

Family Law Education Reform Project

THE ROLE OF THE LAWYER IN FAMILY LAW PRACTICE

OVERVIEW

This is part of a series of teaching materials prepared by the American Academy of Matrimonial Lawyers Best Practices Committee.

EXPLANATION AND COMMENTS

This unit focuses on the role of the lawyer in family law cases. It is authored by Madeline Marzano-Lesnevich an experienced family practitioner and a fellow of the AAML. It includes an outline of the material, and an extensive PowerPoint presentation. The material includes a focus on different models of lawyer-client relationships such as directive, client-centered and collaborative. It is accompanied by a video in which the author conducts three interviews with the same client demonstrating the different models.

ABOUT THE AUTHOR

American Academy of Matrimonial Lawyers Best Practices Committee

Professor Mary Kay Kisthardt, Reporter

UMKC School of Law

The material was authored by Madeline Marzano-Lesnevich, a fellow of the American Academy of Matrimonial Lawyers. Biographical information is available at www.aaml.org.

The **American Academy of Matrimonial Lawyers**, founded in 1962, is an association of 1600 highly regarded domestic relations attorneys hailing from all 50 states, dedicated "to providing leadership that promotes the highest degree of professionalism and excellence in the practice of family law." The on-line materials were developed by the Academy's Best Practices Committee comprised of 5 senior Academy members from geographically diverse parts of the United States.

Role of Lawyers

Madeline Marzano-Lesnevich

- I. Lawyer's Primary Role: To Ensure that Clients Prevail in Their Claims¹
 - A. Tasks essential to this end
 1. Translate clients' claims into legal claims (translator).²
 2. Utilize legal knowledge and experience to offer clients as accurate a prediction as possible of the probability of success (predictor).³
 3. Attempt to ensure that clients achieve greatest possible legal success in pursuit of their claims, or that clients recognize that it is not possible to pursue successfully their legal claims (educator).⁴
 - B. Role of the lawyer is complex; model of "professional as provider-client as consumer" of services inadequate to describe lawyer-client relationship⁵
 1. Legal "product" dependent on lawyer-client interactions.⁶
 2. Matrimonial/family law practice particularly dependent on successful lawyer-client relationships.⁷
 - a. Issues are highly personal and emotionally charged (identity, place of residence, custody, finances).⁸
 - b. Extensive lawyer-client contact required to prepare/ resolve case.
 - i. High level of client participation needed to obtain accurate, complete picture of legal and non-legal aspects of problem.⁹
 - ii. Nature of issues calls for client participation in decision-making.
- II. Lawyer-Client Relationship

- A. Characteristics of lawyer-client interactions
 1. Co-dependence.¹⁰
 - a. Client relies on lawyer for law; ability to navigate "unfamiliar waters" of the legal system during time of emotional chaos.¹¹

¹ Barclay, Scott. "A New Aspect of Lawyer-Client Interactions: Lawyers Teaching Process-Focused Clients to Think About Outcomes," 11 *Clinical L. Rev.* 1, 2-10 (2004).

² Barclay 9.

³ Barclay 2, 9.

⁴ Barclay 2, 10.

⁵ Felstiner, William L.F., and Sarat, Austin. "Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions," 77 *Cornell L. Rev.* 1447, 1450-1458 (1992).

⁶ Felstiner and Sarat 1450.

⁷ Barclay 2-3.

⁸ Barclay 2-3.

⁹ Felstiner and Sarat 1461-1464.

¹⁰ Felstiner and Sarat 1454-1456.

¹¹ Felstiner and Sarat 1455. See also Barclay 1-2.

