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Philosophy of Client Counseling¹

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Robert Dinerstein
Professor of Law
American University, Washington College of Law
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Consider the following legal counseling scenario:

You are Sarah Portnoy, the pro bono general counsel (and a partner at a large law firm in a large city) for a broad-based civil rights organization, Advocacy for Civil Rights (“ACR”). ACR has been in existence for approximately twenty years. About six years ago, the prior executive director engaged in a series of financial arrangements that were, at a minimum, imprudent. For example, he would use grant money obtained from one governmental source to perform on another contract, hoping that when it came time to perform on the government contract, there would be additional funding to carry out that work. While this scheme worked for awhile, it ultimately began to fail, and the organization, which had expanded significantly under this executive director’s leadership, found itself seriously over-extended and unable to pay its bills. Among the most pressing bills were payroll tax payments to the IRS, a substantial contract with a sister civil rights organization (the Civil Rights Consortium) requiring the performance of services and creation of programs that was no longer feasible, and an unsecured loan and line of credit from a local bank.

Once the Board of Directors became aware of these financial and other problems, it asked for and received the resignation of the executive director and chief financial officer of ACR. An interim director took over, and made a series of difficult decisions regarding staff layoffs, closing of two satellite offices, and re-negotiation of contracts. In addition, the organization received a substantial portion of a large settlement in a civil rights case in which it was involved. That settlement permitted ACR to pay off the IRS and most of the vendors to which the organization owed money. The remaining significant obligations were to the Civil Rights Consortium and to the bank. The Board, with advice of a law firm partner of yours, negotiated long-term notes with the bank and the Civil Rights Consortium to pay off the debts over time. The organization made about six monthly payments on each loan but soon found itself unable to keep up payments. The bank made no effort to contact ACR once the payments stopped (about one year ago). With interest and penalties, the note to the bank is now at about \$125,000. The sister civil rights organization, which had an interest in seeing ACR stay in business,

¹ This paper will serve as the basis for a chapter on Philosophy of Client Counseling to appear in Dinerstein, Ellmann, Gunning, Kruse & Shalleck, INTERVIEWING AND COUNSELING (Thomson West, forthcoming).

accepted a revised note that required payments of only \$500 per quarter, an amount that ACR has been able to pay. However, there is an unstated agreement with the Civil Rights Consortium that if another big settlement (in a specific case) comes in to ACR, ACR will use the proceeds to pay off the remaining debt (approximately \$200,000).

The interim director resigned approximately one year ago, and the Board conducted an unsuccessful search for a replacement. The final two candidates, who were well-qualified, were deterred from joining the organization because of its continuing financial difficulties. At that point, one of the Board members, a retired clergyman, agreed to serve as a second interim director to see the organization through the next year at least.

This new interim director, Reverend Joseph McGill, had a lot of energy and immediately began to implement ideas that would put ACR on a sounder footing. After filing a series of new cases, the organization received a substantial settlement in one case (not the one involving the Civil Rights Consortium), with more awards likely in pending cases. The amount received, \$600,000, would permit ACR to pay off both the bank and the Civil Rights Consortium and still have money to spare. But it is not clear that immediate payment of both amounts due is in the best economic interest of ACR.

You have a meeting with the interim executive director to discuss his options regarding the two principal outstanding debts. Tentatively, you have thought that it made sense to pay off the sister civil rights organization immediately to reward it for its faith in ACR and to cement ongoing positive relations with the group. With regard to the bank loan, you have thought that while the bank may not technically have written off the loan, they obviously are not expecting complete payment, and you believe that the bank would accept an offer to pay say one-half the debt in one lump sum as a resolution of all amounts outstanding.

Finally, your discussion with the interim executive director is in the context of the Board chair telling you that the Board is very happy with the executive director's performance, and would like to have Rev. McGill become "permanent director" (with a commitment of at least five years). The Board as a whole has not yet acted on this request, but the chair has indicated that there would be a substantial increase in salary for the executive director, and that the chair has reason to think that Rev. McGill is willing to make the commitment and accept the executive director position permanently.

Your meeting is at the offices of Rev. McGill

L1: Reverend, how are you today?

C1: Just great, Sarah. You have no idea what the excitement level here is like now. I think the staff is highly motivated and I think we're poised to do great things.

L2: That's great. You must be feeling good about the financial improvement too.

C2: You bet, and not just for the obvious reasons. The staff and I are much more comfortable in taking risks, and in making some front-end expenditures, knowing that we have a little more wiggle room. We might even be able to have a clean audit one of these days.

