

The Client-Centeredness and Client Autonomy Model:

What is the Proper Role of Moral Counseling?

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I. Introduction

Lawyer-client counseling can, and often does, involve a number of non-legal issues. Issues involving morality can raise the most knotty questions for lawyers in the counseling context. Perhaps the most difficult issues arise when a client desires to embark on an action which, while legal, is immoral. Unfortunately, the literature lacks adequate examples of just what such discussions about moral issues might sound like in a counseling session. The words and body language are important. Such a topic can be communicated so as to enhance or shatter client autonomy.

I will explore various conceptions of when, how and why topics of morals should be addressed in the lawyer-client counseling context. Examples of conversations between the lawyer and client will be included to

illustrate in selected areas. First, I will discuss the contours of the client-centered approach to legal counseling. Next, the client-centered approach will be contrasted with models of counseling which stress non-client and non-legal interests. Finally, an appropriate role of moral counseling within the client-centered paradigm will be posited.

II. Legal Counseling and the Client Centered Approach

Obviously, practicing lawyers do not operate in a vacuum. In addition to legal analysis and advocacy, a lawyer must be able to effectively interview and counsel his clients.¹ Many lawyers view client-counseling as an activity which requires little special skill or practice.² Unfortunately, the definition of legal counseling is far from universally agreed upon.³ However, it is clear that good client counseling by lawyers is a very difficult and involved skill.

The traditional approach to lawyer-client counseling contemplates a lawyer framing what decisions need to be made and what the actual decisions should be while the client stands by "passively."⁴ The client-centeredness model grew in reaction to the traditional approach.⁵ Client-centeredness was first popularized by David Binder and Susan Price in their 1977 book titled *Legal Interviewing and Counseling: A Client-Centered Approach*.⁶ In a more recent edition of that book, Binder and Price have defined counseling as follows:

the process by which lawyers help clients make decisions. Specifically, 'counseling' refers to a process in which potential solutions, together with their probable positive and negative consequences, are weighed in order to decide which alternative is the most appropriate.⁷

The question arises: who decides which alternative is appropriate? The key to client centered counseling is that the client decides and actively participates in all parts of the process. Binder and Price have refined the definition of client centeredness to six finely honed attributes.⁸ Each attribute is extrapolated on in their book, but the list is as follows:

- * The Lawyer Helps Identify Problems From a Client's Perspective
- * The Lawyer Actively Involves a Client in the Process of Exploring Potential Solutions
- * The Lawyer Encourages a Client to Make Those Decisions Which Are Likely to Have a Substantial Impact
- * The Lawyer Provides Advice Based on a Client's Values
- * The Lawyer Acknowledges a Client's Feelings and Recognizes Their Importance
- * The Lawyer Repeatedly Conveys a Desire to Help

The place of client autonomy is fundamental in the above headings. Binder and Price reason that since the problems are those of the client, it is the client who would be in control of the decision making process.⁹ Binder and Price justify this degree of client control as follows:

clients bear the brunt of decision's consequences, clients presumptively should have the opportunity to determine what course of action to take. Our society values each individuals right of self-determination, and you ought to abandon that value only in the face of strong reason for doing so.¹⁰ Because client autonomy is of paramount importance, decisions should be made on

the basis of what choice is most likely to provide a client with maximum satisfaction.¹¹

The notion of providing advice based on the client's values seems to follow from the premise of client autonomy.¹² Therefore, when the values of a lawyer and client diverge, the lawyer should subordinate his values to those of the client.¹³

What is a lawyer to do when his client seeks to embark on the wrong course of action? From the client's perspective, the contemplated action must seem fine or, presumably, he wouldn't be contemplating it in the first place. Further along that train of thought, what is an attorney to do when the values of the client are patently immoral? Must the attorney continue to view the situation based on the client's values? In other words, when is it appropriate for the attorney to intervene?

III. The Case in Favor of Moral Counseling

The notion that lawyers have professional obligations to counsel clients on matters beyond the technical legal aspects of a case has long roots in American history. In the early days of our Republic it was considered to be the patriotic duty of a lawyer to show honor first to the principle of law, and second to a particular client.¹⁴ Today, the idea that lawyers should address the moral dimension of a client's situation is becoming better accepted.

