

The Lawyer As Counselor

by Jack W. Burtch Jr.

In my second year of law school, I began working for a well-known Nashville defense lawyer. He was in his early sixties then, as I am now. One day he said, “JB, I want you to go to the county health department, find all the pamphlets on mental health, and bring them back here.” Thinking this was somewhat unusual, I asked the reason for his request. “Because many of my clients have trouble accepting reality,” he said, “and I want to find out why.” Sometimes simply bringing clients into reality is our job.

When I look at my law license with its faded signatures, I see the words “Attorney and Counsellor at Law.” For many years, only that first word registered. I was a lawyer. That meant I represented clients in their causes. Within the bounds of morality and legality, I helped them achieve their goals by zealous advocacy. I listened to what they wanted and tried to make it happen for them.

Yet as the years went by, I began to notice something unexpected. In my practice in labor and employment matters, I could now see that certain types of situations tended to produce certain types of problems. Although each client’s case was unique, I began to see patterns in both causes and solutions. This wasn’t true for every problem, of course, but it was for many. It then dawned on me that I might know more about how a situation would play out than those who had been enmeshed in it from the beginning. I was suddenly able to predict how a group of employees might respond to a new management directive. I now realized the larger trajectory of an executive’s career could be forecast by examining a few recent assignments and duties.

Creating Opportunity out of Disappointment

For me, the counselor’s role came into focus about fifteen years ago when an executive called and asked for an appointment. “I don’t know why I’m calling,” he said, “but I’ve talked with some

friends, and they strongly suggested I come and talk to you.” I didn’t know why he was calling either, but I was certainly intrigued. And after we had chatted for about half an hour, I started to see the picture. Here was a successful executive in a large organization who was being nudged toward the sidelines. To me, the signs were obvious: more responsibility for “special” projects; less line accountability; exclusion from meetings he once led; less informal interaction with top management. I thought he was on the way out, but he didn’t have a clue. So, in the nicest possible way, I told him what I saw and suggested that his time with this company might be coming to an end. After his initial, emotional reaction, he sat very still for some minutes. Then he looked up and said, “They want me out. But they don’t know I’m now onto their game.” He paused again and asked, “How can we use what we now know to get what we want?” In the shortest time I’d ever seen, this client was ready to turn disappointment into opportunity. We met again to develop a strategic plan, and a few months later my client walked out of his office for the last time, as a happy man. Any lawyer who has practiced for a long time has had similar experiences. Situations that seem mysterious to our clients often appear clear to us. This is not because lawyers are smarter, or have better insight, or are gifted with legal clairvoyance. It’s simply because the experienced lawyer has been down this road before and the territory is familiar. Notwithstanding the vagaries and complexities of human character and motivation, people often react to given situations within a range of somewhat predictable responses. The longer we practice, the more familiar we are with those likely responses.

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Capitalizing on Industry Knowledge

In academic legal counseling terminology, the lawyer's accumulated past experience in a particular field is called "industry knowledge." This term refers to the information gathered by working through the same types of legal problems over and over again. Land-use lawyers know how land developers tend to react when interest rates drop; criminal lawyers know that experienced criminal defendants have different fears than people charged for the first time; trial lawyers know that eyewitness testimony isn't always right.

Experienced lawyers armed with industry knowledge have an advantage others do not. These lawyers can advise clients about legal issues and at the same time offer the benefit of their experience. Experienced lawyers can suggest what types of approaches tend to work best and what good outcomes might result—often to the surprise of clients who haven't considered these options before.

Practicing Legal Counseling

I did my first actual legal counseling by accident. Or at least I didn't know I was doing it; only hindsight made it clear. I was the new associate in a large law firm. Everyone on the labor team, including my boss, was out of town.