- b. Lawyer relies on client for factual underpinnings of case.¹²
 - 2. Interactions result in “negotiated product.”¹³
 - a. Lawyer and client work together to develop “mutually tolerable” story to present to adversary or court.
 - b. Either client or lawyer may suppress motives/ goals/ data inadvertently or intentionally; may create suspicion.
- B. Power in the lawyer-client relationship
 - 1. Sources of client power.
 - a. Economic leverage.¹⁴
 - b. Client sophistication; expertise equal or greater than lawyer’s.¹⁵
 - c. Client “aggressiveness” in pursuing case.¹⁶
 - 2. Sources of lawyer power.¹⁷
 - a. Knowledge of law.
 - b. Prior experience.
 - c. Familiarity with the “system”; courts, judges, procedures.
 - 3. Power in lawyer- client relationships is dynamic.¹⁸
 - a. Continually generated from within a situation.
 - b. May be mutable, shifting over time between parties.
 - c. May be ambiguous, disputed, elusive.
 - 4. Power and the “negotiation of reality.”¹⁹
 - a. Lawyer and client may perceive reality in diverging terms.
 - b. Defining legally realistic goals acceptable to the client may require complex struggles within the lawyer- client relationship.
 - c. Client may perceive goal as “process” (vindication, retribution); lawyer typically views goal as “outcome.”²⁰
 - d. Lawyer may need to remind client that goals must be ethically permissible.
 - 5. Potential for misuse of power through manipulation.
 - a. Clients, influenced by financial or emotional factors, may mislead lawyers through false, misleading, or inadequate information, e.g. regarding a spouse’s likelihood of accepting an offer.²¹
 - b. Lawyers may attempt to manipulate clients through tailored presentations, exaggeration, or dishonest assessment of likely outcomes of a particular course of action.²²

¹² Felstiner and Sarat 1455.

¹³ Felstiner and Sarat 1454-1456.

¹⁴ Felstiner and Sarat 1451-1454. See also Ellmann, Stephen. “Lawyers and Clients,” 34 UCLA L. Rev. 717, 717-718 (1987).

¹⁵ Ellmann 717-718.

¹⁶ Id.

¹⁷ Id.

¹⁸ Felstiner and Sarat 1449-1458.

¹⁹ Felstiner and Sarat 1457-1461.

²⁰ Barclay 5, 12.

²¹ Felstiner and Sarat 1465-1466.

²² Felstiner and Sarat 1463-1464. See also Ellmann 726-729.

6. Power and the negotiation of responsibility.²³
 - a. “Who does what” to keep case on track should be clearly defined at outset.
 - b. Some tasks clearly province of lawyers (procedural activities, preparing pleadings, conducting hearings, trials).
 - c. Other responsibilities may be assumed by clients to conserve time, financial resources (data gathering, communications).
 - d. “Negotiations” often a contested area.
 - i. Lawyers generally attempt to control negotiations, except for discussions involving personal property.
 - ii. Lawyers often regard lawyer-to-lawyer professional exchanges as a fundamental service in matrimonial law.
 - iii. Clients may seek to negotiate with spouse directly.
7. Power and decision-making.
 - a. Decision-making crucial to successful resolution of case: establishing goals, devising tactics, making/ accepting offers, deciding whether to proceed to trial.
 - i. In trial situations, general rule: client decides the “ends” and the lawyer decides the “means.”²⁴
 - ii. Lawyer’s duty of care to client may require that some decisions of strategy be made independent of client wishes.²⁵
 - b. Respective roles of lawyer and client in the decision-making process a reflection of the dynamics of power within the lawyer-client relationship.
 - i. Lawyers help clients reach appropriate decisions through “legal counseling,” a complex process which seeks to define client needs and goals, to propose and evaluate potential solutions, and to predict outcomes.²⁶
 - ii. The lawyer’s role in legal counseling and the degree of client participation in the decision-making process have been debated extensively: Who should decide what actions to pursue - lawyer, client, or both? How to balance client’s autonomy with duty to prevent self-inflicted harm.²⁷
 - iii. Different models of lawyering attempt to define the distinctions between various approaches to client counseling/ lawyer-client interaction.²⁸

²³ Felstiner and Sarat 1466-1468.

²⁴ Bradford , Glenn E. “Who’s Running The Show? Decision-Making in the Courtroom in Civil and Criminal Cases,” 62 J. Mo. B. 148, 150-152 (2006).