L3: Yes, I think we're headed there. Which brings me to what I wanted to talk with you about. Now that we have the big Gemstone settlement in hand, have you thought about how you want to use the money?

C3: I must say that when I was on the Board, the idea that one could even have asked that question, let alone have an answer for it, would have been absurd.

L4: Absolutely. But as you've been telling the Board and me, Joe, we need to get used to the organization having turned the corner. It's a new day.

C4: Yes, it is. In fact, I *have* been thinking about what to do with the settlement money. For one thing, I think we need to set aside some money for our new fair employment initiative we've been talking about. I also think it's time to bring some of the staff's salaries up to market levels. But even when we do that, I see us having money left over to deal with our debts. I'd like to pay off Evans Bank immediately.

L5: What about the debt to the Civil Rights Consortium? Have you thought about paying them off?

C5: I am not sure I see the rush there. For one thing, Jane [the executive director of the Civil Rights Consortium] has always said that as long as we can keep paying the \$500 per quarter, with full repayment once the Acme Insurance case settles, she and her Board are OK. Second, I've been talking with our litigation consultants in Acme, and they tell me that it might not be bad for there to be a little leverage on the Consortium to settle the case, rather than push the case to a hearing where we well might do a lot worse (or, at the least, not see any money for years). If Jane thinks that settling the case will get her the repayment from us sooner, it might tip the balance toward the settlement.

L6: That's interesting. But wouldn't Jane be annoyed to learn that we were sitting on a six-figure settlement with the ability to pay her off and not using the money to do so? That's assuming, of course, that she even knows about the recent settlement—which of course raises other issues.

C6: Oh, she knows. Not only did we do a press release, but I made sure to call her directly. I think it's significant that she did not in any way pressure me, or even mention, our debt when I told her about the settlement. She was just happy for us that we had achieved such an important precedent, not to mention a major award.

L7: OK, I can see you've thought some about whether we need to repay the Consortium right away. You have your reasons, and I am glad to hear you've been thinking it through. I do have an additional perspective on this that I'd like to share with

you, but before we get to that, I would like to return to the bank for a moment. I must say I was a little surprised to hear that you thought the first priority would be to pay them back in full. I think it is pretty clear that the bank has all but given up on getting any more money from us. Can you tell me what your thinking was there?

C7: I am surprised you're surprised. We borrowed the money in good faith but we've been unable to pay it back. Now we can. I feel bad that Larry [the former executive director] was able somehow to persuade the inexperienced loan officer to give us the line of credit and loan on an unsecured basis. I think we need to make things right now that we can. For me, it's a moral obligation.

L8: Don't get me wrong. I am not recommending that we ignore our obligations. But I have been thinking that with the bank, the loan is more of an arms-length transaction. They—or at least the bank officer—must have had their own reasons for giving us the loan and extending the line of credit to us. It didn't work out for the bank (and by the way, we don't know what happened to the young loan officer—he may be long gone at this point, and if he's not we can assume that it wasn't such a big deal for him to make the unsecured loan). So I was thinking that we could make an offer for some portion of the amount outstanding, say one-half, and that they'd consider that like a gift. Remember that they haven't been in touch with us for months even though we've stopped making payments.

C8: I still can't get around the fact that they loaned us the money fair and square. In fact, the loan and line of credit [which has subsequently been repaid] came at a crucial time for us. Because of Larry's shenanigans, we couldn't pay it back, but now we can. Paying them back in full is the right thing.

L8: You know, Reverend, the \$125,000 amount due includes interest on the debt and penalties that the bank adds on as a matter of course. The principal we owe is considerably less than the \$125,000—probably closer to \$100,000. I need not tell you that these interest and penalty charges are often not consumer-friendly. Would you be averse to our negotiating a reduction in this amount of the debt?

C9: Don't get me wrong, Sarah. I am not saying we should fall on our sword here, or pay more than we owe. If you tell me that it is OK to negotiate the amount, within reason, I am happy to do it. I just want to do what's fair.

L9: Fine. Let me do some additional research and talk to some folks and I'll get back to you with some additional advice. And I'd like to fold into our later discussion a further conversation about how to deal with the debt to the Consortium. Is that OK with you?

C10: Absolutely. You know I rely on your advice and I will be interested to hear what you come back with.