A. Alternative Dispute Resolution and Non-Party or Non-Legal Interests

Though it may seem, at first blush, that discussion of morality has no place in the formal practice of law, one has only to consider the precepts underlying the ever more accepted Alternative Dispute Resolution (ADR) to appreciate how important these interests can be. The book *Getting to Yes*, by Roger Fisher and William Ury, served to popularize the concept of advising clients to consider the interests of all parties to a conflict, and non-parties.¹⁵ It is common for these interests to be non-legal in nature. Typically, ADR advocates stress the practical reasons for taking all interests into account - the agreement will be better tailored to the factors which truly motivate each party; the agreement will be more enduring because each party has taken a meaningful part in sculpting it; the process of reaching agreement will promote better relations between opposing parties.

Scholar Carrie Menkel-Meadow advocates a more precise ADR model for attorney's representing clients in negotiation.¹⁶ One of her criteria for a good agreement is:

Is the solution "fair" or "just"? Have the parties considered the legitimacy of each other's claims and made any adjustments they feel are humanely or morally indicated? (noting) This . . . criterion asks the negotiator to step back from a client-centered stance and consider whether the result achieved is, apart from the client's perspective, a fair one to the other side, or to additional parties who may be affected by the solution. Thus, the evaluation criteria are addressed both to those negotiators who stand inside a negotiation and have to decide what to do and to those who stand outside a negotiation and want to decide whether a good result has been achieved.¹⁷

As regards the proposed content of such a conversation with the client, Menkel merely asserts: "the application of humanitarian, moral or ethical standards to a negotiation result obviously requires a dialogue between client and lawyer."¹⁸ And so, the reader is left to guess what such a conversation is supposed to sound like. Even so, it is instructive that Menkel explicitly includes reference to moral factors as a key criteria to assess the success of a lawyer's job negotiating for his client.

B. The Moral Activist View of Client Counseling

The client counseling moral activists promote aggressive intervention by attorneys who conclude that their client is embarking on an immoral action or decision. David Luban provides an excellent definition of the moral activist definition of client counseling in the legal context.

"Client counseling" is simply a shorthand way of describing a complex kind of lawyer-client relationship in which the lawyer brings his or her phronesis [practical wisdom] in order to divert clients away from projects that harm the common good. Client counseling may mean kindling the clients' consciences, but more often it will mean inventing alternative ways for clients to satisfy their interests. Sometimes it means persuading clients that the course of action they propose will harm them even when that is not necessarily so. In other instances, client counseling will require threatening to withdraw from a representation or refusing to follow a client's instructions. In extreme cases, it means telling the client that if he does not back away from a course of action, the lawyer will blow the whistle on him.¹⁹

1. The "Duty" to Counsel Clients on Moral Aspects of Their Case

At least one scholar advocates the creation of an enforceable duty to compel lawyers to counsel clients on the moral ramifications of their contemplated actions or decisions.²⁰ Peter Margulies asserts that lawyers, generally, will not provide the moral counseling he feels is necessary absent the threat of violating a disciplinary rule of their local bar association or court.²¹ According to Margulies, immorality of client plans are not discussed because neither the lawyer nor the client tend to experience the harm likely to follow from such action. Rather, the negative consequences are "externalities."²² Furthermore, lawyers' tendency toward self-promotion, fame and wealth often defeat any altruistic incentive to engage in moral counseling.²³

Unlike the client centered approach, which allows for discussion of moral issues because the client may be concerned about such issues, the moral activist approach would force clients to consider even those moral harms to third parties which neither tangibly effect the client, nor naturally interest him.²⁴

Margulies posits several circumstances under which it would be appropriate, in fact mandatory, for an attorney to counsel a client on non-legal and/or non-client interests.²⁵ For purposes of this paper, however, only certain circumstances involving moral counseling will be addressed.