²⁵ Id.

²⁶ Dinerstein, Robert D. “Client Centered Counseling: Reappraisal and Refinement,” 32 Ariz. L. Rev. 501, FN 8 (1990).

²⁷ Bradford 158.

²⁸ Dinerstein 506-511.

III. Models of Lawyering

A. Traditional model of client counseling

1. Long-held, “authoritarian” approach: clients have problems and professionals have solutions.²⁹
2. Lawyer dominates interactions; defines the lawyer- client relationship.³⁰
3. Client essentially passive; delegates decision-making responsibility to lawyer.³¹
4. Lawyer does not regard client as competent to participate fully in resolving legal problems.³²
 - a. Little meaningful exchange between client and lawyer.
 - b. Client input not valued; clients seeking active involvement may be resented.³³

B. Client-centered counseling model: background

1. Genesis in 1950s re-examination of professional-client relationships in a variety of fields.³⁴
 - a. Challenged belief that professionals had the right to “control” clients/patients in order to best serve their needs.
 - b. More participatory approach stressed collaboration between professional and client/patient, and acceptance by client/patient of personal responsibility.
2. Douglas Rosenthal’s influential 1974 book, “Lawyer and Client: Who’s in Charge?” questioned the efficacy of traditional lawyer-client relationship; articulated argument for “participatory” model of lawyer-client interaction.³⁵
3. Client-centered counseling defined in David Binder and Susan Price’s widely utilized 1977 text, “Legal Interviewing and Counseling: A Client-Centered Approach.” Key consideration is client autonomy.³⁶

C. Client-centered model: characteristics

1. Grounded in belief in client’s intelligence, moral soundness, dignity, and autonomy.³⁷
2. Problems are identified from the client’s perspective.
3. Client is actively involved in exploring solutions to problems.
4. Client’s personal circumstances and values are considered by the lawyer when

²⁹ Felstiner and Sarat 1451-1452.

³⁰ Id.

³¹ Dinerstein 506.

³² Smith, Linda F. “Interviewing Clients: A Linguistic Comparison of the “Traditional” Interview and the ‘Client Centered’ Interview,” 1 *Clinical L. Rev.* 541, 542-543 (1995).

³³ Dinerstein 506.

³⁴ Smith 542-543.

³⁵ Condlin, Robert J. “‘What’s Love Got to do With It’ – ‘It’s Not Like They’re Your Friends for Christ’s Sake.’ The Complicated Relationship Between Lawyers and Client,” 82 *Neb. L. Rev.* 211, 226-227 (2003). See also Smith 542-543.

³⁶ Id.

³⁷ Condlin 227.

providing counsel.

5. Client's emotional state and concerns regarded as important.
6. Client is encouraged to make decisions.
7. Lawyer explicitly and repeatedly expresses intention to help the client.³⁸
8. Lawyer often very reluctant to provide advice, even when requested to do so, out of fear of "imposing" solutions.³⁹

D. Advantages of client-centered approach

1. Client autonomy fosters sense of empowerment.⁴⁰
 - a. Especially important in situations where client is able to make intelligent choices, but has little power.
 - b. Appropriate when empowered client demands autonomous model.
2. Client best able to view the problem "holistically."
 - a. Can comprehend the non-legal aspects of the situation – social, economic, and emotional – better than the lawyer; better able to select an appropriate solution.⁴¹
 - b. Consideration of totality of client circumstances highly relevant in matrimonial law cases.
3. Client participation may enhance general feelings of control over life during difficult period, reducing anxiety generated by unfamiliar legal process.⁴²
4. Greater client participation/ investment in resolution of problems results in greater client satisfaction in result.⁴³
5. Lawyer is more likely to perceive client as "more fully realized" person, enhancing the lawyer-client relationship.⁴⁴

E. Dominance of client-centered models academic literature

1. Many law professors have backgrounds in legal services, or in large firms with powerful clients.⁴⁵
2. An autonomous model is useful in law clinic settings, where inexperienced law students may be unaware of personal biases, and have little experience devising solutions to problems appropriate to the circumstances of their clients.⁴⁶

F. Disadvantages of a "pure" client-centered model

1. Client may be unable to make intelligent, informed decisions because of

³⁸ Condlin 227. See also O'Leary, Kimberly E. "When Context Matters: How to Choose an Appropriate Client Counseling Model," 4 T.M. Cooley J. Prac. & Clinical L. 103, 106-107 (2001).