* * *

This dialogue, drawn very loosely from a real situation faced by the author, presents the background for a lawyer-client counseling session. It is, of course, not the counseling session as such, in that the dialogue does not reflect the structure that we will urge you to consider bringing to such sessions: the clarification of short-, medium- and long-term client goals (though there is some of that here), the identification of choices or options for the client (with the client's input and the lawyer's prediction of a range of possible results), the careful (and interactive) consideration of the advantages and disadvantages of those choices along a broad range of dimensions (legal, economic, cultural, psychological, political, moral, and more), the balancing or weighing of the identified options in light of their predicted consequences, and, ultimately, the making of the decision and steps needed to implement it. But we hope that this scenario can serve to identify, at least preliminarily, some of the important underlying values that should inform the lawyer's counseling of his or her client.

Our starting point for analysis is that the lawyer should approach the counseling session² from a stance of what might be termed *contextual client-centeredness*. That is, the lawyer should attempt to adopt a method of client counseling—client-centered counseling—that seeks to maximize the client's role in decisionmaking, both as a matter of process and of ultimate substantive result. Legal commentators have urged adoption of a client-centered counseling approach as far back as David Binder and Susan Price in their highly influential 1977 textbook, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH*.³ We add the modifier “contextual” to emphasize some of the considerations that ought to inform how the lawyer interprets the requirements of client-centered counseling in a particular situation.

In looking at the above lawyer-client dialogue excerpt, it might be useful to identify some of the contextual factors that could play a role in how the lawyer will go about planning for, and ultimately conducting, a client-centered counseling session. Consider the relevance of the following (which is by no means a complete list):

- That the lawyer and the Executive Director have a long-standing relationship and thus appear to know each other well.
- That the Executive Director was formerly a member of the Board of Directors, and thus (1) had a different kind of relationship with the lawyer in the past; and (2) might feel responsible for the default on the debt to the bank in his past role of fiduciary for the organization.

² We use the singular term “session” to describe the lawyer-client counseling interaction, but, as this partial dialogue reflects, counseling may occur over a number of formal and informal sessions. Indeed, some lawyers engage in preliminary counseling as early as the initial client interview, though we urge the exercise of caution in such instances, especially for law students and new lawyers, because of the substantial dangers of counseling based on insufficient knowledge.

³ David A. Binder & Susan C. Price, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). [Note later editions/authors here].

- That the client is a religious figure (though note that if one reads “religious” as “moral” and “moral” as “paying all of one’s debts in full,” the client’s willingness to delay payment of the debt to the Civil Rights Consortium suggests that there is more nuance in his views than might be expected. He is, after all, a religious figure who has chosen to extend his activities beyond a pastoral context).
- That the organization in question is a civil rights organization.
- That the lawyer handles matters for the organization on a pro bono basis, and works for a large, big-city law firm.
- That the maker of the \$125,000 loan is a bank, presumably well-represented by counsel.
- That the bank officer who actually approved the loan was young and inexperienced.
- That the commercial marketplace in which the bank operates may (or may not) find it acceptable (and not immoral) for debtors to make substantial partial payments of debts owed.

Note that the above list does not even include some of the contextual factors that clinical scholars and others increasingly note when examining the lawyer-client relationship, such as the differences (or similarities) in race, ethnicity, gender, and religious affiliation that might affect the relationship and the interactions that occur within it.

Why does context matter? It matters because there is no generic right-and-wrong of lawyering, but, rather, techniques, strategies and attitudes that might be adaptive in some situations and problematic in others. Good lawyers know (among other things) how to identify contextual factors and incorporate them into a nuanced vision of client counseling.

In advocating a contextual client-centered approach to counseling, we are mindful that some commentators have criticized client-centered approaches on a number of grounds.⁴ Indeed, our approach to client-centered counseling reflects and incorporates some of those critiques. While at one time the landscape of client counseling models might have been thought to include only traditional (lawyer-oriented) and client-centered models, the field now would appear to include a wider variety of approaches: traditional, client-centered, political or justice-oriented, and collaborative, to name but some.⁵ We

⁴ See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990) [and other sources].

⁵ Different authors conceptualize the different approaches to client counseling in diverse ways, and the available characterizations are hardly free from controversy. For example, Thomas Shaffer and Robert Cochran, in their textbook, *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994), propose the following models: Lawyer as Godfather (roughly the traditional model), Lawyer as Hired Gun (the client-

could say (and write) a lot about these models,⁶ and whether their characterization of lawyer and client behavior seems accurate, but for now it is enough to focus on the supposed differences between the client-centered and collaborative models.

