform the client of the offer and counsel on whether to accept or reject it unless in earlier counseling the client has already decided which offers will be accepted and which rejected (see §§20.5 and 21.6).<sup>3</sup>

*When the client decides to do something illegal.* Illegality can happen on more than one level. For example, one client might decide to commit a crime. Another client might decide to do something that involves an increased risk of negligence liability. Ethics law treats these possibilities differently.

Under Rule 1.2(d) of the Model Rules:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

This means that in counseling you may not suggest an option that involves committing a crime or civil fraud. But if a client asks you whether a particular act would be illegal, you may answer the question, regardless of what the answer might be.

If you say that the act would be illegal and if the client then asks what would happen if the client were to do it anyway, you may answer that question as well. Depending on the act at issue, you might say that the client could be made to pay damages in tort or contract, or you might explain the judge's sentencing discretion if the act is a crime. If the client further asks you to predict whether the client would be held liable or prosecuted or convicted, you may answer that, too. For example, if the client has a store and wants to open it for business on Sundays, and if your state or county has a Sunday-closing law that has not been enforced in generations, you may tell the client that opening on Sundays is technically illegal, but that there is virtually no chance of the client's being prosecuted. Why may you do that? If law—as practicing lawyers know it—is “[w]hat officials do about disputes,”<sup>4</sup> you are explaining the law to your client.<sup>5</sup>

Rule 1.2(e) provides that “[w]hen a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.” That means that if the client asks you to help plan an act that would

3. Comment to Rule 1.4 of the Model Rules of Professional Conduct.

4. Karl N. Llewellyn, *The Bramble Bush* 3 (1930).

5. Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* 59–60 (1975).

be criminal, you must say that you cannot and explain why. What is the difference between this and answering the client's question about opening a store on Sunday? It is the difference between describing what the law will do and helping to plan an act. You did not help the client plan to commit the crime of opening on Sunday; you simply predicted the consequences.

*When the client makes a decision that you consider immoral.* Ethics law gives you a choice between two alternatives. You may act on the client's wishes. Or you may withdraw from the case.<sup>6</sup>

Your withdrawal will probably not cause the client to change the decision. Another lawyer can probably be found who will not pose the objection that you made. And if you represent the client in litigation, the court might order you to continue to represent the client "notwithstanding good cause for terminating the representation."<sup>7</sup> If you try to withdraw on the eve of trial, for example, the harm withdrawal would cause to the opposing party, the court, witnesses, and others might outweigh the harm caused by your continuing to represent the client.

Usually, it is more effective to appeal to the client's self-interest. If the client might be able to see a connection between self-interest and moral values, you might try linking them in an approach something like this:

*Lawyer:* I can understand why you would want to treat your business partner this badly. If I had a partner who behaved that way, I think I would be as upset as you are. But I'm worried about the future. Sometimes, in the heat of hurt feelings, we do things that we later regret. We behave harshly while angry. And later when anger has cooled down, we think that that is not how we want to be remembered by anybody else or even by ourselves. I'm worried that a few years from now you might wish that you had treated your partner less harshly on this occasion. I'm not talking about forgiving her. I'm only talking about being less vengeful.

If the client is not likely to see a connection between moral values and self-interest, you might develop a creative plan that does something special for the client's own self-interest in a way that eliminates or reduces the moral problem without describing it as a moral problem.

For example, suppose the client is a real estate developer who has quietly bought up two city blocks of apartment houses. The tenants are all low-income, and the client wants to tear down the buildings and construct a large corporate office complex with upscale stores on the street level. The client has already emptied most of the apartments by refusing to renew leases as they expire and by offering a few thousand dollars each to tenants who would move out while their leases are still in effect. The client predicts that, if this continues, nearly all the apartments will be empty within a few months. But about a dozen tenants have declared that they refuse to move, and each of them has a lease that extends

---

6. Model Rule 1.16(b)(3).

7. Model Rule 1.16(c).

long past the scheduled date of demolition. The client calls these people “the resisters.”

The client intends to demolish the buildings in which the resisters do not live on a 24-hour-a-day schedule, which is legal in that part of town even though the resisters would not be able to get much sleep. The client will make no effort to make access to the resisters’ apartments easy during demolition, and the client will cut off the resisters’ utilities from time to time, using “demolition safety” as an excuse. You told the client that it would be illegal to cut off utilities unless it was really required for safety reasons, and the client asked whether the resisters could easily prove that the cutoffs were unnecessary. When you answered that proof would be hard, although not impossible, the client chuckled.

What can you do to persuade this client that it would be in the client’s own self-interest to treat these people better? Sometimes a client may be influenced if you were to predict that terrible things would happen to the client if the client were to persist. But the facts here will not support that. This client can probably get away with it if the client is cunning enough. You are not willing to withdraw, and even if you were, it would make no difference because the client can replace you with another lawyer who is not bothered by such things.

The key is to find an incentive that makes sense within the client’s way of thinking. Can you show the client that more civilized methods of persuading the resisters to leave would cost less? Can you think up an act of generosity on the client’s part that would solve the resisters’ housing problems while producing a benefit for the client that the client considers worthwhile? Some clients instinctively think narrowly while ignoring the effect of good and bad publicity. And the tax code can at times be quite helpful. Money spent in some ways is not taxed or is taxed less than money spent in other ways. You cannot know the true cost of any transaction until its tax consequences are factored in. If Plan X costs \$1,000 and is fully taxed, it is more expensive than Plan Y, which costs \$1,150 and is not taxed at all.

In general, there is a limit to the number of times you can tell a client that the client is behaving immorally. With some clients, you will lose your credibility if you do it even once. Even with a particularly fair-minded client, you begin to lose credibility if you do it with any regularity.

*When the client is disabled from making a decision.* A minor or a person suffering from a mental disability might not be considered by the law to have the capacity to make legally binding decisions. (The definition of incapacity differs slightly from state to state.) But most people who are incapacitated from making legally binding decisions are still entitled to some autonomy and no less respect than anyone else.

The Model Rules take both of these problems into account. Under Rule 1.14(a), “[w]hen a client’s ability to make adequately considered decisions . . . is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” The Comment to Rule 1.14 explains that “a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being. . . . [For example,] some persons of advanced age can be quite capable of handling

routine financial matters while needing special legal protection concerning major transactions.”

Rule 1.14(b) provides that a “lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.” For example:

[I]f a disabled client has substantial property that should be sold for the client’s benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer’s part.