³⁹ Dinerstein 509-510.

⁴⁰ O'Leary 107.

⁴¹ Condlin 227.

⁴² Dinerstein 547-550.

⁴³ Dinerstein 547-550. See also Condlin 227-228.

⁴⁴ Dinerstein 552-554.

⁴⁵ Dinerstein 518-519.

⁴⁶ O'Leary 106-108.

- mental, physical, or psychological impairment.⁴⁷
2. Client may desire the lawyer to take a more active role in decision-making than a strictly autonomous model allows.
 3. Ethical concerns may require a lawyer to actively persuade a client to select an alternative course of action.
 4. Client autonomy may be harmed by lawyer's unwillingness to provide important advice out of reluctance to "impose" views on client.⁴⁸
 5. Resistance to providing client with advice implies client unable to resist lawyer's suggestions.⁴⁹
 6. Client-centered counseling is time-consuming for the lawyer, and therefore more costly for the client.⁵⁰
- G. Other Models of Lawyering; arose in the 1980s and 1990s in response to strict client autonomy⁵¹
1. William Simon, in *Ethical Discretion in Lawyering*, proposes a model in which the lawyer strives to "do justice," through client persuasion.⁵²
 2. Stephen Ellmann, in *Empathy and Approval*, rejects lawyer neutrality towards client's morals as espoused by Binder and Price in favor of "positive judgment."⁵³
 3. Models of Thomas Shaffer and Robert Cochran, Jr.⁵⁴
 - a. "Godfather": lawyer dominates decision-making based on client's interest as defined by lawyer.
 - b. "Hired gun": client tells the lawyer what to do, with minimal discussion.
 - c. "Guru": lawyer tells client what to do, in light of consequences to society of decisions.
 - d. "Friend": lawyer discusses how client's values impact decisions; lawyer free to raise moral issues.
 4. Charles Fried, in *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, offers a model of lawyer as "limited purpose friend," who adopts the client's interests, but only in matters of legal representation.⁵⁵
 5. Robert J. Condlin, in *What's Love Got To Do With It*
 - a. Characterizes the lawyer as "friendly fiduciary" and agent
 - b. Contends that the lawyer-client relationship is too complex, idiosyncratic to be defined by a single model / metaphor⁵⁶

IV. Lawyers Performing Non-Traditional Roles: ADR (Alternate Dispute Resolution)

⁴⁷ O'Leary 108.

⁴⁸ Dinerstein 567-568. See also Ellmann 744-745, 778.

⁴⁹ Dinerstein 576-578.

⁵⁰ Id.

⁵¹ O'Leary 108-109.

⁵² Id.

⁵³ Id.

⁵⁴ O'Leary 142-143.

⁵⁵ Condlin 234.

⁵⁶ Condlin 306-309.

A. Mediator

1. Mediation non-adversarial; can be appropriate in divorce cases because of sensitive emotional factors.⁵⁷
2. Lawyer generally does not function as lawyer when mediating.
3. In family mediation lawyer may function as lawyer, as “impartial” advisor to both parties, advisor to one party, or as part of an interdisciplinary team.⁵⁸

B. Collaborator

1. Collaborative lawyer serves as member of interdisciplinary team; divorce matters frequently addressed.⁵⁹
2. Recognition that for clients, “divorce is not primarily a legal event.”⁶⁰
3. Client-centered, values-based approach strives for enhanced, “deep” conflict resolution.⁶¹
4. New orientation: commitment not to go to court.⁶²