The union employees of a client company had gone on strike and were picketing the plant. This was expected and not considered a problem. However, early one afternoon I got a phone call from the manager of the trucking company next door to the plant. Some pickets had moved over to the trucking site, and the unionized truck drivers were refusing to cross the picket line. The truck facility was functionally shut down. Its manager told me to go to court and get an injunction to make the pickets go away. I got the facts from him as best I could and did some quick legal research. Because the company on strike owned the trucking company and was arguably in a related operation, I didn't think an injunction was likely. In fact, there was a good chance that losing an injunction could actually worsen the trucking company's current situation. I told the manager what I had found out, and he told me I was wrong.

Late that afternoon, I drove over to the truck yard. A small band of pickets was patrolling the entrance. In the middle of the yard was a large trailer. The name of the company being struck was painted, in large letters, along its entire length. I suggested to the manager it might be a

good idea to move the trailer off the property, since it looked like a billboard supporting the struck company. He thanked me for my thoughts, again told me to get an injunction, and ushered me out the door.

The next morning, I got a call from the irritated general counsel of the parent company in New York. He said if I didn't have the fortitude to get an injunction, my boss would. So I went back over to the yard to get affidavits for an injunction hearing. After finishing up, I said to the manager, "Just do me a favor. Move the trailer and see what happens." He humored me and hooked the trailer up to a truck. As it headed out the gate, the pickets followed in a line, looking for all the world like a small parade. Clearly, the men were picketing the trailer, not the truck company.

Practicing Client-Centered Counseling

At the time of that strike, I was a new lawyer. I wasn't a legal genius, but I had blundered onto the revelation that not every legal problem has a legal solution. While I had not done any intentional counseling, I had proposed an alternate way to achieve the client's goal without going to court. Fortunately the trucking client's goal was clear, but that's not always the case.

In order to discern client goals, the lawyer has to somehow get inside the client's head and view the issue through the client's eyes. In modern legal counseling theory, this is known as "client-centered counseling." It focuses on the client's needs, desires, values, and attitudes. This theory sees it as the lawyer's duty to present various options that address the issue based on the client's orientation.

Client-centered counseling derived from the psychological theory developed by Carl Rogers. Rogers believed that human beings seek to become self-actualized—to achieve their full potential. The counselor's job is to show empathy, respect, and understanding so clients can make healthy decisions for themselves and develop their own potential to the fullest extent.¹

In legal theory, the client-centered approach was first introduced by Binder and Price² in the late 1970s. This approach has also been referred to as the "autonomy" or "informed consent" approach.³ Binder and Price introduced this model as an alternative to what they deemed to be the "traditional" approach.⁴ Other names for this approach are the "paternalist" and "best interest" approach.⁵

Practicing Traditional Counseling

There is no evidence the traditional approach is a single coherent model. Instead, it seems to be a much looser concept: simply the way professionals interact with laypersons. Different lawyers practice different ways, depending on their own experience and what seems to work best for them and their clients. It has not been until recently that theories, methods, and approaches to client counseling have even been discussed. Before, lawyers often relied on the approach they learned from their mentors.

The practice of law is dynamic; different situations require different approaches.

The traditional approach is probably just a romanticized view of the way some lawyers once practiced law. It stands in contrast to the new approaches and theories of professional interaction. In truth, the successful practice of law probably requires a pragmatic mixing of different theories. More accurately, it requires a little of each theory, depending on the particular situation and the particular client. The practice of law is dynamic; different situations require different approaches. Attempting to invent a universal method or strategy to be applied to every situation likely will result in disappointment.

When the Binder and Price model was first presented in 1977, it received substantial criticism — much of it justified — from the practicing bar. Decisions, Binder and Price argued, should be based on alternatives that bring the “greatest client satisfaction.”⁶ They said that lawyers cannot really know what value clients place on different consequences and what alternatives will bring the greatest satisfaction. Therefore, ideally, all decisions should be left to the client. A close reading of this approach led many to conclude that Binder and Price fundamentally believed lawyers should not give legal advice. The lawyer’s only role, under this theory, was to evaluate the legal and nonlegal consequences of different courses of action so the client could make the best choice, according to the client’s desires.