2. The Duty to Counsel Clients Not to Harm Others

The first of Margulies' proposed duties would be to counsel clients to avoid causing others to "suffer from the needless infliction of pain."²⁶ As an example, Margulies offers the case of just debt defeated by the statute of limitations or the statute of frauds. Where the creditor is poor and the debtor is wealthy and can "easily afford to repay the loan."²⁷ Margulies reasons that this circumstance would inflict harm to the creditor and is thus immoral. Margulies would require attorneys, at this point, to inform the client that invocation of the statute of limitations would cause needless suffering by the creditor, is thus immoral and should not be done. Unfortunately, Margulies sheds no light on exactly how such a conversation should proceed.

If, after moral counsel about ill effects on non-client interests the client refuses to change course, then Margulies would permit the lawyer to threaten to withdraw unless the client complies with the lawyer's desire. If this threat is not effective, then Margulies would permit the attorney actually withdraw, based solely on his disagreement with the client about moral issues.²⁸

3. Practical Difficulties With Mandatory Moral Counseling

Whatever else can be said about the notion of mandatory morality counseling, it is clear that such rules would be near impossible to administer. First, the judgment about whether various circumstances qualify as immoral under the Margulies scheme is open to multiple conclusions. Are lawyers supposed to consult Margulies for the rest of eternity to determine whether their actions are moral? Second, rules should be enforceable. It is very difficult to imagine an enforcement vehicle sufficiently all-knowing to uncover cases where attorneys have either failed to raise moral issues with clients or raised them in a weak, perfunctory and self-defeating manner.

III. Client Autonomy and Moral Counseling

A. When Intervention is Appropriate

The established client-centered approach, as laid out by Binder and Price, strongly emphasizes the importance of avoiding client manipulation. If, and only, if the client reaches an extremely detrimental decision, then the lawyer may "suggest the client change or reconsider the decision."²⁹

The authors define an extremely detrimental decision as one which "would very likely result in substantial economic, social or psychological harm in return for very little gain."³⁰ Evidently, the contemplated harm is to the client, not opposite parties or non-parties. Though the authors chose not to include moral harm, this is the only analysis offered in the text dealing with how a client centered attorney is supposed to deal with client decisions with which he strongly disagrees.

B. Binder and Price Text Book Example of Intervention: Whether to Ask for Alimony in Divorce

Explicit disagreement with the client, however, must be done with the greatest professional restraint so as not to unduly influence the client toward the attorney's point of view. To illustrate the difference between acceptable and unacceptable intervention by an attorney who believes his client has reached an extremely detrimental decision, Binder and Price have framed the following two examples:

Case #1:

- 1) Lawyer: Ms. Greenspan, what your saying is that no matter what happens, you want to remain on a friendly basis with your husband. You feel that if you ask for alimony your husband will become angry and then for sure he'll never come back.
- 2) Client: Right, and if things really get bad, he'll take care of me. I know he will.
- 3) Lawyer: Having your husband back is the most important thing, and asking for alimony increases the risk he won't come back, is that what you are saying?
- 4) Client: Exactly.
- 5) Lawyer: You may well be right, it may increase the risk, but, on balance, I think your making a mistake. You're giving up your right to alimony when you don't know if he'll be back, and when you don't have a job. You don't know for sure how things will turn out in the future. Right now, you're in a vulnerable position. I think you'd be best off by protecting yourself with a court order. You can always waive your right to alimony later, but the reverse is not true. Why don't you at least take some time and think it over.

Case #2

Lawyer: Ms. Greenspan, you're making a mistake. You're going to regret waiving alimony. As sure as I'm sitting here, your husband is going to leave you high and dry. Follow my advice and get a court order for alimony.³¹

The authors criticize the attorney in case number 2 by suggesting he went "beyond the appropriate limits of intervention . . . [by] commanding the client to seek alimony."³² We can surmise from this criticism that baldly telling a client what an attorney feels is in her best interests and urging the client to so act is impermissible under the client-centered approach.