V. Utilizing Models of Lawyering

A. Selecting an appropriate model: some considerations

1. Interpersonal characteristics: personality, culture, race, and gender impact clients’ communication needs.⁶³
 - a. Some clients will feel “abandoned” by lawyer neutrality and a strict client-centered approach.⁶⁴
 - b. Some cultures regard decision-making as a group process.
 - c. Some racial groups may be reluctant to participate fully in information gathering because of mistrust.⁶⁵
 - d. Past trauma may render a client unable to exercise autonomy without special assistance, or render the client more in need of opportunities to act autonomously.⁶⁶
 - e. Skill/experience of the student/lawyer, with client-centered models affording most guidance to neophyte.⁶⁷

B. Client-centered models and interview techniques

⁵⁷ Riskin, Leonard L. “Mediation and Lawyers,” 43 Ohio St. L. J. 29, 33 (1982).

⁵⁸ Riskin 36-37.

⁵⁹ Tesler, Pauline H. “Collaborative Family Law, the New Lawyer, and the Deep Resolution of Divorce-Related Conflicts,” 2008 J. Disp. Resol. 83, 84-89.

⁶⁰ Tesler 128.

⁶¹ Tesler 112-113.

⁶² Tesler 119.

⁶³ O’Leary 127-130.

⁶⁴ Id.

⁶⁵ Id. See also Jacobs, Michelle S. “People from the Footnotes: The Missing Element in Client Centered Counseling,” 27 Golden Gate U. L. Rev. 345, 384-386 (1997).

⁶⁶ O’Leary 131.

⁶⁷ O’Leary 134-136.

1. Techniques designed to encourage client to communicate more frankly than “traditional,” lawyer-controlled interview (floor control, topic control)⁶⁸
 - a. Client may be embarrassed by disclosures.
 - b. Client may fear information may harm case to case.⁶⁹
2. Binder and Price promote use of “facilitators”⁷⁰
 - a. Non-judgmental “empathetic understanding.”
 - b. “Active listening” which repeats client’s statement.
 - c. Critics suggest these tactics manipulate clients through false “pose” of non-judgmental empathetic acceptance.
 - d. Other client-centered linguistic tactics such as “open-ended questions” may fail in practice.⁷¹
 - i. Legal interviewers “trolling for facts” may ignore significant information “embedded” in client responses, often in opening moments (small talk) of interview.
 - ii. Interviewers may miss information by steering client toward predetermined topic.⁷²
 - e. Power may shift from client to lawyer when meeting changes from “interview” to “counseling session.”⁷³

VI. Concerns for the Family Law Practitioner

A. Competence required in a wide range of arenas

1. Deals with multiple client issues, rights, and responsibilities (e.g. custody, taxation, bankruptcy, abuse) knowledge of a broad range of law essential.⁷⁴
2. Differs from other areas of law in practice and procedures.
3. Matrimonial law marked by complex, emotion-laden problems, demanding substantial interpersonal skills.⁷⁵
 - a. Unlike most “act-oriented” legal rules, those impacting family law are “person-oriented.”⁷⁶
 - b. Client emotions and attitudes are central to family law problems.
 - c. Lawyers must be interdisciplinary; sensitive to cultural, psychological, and social factors.
 - d. Lawyers must recognize their limitations, and be prepared to identify and enlist the services of other professionals for their clients.
 - e. Lawyers must recognize that stress and fear interfere with informed,

⁶⁸ Smith 546-549. See also Ellmann 733-734.

⁶⁹ Ellmann 733.

⁷⁰ Ellmann 733-744.

⁷¹ Gellhorn, Gay. “Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews,” 4 *Clinical L. Rev.* 321, 321-328 (1998).

⁷² Gellhorn 355.

⁷³ Smith 590-591.

⁷⁴ Fines, Barbara Glesner and Madsen, Cathy. “Caring Too Little, Caring Too Much: Competence and the Family Law Attorney,” 75 *UMKC L. Rev.* 965, 966-968 (2007).

⁷⁵ Fines 979.