The “collaborative” critique of client-centeredness criticizes the latter for its commitment to lawyer neutrality toward client goals and the lawyer’s supposed stance of disinterestedness toward the client. On this view of client centeredness, the lawyer lays out options and consequences for the client (as described above) and throws the decision into the client’s lap while providing precious little guidance, a pose that might be captured by ending the lawyer’s presentation with the statement, “I’ve laid it all out for you—now you decide.” The lawyer comes across as a technocrat unwilling to engage the client in interactive decisionmaking, overly committed to a view of client autonomy that belies any engagement with the client for fear of disrupting the client’s world view.

This description of client-centered counseling does not resonate with our own views of how well-trained client-centered counselors ply their trade. In fact, the process of engaging clients in clarification of goals and discussion of potential consequences is, and must be, highly interactive and collaborative. The good client-centered lawyer probes, pushes, and challenges the client’s conceptions, even as the lawyer remains open to the possibility that the client will not share the lawyer’s views on these matters.

To be sure, some people have sometimes interpreted client-centered counseling in this mechanistic fashion, but we should not confuse poor technique with impoverished theory. There is nothing about the underlying theory of client-centeredness that eschews a collaborative approach between lawyer and client.

There is one respect, however, in which the collaborative approach, at least as advocated by some of its supporters, would appear to differ from a pure client-centered approach. The collaborative lawyer may be more willing than his or her client-centered counterpart to offer his or her views about whether the client’s decision(s) is correct. In a true collaboration, of course, the lawyer would be open to being influenced *by* the client at least as much as the lawyer seeks *to* influence the client. Not all proponents of a collaborative approach would go so far, but most would at least argue for the legitimacy, and perhaps the necessity, of the lawyer taking a more explicitly active role in telling the client what the lawyer thinks about the client’s choice(s).

How could one be against this kind of collaboration? In a number of respects, we agree with this approach, though we observe that there is an inevitable one-sidedness to any professional-lay relationship because the lay person is seeking assistance from the professional and not vice versa. But we emphasize the importance of a collaborative process—which we argue is fully consistent with a robust vision of client-centered

centered/zealous advocacy model), Lawyer as Guru (the justice or political model), and Lawyer as Friend (the collaborative model, and the one they espouse).

⁶ And we have [cite to sources].

counseling—while viewing the ultimate goals of the lawyer-client relationship as more centered on the client and his or her goals (however derived) than on the lawyer and client together, as a true and complete collaborative approach might suggest.

And yet. Even in our collaborative process model, there are times when the context permits, or even requires, the lawyer to be more willing to express his or her opinion to the client. The dialogue that began this chapter may well present one of those contexts. Ask yourself whether some of the dangers that concern us when lawyers are too eager to give their opinions to their clients—that the lawyer will dominate the client because of the lawyer’s greater social and economic power, that the lawyer cannot know enough about a first-time client to appreciate fully all of the elements that should go into the client’s decision, and so on—are at work in Sarah Portnoy’s counseling of Reverend McGill. Is it likely that Portnoy could persuade Rev. McGill to make the choice he does not want to make because she is more powerful than he is? Does the long-standing nature of their professional relationship assuage your concerns about the limits of the lawyer’s knowledge? Shouldn’t the lawyer be able to anticipate the kinds of concerns Rev. McGill would bring to bear in his decisionmaking process?⁷

These are questions, not assertions, and you will certainly note from the dialogue that for all the information Sarah Portnoy had about the client, the organization, and the broader context, she actually predicted that Rev. McGill would have the exact opposite point of view. That is, Portnoy thought that Rev. McGill’s first priority would be to repay the debt owed to the sister civil rights organization and not to the bank. Perhaps there are additional reasons, not reflected in the dialogue excerpt, that explain why Rev. McGill is not as concerned about the debt to the Consortium as he is about the bank debt. Sometimes, the ongoing nature of a relationship can make it harder to “do the right thing” than easier to do so. The wise counselor is aware of contextual factors, and seeks out additional ones, but does not assume that those factors inevitably and reliably point to a particular solution in any particular case.

* * *

[Remainder of chapter/paper will pick up the lawyer-client dialogue at a later point and identify some of the ongoing themes that inform our view of lawyer-client counseling. It will also demonstrate more concretely some of the differences among lawyers counseling under different philosophies or with different models. Finally, it will explore, briefly, the underpinnings of the client-centered model that we find most salient]

⁷ See also Steve Ellmann’s chapter on moral lawyering.