Possibly in response to some of this criticism, Binder and Price pulled back from this view in later editions of their textbook. However, they were careful to do so without compromising their allegiance to client-centered counseling.⁷

Balancing the Merits of Counseling Styles

If part of the value an experienced lawyer provides is industry knowledge, then using the client-centered approach to practice presents certain challenges. Broadly speaking, most clients’ problems can be broken into two categories: their specifically legal concerns and their more general, nonlegal concerns.

For example, a customer on the East Coast may want to sue a supplier for damages because the widgets he ordered did not meet specifications. It is clearly the lawyer’s job to identify the elements supporting a breach-of-contract or -warranty theory. But if a recent upheaval in the widget market has reduced the number of possible suppliers to two and the only other supplier is located on the West Coast, the customer’s nonlegal concern could become paramount. Anything that disrupts relations with the current supplier now could produce even more adverse consequences over the long term.

Experienced commercial lawyers will view this as one problem with two components. The first component, what the law requires, is the most straightforward. Commercial lawyers have so internalized these rules that they are able to analyze the legal elements without much conscious thought. The second component of this issue is more challenging and thus more interesting. An experienced commercial lawyer will remember the approaches that worked for other clients in similar situations. Without telling the client what to do, this lawyer can draw on years of experience to develop possible courses of action. This blended counseling style works, because lawyers, even unconsciously, integrate their legal and nonlegal knowledge to give effective advice. Few problems have purely legal solutions.

It is a lawyer’s job to honor all the client’s concerns — legal, economic, social, emotional — in developing a strategy that yields the best solution to the problem under the existing circumstances. To do this, the lawyer has to ask pointed questions to figure out what the problem really is, even if the client doesn’t know or doesn’t want to reveal it. (Few clients will freely admit they want to disinherit a child because they did not approve the choice of marriage partner. They will find a more palatable excuse.) Solutions to nonproblems aren’t solutions. Only discovering the real problem will uncover the real solution.

Of course, lawyers never have enough information to produce certainty in any result. We negotiate deals, structure business transactions, and draft complex agreements to solve the errors

of the past and control events in the future. We assume that the way humans have tended to behave in certain circumstances in the past will continue into the future. Otherwise, how could we believe that, in most cases, our deals, structures, and agreements will work as intended?

Honoring Our Calling

Law is a multidisciplinary profession. Our work represents an integration of skills as we craft the strategies, plans, pleadings, and documents that are our tangible work product. Surely our clients are partners in these efforts. It is, after all, their problem, not ours. While we may be empathic listeners, we need to be detached from their problems to provide an impartial perspective.

Some may argue that by emphasizing the counseling role of the lawyer we are straining the boundaries of our profession. Most of us were not trained as clinical psychologists. Only a few hold a master's of business administration degree. Lawyers who think they can do it all risk being seen as arrogant. But on the other hand, taking too narrow a view of the lawyer's role deprives clients of the very service they hired us to give.

Clients call lawyers because they experience a problem that requires legal expertise to resolve. If their problems didn't have a legal component, the clients probably wouldn't have come to a lawyer in the first place, or the lawyer would have referred them elsewhere. But few real legal problems have only legal components. The other issues are there, even if they aren't immediately visible, and they need to be taken into account.

Giving good legal advice means the lawyer must listen closely in order to appreciate and understand the client's particular concerns and values. Good legal advice also requires the lawyer to draw on personal experience, skill, and knowledge to formulate the strategies and solutions that will help achieve the client's goals.

We have a reminder of our calling near at hand. Just look up at the license hanging on your wall. It reads "Attorney and Counsellor at Law."

Endnotes:

- 1 See, e.g., CARL R. ROGERS, *COUNSELING AND PSYCHOTHERAPY* (1942).
- 2 DAVID F. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).
- 3 See William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 213 (1991).
- 4 See BINDER & PRICE, *supra*.
- 5 See Simon, *supra* note 2 at 213.
- 6 See BINDER & PRICE, *supra* at 148.
- 7 DAVID F. BINDER, PAUL BERGMAN, SUSAN C. PRICE, & PAUL R. TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004).

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