⁷⁶ Fines 968-969.

rational decision-making.⁷⁷

- B. Duty of self-care for the family law practitioner⁷⁸
1. Lawyer's psychological health threatened by "vicarious trauma."
 - a. Result of empathetic connection with client trauma.
 - b. May result in fatigue, social withdrawal, increased sensitivity to violence, fear; also despair, hopelessness, cynicism, decreased sensitivity.
 - c. Vulnerability of lawyers to vicarious trauma heightened by lack of training other "counselors" receive.⁷⁹
 2. Self-protective measures.⁸⁰
 - a. Aim to include non-traumatized clients in caseload.
 - b. Seek peer support.
 - c. Learn to establish appropriate boundaries to prevent the client's problem from becoming the lawyer's.
 - d. Consciously monitor one's own mental and emotional well-being.

⁷⁷ Fines 982.

⁷⁸ Fines 986-990.

⁷⁹ Fines 992-993.

⁸⁰ Fines 993-997.



Role of Lawyers & The Family Law Practitioner

Madeline Marzano-Lesnevich, Esq.

The Role of the Lawyer

Section I



Lawyer's Primary Role

To Ensure that Clients Prevail in Their Claims

To do this, a lawyer must serve as a:

Translator

Predictor

Educator

Lawyer's Primary Role cont'd

Translator

- Translate a client's claims into legal claims

Predictor

- Utilize legal knowledge and experience to offer clients as accurate a prediction as possible of the probability of success

Lawyer's Primary Role cont'd

Educator

- Attempt to ensure clients achieve the greatest possible legal success in pursuit of their claims

Or, alternatively...

- Help clients recognize that it is not possible to pursue their legal claims successfully

The Role of the Lawyer is Complex

In a traditional model:

- Professional is the provider
- Client is a consumer of services
- This model is inadequate; it does not acknowledge:
 - the relationship a lawyer has with his/her client
 - that the legal “product” is dependent on lawyer-client interactions

Matrimonial/Family Law Practice

- Particularly dependent on successful lawyer-client relationships
- Issues are highly personal and emotionally-charged, involving clients':