C. Real World Example of Intervention: Whether to Ask for Alimony in Divorce

William Felstiner has published empirical research which tends to show that attorney intervention occurs with frequency.³³ Fortuitously, one "real-world" episode of lawyer-client counseling which was observed by Felstiner dealt with precisely the same topic as the example provided by Binder and Price, namely: the case of the unsupported wife. This example was published by Felstiner to illustrate how power commonly shifts from the client to the lawyer, even among lawyers who purport to believe in the centrality of client autonomy. The text of an actual client counseling session follows:

- 1) Wendy: And so you haven't told him the sad facts of life that you are going to have to continue to have money?
- 2) Kathy: I have not told him anything like that. I figured the less I said the better.
- 3) Wendy: [Whether you sell the house or not] you'll probably be entitled to some support What do you want to do?
- 4) Kathy: I don't know what the best thing to do is. I honestly don't, just listening to you. That's where I'm at a total loss. I do not know what the best thing to do is.
- 5) Wendy: Well, it's really your decision because you have to live with it for the rest of your life.
- 6) Kathy: I know.
- 7) Wendy: If I make that decision and later on you are unhappy about it you are going to say, "Well, why did she choose this road to go. "I think probably, unless you let him know he's going to have to pay support, you may be working on a false assumption. He's going to have to know that whether you keep the house or sell the house or whatever, he's going to have to pay you support.
- 8) Kathy: I really wish that I didn't have to take anything.
- 9) Wendy: I understand that. But let's be practical.... You have all these basic expenses that there is nothing you can do about. You cannot meet them. You cannot make enough money to do so.
- 10) Kathy: You know I'm just a wimp.
- 11) Wendy: If you were a brain surgeon I'd tell you to tell him to go buzz off and waive it. But you can't do that. You don't make enough money, and I'm really concerned about how are we going to take care of you. You have to have income from him too. There is just no other way that you are going to get around it.³⁴

The author notes that the more strident the lawyer gets the more indecisive the client becomes. The question is: has the lawyer engaged in a "hard sell" of her best judgment while maintaining the proper respect for the

integrity of her client's autonomy? It would appear to me that this lawyer has performed a power grab.³⁵ Though the lawyer did indeed ask the client what she wanted to do (#3), the client did not ask the lawyer what the client should do. In fact, the client never even asked the lawyer's opinion. The "wimp" comment indicates a capitulation by the client to the will of the lawyer. Evidently, such impingement's on autonomy are not seldom occurrences in the practice of law.

D. Non-Intervention: Manipulation by Other Means?

If the attorney in the Felstiner example violated client autonomy by foisting her judgment upon the capitulating will of her client, is it possible that even the non-interventionist Binder and Price approach would accomplish the same end by other means? In other words, isn't the comment: "I think you'd be best off by protecting yourself with a court order. You can always waive your right to alimony later, but the reverse is not true." (from example one, comment #5) likely to create the same decision by a client as would the comment: "you're making a mistake. You're going to regret waiving alimony" (from example two).

Serena Stier, commentator on client counseling in the legal context, has observed that the client-centered approach can amount to a different form of manipulation. Stier asks whether the client centered style of counseling is: "merely a more subtle method of manipulating clients? It may be that some lawyers will use their greater psychological sophistication [to overcome the will of their clients.]"³⁶

Whether using the client-centered approach can be tantamount to manipulation is of great significance to the attorney who desires to counsel clients on matters of moral concern, but seeks to do so in a non-manipulative manner. Is it possible for a lawyer to counsel clients on moral aspects of their case without transgressing the autonomy of the client? While I have not located any actual or example transcripts of precisely what moral counseling might sound like, at least one author has put forward his notion of the fundamental difference between moral activist and client-centered approaches to such counseling. Robert Dinerstein, in his article: Client-Centered Counseling: Reappraisal and Refinement,³⁷ has formulated the following examples illustrating the client-centered and moral activist approach to moral counseling:

Moral Activist Approach to Moral Counseling

"I cannot assist you in doing x [where, e.g., x is polluting a stream or interposing the statute of limitations] because I find x to be immoral and my own moral precepts will not allow me to participate in your actions. If you refuse to forego doing x I will certainly no longer represent you and I may even have to blow the whistle on you."

Client-Centered Approach to Moral Counseling

" 'Have you considered the moral consequences of doing x? Do you see any moral reasons to do x? Do you see any moral reasons to forego doing x?' If the client in the latter setting persists in her moral obtuseness ('As a matter of fact, I don't see any moral problems in pleading the Statute of Limitations even though I know I owe the money'), the client-centered lawyer might go so far as to say 'Well one possible response to your doing x is that one might have the following moral objection to it. Have you considered that?'"³⁸

Dinerstein points out that, unlike the moral activist lawyer, the client-centered lawyer would be prepared to help his client to achieve his immoral, though legal, objectives after engaging in some dialogue on the topic.

Most proponents of moral counseling agree, at least on the surface, that client autonomy should be respected. However, the client should also be counseled to forego immoral actions or decisions. How is it possible to counsel a client for the purpose of changing his mind without violating client autonomy? William Simon attempts to solve this paradox in his article, Visions of Practice in Legal Thought³⁹, where he writes:

The authoritative test of the lawyer's judgment is that the client come to share it under conditions in which the

lawyer believes that the client's understanding is not affected by conditions of hierarchy.⁴⁰

Notice, however, that behind Simon's plea to remove hierarchy there remains a lawyer persuading a client to adopt the lawyers view of a problem. Where the problem is a technical legal issue, this is, of course, necessary. Where the issue is a lawyer's view of the moral dimension of a client's case, however, such persuasion may amount to coercion. Why is the lawyer's sense of morality necessarily superior to the client's? Why should the "authoritative test" be whether the client has capitulated to the will of the lawyer? In short, what about client autonomy?

Simon answers that very question in a later article entitled Ethical Discretion in Lawyering.⁴¹ In this article, Simon reveals his basic assumption that where client autonomy conflicts with morality, it is morality which ought to win. Simon says:

[T]he appeal to individual autonomy or right is not a sufficient basis for client loyalty because it begs the question of why the client's autonomy or right should be preferred to that of the person whose autonomy or right is frustrated by the client's activities.⁴²

If we accept Simon's fundamental assumption, then we must reject the adversarial system of justice. Perhaps it is not necessary to reject our contemporary legal system in order to find an appropriate place for some dialogue about morals between lawyers and clients. Perhaps it is possible to counsel a client about moral issues without unduly manipulating the client.

IV. Developing an Appropriate Role for Moral Counseling

A. The New Binder and Price Model

Conveniently, Binder and Price have offered a modern view of the role of moral counseling in a client-centered context. It is true that the original Binder and Price text⁴³ made no mention of moral counseling at all, and the tone of that book was strongly against lawyer disagreement with the values of his client. However, Binder and Price have published a much more recent text, titled: Lawyers as Counselors: A Client-Centered Approach,⁴⁴ in which they devote a small section to this very issue. In this section, the authors posit that "client-centeredness sometimes allows you to express values that conflict with a client's.⁴⁵

First, Binder and Price assert that a lawyer also has autonomy. This concept, however, is left undeveloped. Even so, based on this lawyer autonomy, an attorney may voice his views on morality.⁴⁶ However, the lawyer must take great care not to voice his values "so forcefully that you override the clients' capacities to make their own decision."⁴⁷ Unlike many other sections in this text, Binder and Price do not include detailed illustrative examples of what such a conversation might sound like.⁴⁸

Binder and Price do, however, set forth certain proposed guidelines for lawyers to follow. According to the authors, these guidelines should help lawyers to provide moral counsel in a way consistent with client-centeredness. The first step is to recognize the legitimacy of the client's values.⁴⁹ Next, the lawyer may "ask" the client to consider whether a proposed action "promotes the social good."⁵⁰ The phrase "social good" is used as a euphemism for morality. If the client prefers to maintain his course of action, then he is entitled, as of right, to do so. However, the lawyer may ask the client "to seek other counsel or to withdraw if ethical rules permit you to do so." Finally, lawyers are admonished to voice moral concerns "sparingly."⁵¹

While Binder and Price fail to offer detailed examples of how an attorney might appropriately broach this topic, it is possible that the advice they do give is even more valuable. Particularly in these matters lawyers and clients are likely to have very individualized styles. Any style, however, can be trained to exercise the mature restraint embodied in these proposed guidelines. By providing a few beacons around the perimeter of

permissible conduct, a range of styles is accommodated. In my view, Binder and Price have, in their more recent work, provided a thoughtful way for lawyers to express important moral views consistently with client autonomy.

B. Practical Considerations Involved in Moral Counseling

Lawyers who want to use the Binder and Price model of moral counseling may want to consider non-linguistic communication and other psychological aspects of the counseling session. Non-linguistic communication can carry very sophisticated legal meaning⁵². Even if a lawyer verbally complies with Binder and Price's admonition to validate the client's values, that lawyer's body language, if unchecked, might reveal his opinion that the client's values are invalid.⁵³ This is particularly true in this area of counseling because, by definition, the lawyer is in disagreement with the client. Such non-verbal clues may serve to alert the client that the lawyer truly desires capitulation, not dialogue.

Finally, it is reasonable to expect psychological resistance from a client who has just had his morals challenged. No less than Andrew Watson has warned lawyers of the psychological dangers provoked in clients who are confronted with non-client and non-legal interests.⁵⁴ One particular trap to avoid is the phenomenon of counter-transference.⁵⁵ During counter-transference, the lawyer is effected by emotional reactions to the client. Clearly, it is important to deal effectively with irrational or emotional responses from both the lawyer and the client in a delicate manner. Unfortunately, it seems all too certain that moral counsel would provide a flash-point for such feelings because the lawyer disapproves of the client's values and the client may perceive that the client's values are under critical attack.

V. Conclusion

It has been said that "if it weren't for bad people, there wouldn't be any good lawyers."⁵⁶ It is axiomatic that lawyers will deal with client's who have acted immorally, or who contemplate immoral actions. Where these actions are illegal, the lawyer's duty is to take no part in the activity. Where these actions are strictly legal, the lawyer may have an easier time being great than "good."

Attempting to micro-manage the process of moral counseling by adopting duty to counsel is problematic. In addition to being unenforceable, such rules are inadvisable. It is reasonable to operate on the assumption that lawyers are capable of exercising discretion in deciding whether or not to initiate moral counseling.

The point is that it is better to be moral than to be immoral. This is the kind of behavior we should encourage in ourselves and others. Nothing in the current codes of conduct prevents engaging clients in dialogue about the moral dimensions of representation. Thus, while mandatory rules governing moral counseling probably go too far, it is fair to observe that more lawyers should think more about the moral dimensions of their practice. Providing a good, as well as great job may just enhance satisfaction by both clients and lawyers - not to mention the esteem in which our profession is held by [the] citizens.

Footnotes:

1 Re, The Lawyer as Counselor and the Prevention of Litigation, 31 Cath. U. L. Rev. 685 (1982) (counseling is an important part of a lawyer's job).

2 See. e.g. Sonelson, Interviewing Clients Ethically, 37 No. 1 Prac. Law 13 (1991) ("Counseling clients consists mainly of two things: identifying methods of meeting the client's stated goals and deciding which methods will be used." Finding out the client's goals is neglected here. Also, counseling is not like an appellate case where the facts are laid out Ñ facts must be gathered).

3 For an over simplified definition, see, e.g., D. Guilford, *Legal Negotiation: Theory and Applications*, 184 (1989) ("Counseling can be defined as the interaction between the lawyer and the client as they decide how to achieve the client's best interests"). For an esoteric definition, see, T. Shaffer & R. Remount, *Legal Interviewing and Counseling*, 19-5 (1980) ("Legal interviewing is an exercise in value choices: the choice between legality and authority, between historical tradition and immediate need and circumstances, between transcendent social values and immediate private preferences, between possibility and compulsion, between humanistic concern and the values of rigor and discipline, between concern for self and concern for others, between self-limiting honesty and self-aggrandizing seeking, between exercise of power and the predominance of human concern, between change and constancy - the list of opposites could go on.") One wonders why such a list went on as far as it did.

4 Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 *Ariz. L. Rev.* 501, 504 (1990).

5 *Id.*

6 D. Binder & S. Price, *Legal Interviewing and Counseling: A Client-Centered Approach*, (1977).

7 D. Binder, P. Bergmen, S. Price, *Lawyers as Counselors: A Client-Centered Approach*, 135 (1991).

8 *Id.* at 19-22.

9 *Id.* at 260.

10 Binder and Price note, sardonically, here that: " Some lawyers consider possession of a law degree a sufficiently strong reason to override client autonomy. However, such a position fails to grasp fully how dependent most decisions are on non legal experience and personal values." *Id.* at 261.

11 *Id.*

12 Unfortunately, even lawyers who recognize the importance of client autonomy admit that it can be difficult to reconcile it with natural professional impulses toward paternalism. See, e.g., Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 *Md. L. Rev.* 213 (1991).

13 In the words of Binder and Price: "The Lawyer Provides advice based on the client's values. . . your advice should generally be based on your understanding of the client's values. Giving advice based on the consequences you personally think are important would impose your values on a client and would be antithetical to client-centeredness." *Supra* note 7, at 21.

14 Croft, *Reconceptualizing American Legal Professionalism: A Proposal for a Deliberative Moral Community*, 67 *N.Y.U. L. Rev.* 1256, 1327 (1992) (As previously noted, early American lawyers were influenced by the English barrister tradition. . . [Lawyering was] premised on the public-oriented service of the citizen-patriot. Their overarching obligation both within and without the client-counseling context was to create and disseminate a culture of respect for, and compliance with, the purposes of law).

15 R. Fisher & W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (1981).

16 Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *U.C.L.A. L. Rev.* 754 (1984).

17 *Id.* at 761.

18 *Id.* at 762.

19 Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 *Vand. L. Rev.* 717, 737-38 (1988).

20 Margulies, "Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Non-Legal Issues and the Interests of Non-Clients, 68 *N.C.L. Rev.* 213 (1990).

21 ". . . lawyers will not discharge these suggested duties if left to their own devices." *Id.* at 214.

22 *Id.* at 219.

23 *Id.* at 218-219 (. . . attorneys often have incentives derived from pecuniary or psychic income that submerge the interests of non-clients. Many people go to law school because they seek status and material wealth. The pursuit of such rewards does not necessarily achieve results consistent with the public interest.) The author asserts that, in fact, lawyers sell innocent third parties down the river so as to maximize power and money for himself and his client. This is, perhaps, not a particularly new discovery.

24 "Lawyers' advice about client's enlightened self-interest can be exceptionally helpful in furthering moral or policy values . . . even though such advice ultimately rests on an appeal to the client's self-interest, and is therefore less radically different from traditional advice given by lawyers than is the non-client-oriented advice outlined in this article." *Id.* at 219.

25 *Id.* at 221. The complete list is an impressive, if not exhaustive, logical arrangement of what I would call issues of conscience. It seems all too likely that such questions are raised with harmful infrequency. Whether the answer to this harm should be a mandatory rule, however, is dubious. The Margulies categories of issues requiring counsel is as follows:

1. Morality:

- a) The action or decision will harm others.
- b) The action or decision involves lying or misleading.
- c) The action or decision violates the norm of equality of all persons.
- d) The action or decision is one that the client would not wish for everyone in society.

2. Psychology:

- a) The action or decision may engender guilt or regret.
- b) The client should seek the services of a mental health professional.

3. Policy:

- a) Unintended consequences:
 - i) Chilling effect: The action or decision may diminish the availability of goods, services, or information, or may create incentives to impinge on socially important or fundamental interests or relationships.
 - ii) Public burden: The action or decision will harm others in a way that ultimately will require a remedy from society at large.
- b) The action or decision will result in a net loss to society if all individuals act in a like manner.

26 *Id.* at 223.

27 *Id.* It is puzzling that Margulies would grant the attorney with discretion to decide when a money is "easily" paid by a client. The concepts of easy and difficult in this context can be subjective indeed.

28 *Id.* at 214.

29 *Supra*, note 6, at 208.

30 Id. at 203.

31 Id. at 209.

32 Id.

33 Felstiner & Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 Cornell L. Rev. 1447. (Discussing lawyer's respect (or lack thereof) for client autonomy, Felstiner observes: "Sometimes behavior conforms to this ideology; most of the time it does not. As one layer told us: '[The client] seems willing to take my advice. I would say 'we've got and agreement . . . This is as good as you're going to get in court, and I think it's not worth the risk of going to court.' And I think she would say 'OK, fine.' On the other hand, if I said, 'Look, I think you can do better in court and I think it is worth the ordeal' which it will be, to go in there, and I think 'OK Let's go in there and let the judge decide.' She would agree to that too").

34 Id. at 1487-1488.

35 Felstiner takes a much more generous view of this exchange. At the point where the lawyer asks the client what she wants to do, Felstiner observes: "power is shifted; the client is invited to assume the directive role. But Kathy does not take up the invitation and substitutes the question of what is 'best' for the question of what she wants. Any reality that she may want to construct seems to demand knowledge that she does not possess." Id. In order to make a qualified appraisal of whether power has in fact shifted by the asking of that one question is difficult with the aid of a cold transcript. Full evaluation would probably require one to be present, yet unseen, at such an encounter to view, yet not effect, the actual dynamics and demeanor involved. Even so, the words do not suggest to me that power, in any meaningful sense, has shifted at all. It is more probable that the lawyer asked the question with full anticipation of the answer which was given because the lawyer wanted to manufacture an occasion to foist her judgment upon the client.

36 Stier, *Reframing Legal Skills: Relational Lawyering*, 42 J. Legal Ed. 303 (1992).

37 Supra, note 4.

38 Id. at 556.

39 Simon, *Visions of Practice in Legal Thought*, 36 Stan. L. Rev. 469 (1984).

40 Id. at 486. Dinerstein is highly critical of Simon's proposed vision. Dinerstein notes: "Significantly, Simon does not indicate how to establish such non-hierarchical conditions nor how the lawyer knows that the client's adoption of the lawyer's views (or vice versa) was accomplished under non-hierarchical conditions. The opportunities for lawyer self-deception appear numerous." Supra, note 4, at 558.

41 Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083 (1988).

42 Id. at 1125

43 Supra, note 6.

44 Supra, note 7. Exemplifying the old truth that every rule has it's exception.

45 Id at 282.

46 Binder and Price premise the role of moral counseling on a lawyer's interest in a good and functional

society. The authors assert: "[moral counseling] is consistent with client-centerdness and professional autonomy. Your interest in furthering what you perceive as society's interest through your law practice allows you to raise your moral concerns." Id at 283.

47 Id at 283.

48 To be fair, however, one example situation is offered by the authors to illustrate their point - but, alas, nothing like a transcript emerges. Perhaps the brevity and lack of detail in this section signifies the author's ambivalence about the topic of moral counseling.

49 Even where the lawyer believes the client's values are immoral, this step is necessary. Binder and Price posit that "a client whose values differ from yours is not 'wrong'. . ." Id at 283. Rather, values are only arguably wrong. In fact, the title to this section reads: A Client's Arguably "Immoral" Preferences. Id at 282.

50 Id at 284.

51 Id.

52 Hibbitts, "Coming to Our Senses": Communicating Legal Expression in Performance Cultures, 41 Emory L. J. 873 (1992) (arguing that legal meaning can be communicated through sight, hearing, taste, smell and touch).

53 Supra, note 36 (suggesting that lawyers should listen with their "third ear" to the "meta-messages" being communicated by client's through body language and that lawyers should be deliberate with their own body language).

54 Watson, Essays on Legal Education: Mediation and Negotiation: Learning to Deal With Psychological Responses, 18 U. Mich. J. L. 293 (1985). The process of mediation is, of course, related to moral counseling to the extent that both endeavors seek to bring non-client and non-legal issues into the client's decision making criteria.

55 Supra, note 36.

56 It has been said - though I don't know by who. [I can get a source, if necessary to avoid negative impact on the grade for this paper].

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