Identity

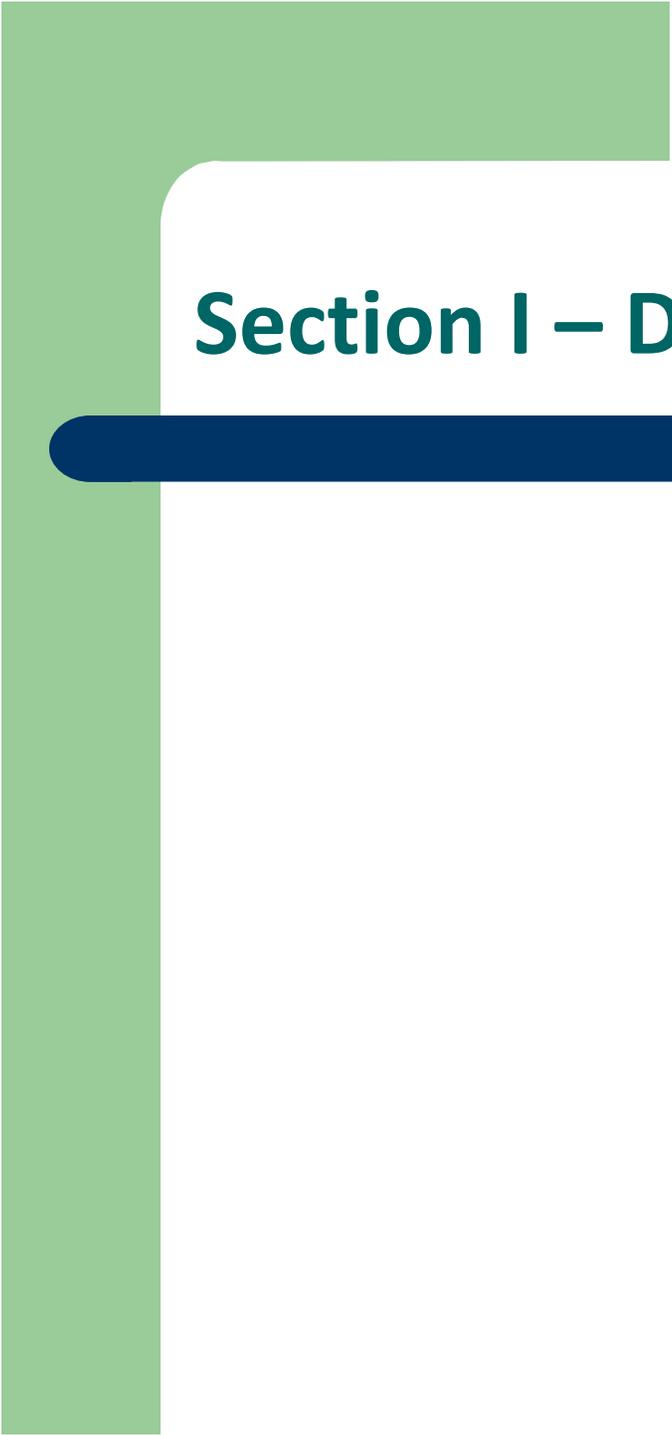
Place of residence

Custody rights

Finances

Matrimonial/Family Law Practice cont'd

- Extensive lawyer-client contact required to prepare/resolve case
- High level of client participation needed to obtain accurate, complete picture of legal and non-legal aspects of problem
- Nature of issues calls for client participation in decision-making



Section I – Discussion Questions



Lawyer-Client Relationship

Section II



Lawyer-Client Interactions

Co-dependence

- The client relies on the lawyer for law and the lawyer's ability to navigate the "unfamiliar waters" of the legal system during a time of emotional chaos
- The lawyer relies on the client for the factual underpinnings of the case

Lawyer-Client Interactions cont'd

Interactions result in “negotiated product”

- The lawyer and client work together to develop a “mutually tolerable” story to present to adversary or court
- Either the client or the lawyer may suppress motives/goals/data inadvertently or intentionally, which may create suspicion

Power in the Lawyer-Client Relationship

Sources of client power

- Economic leverage
- Client sophistication
 - Expertise equal or greater than lawyer's
- Client “aggressiveness” in pursuing case

Power in the Lawyer-Client Relationship cont'd

Sources of lawyer power

- Knowledge of law
- Prior experience
- Familiarity with the “system”
 - courts, judges, procedures

Power in the Lawyer-Client Relationship cont'd

Dynamic power in the relationship

- Continually generated from within a situation
- May be mutable, shifting over time between parties
- May be ambiguous, disputed, elusive

Power in the Lawyer-Client Relationship cont'd

Power and “negotiation of reality”

- Lawyer/client may perceive reality in diverging terms
- Defining legally realistic goals acceptable to the client may require complex struggles

Power in the Lawyer-Client Relationship cont'd

Power and “negotiation of reality”

- Vision of goal
 - Client may perceive goal as “process” (vindication, retribution)
 - Lawyer typically views goal as “outcome”
- Lawyer may need to remind client that goals must be ethically permissible

Potential for Misuse of Power

- Clients may mislead lawyers through false or inadequate information
 - (e.g., spouse’s likelihood of accepting an offer)
- Clients may be pressured by financial or emotional factors
- Lawyers may attempt to manipulate clients through tailored presentations, exaggeration, or dishonest assessment of likely outcomes of a particular course of action

Power and the Negotiation of Responsibility

- “Who does what” to keep a case on track should be clearly defined at onset
- Some tasks clearly province of lawyers
 - procedural activities, preparing pleadings, conducting hearings, trials
- Other responsibilities may be assumed by clients to conserve time, financial resources
 - data gathering, communications

Power and the Negotiation of Responsibility cont'd

- “Negotiations” are often a contested area of the lawyer-client relationship
- Lawyers generally attempt to control negotiations
 - except for discussions involving personal property
- Lawyers generally attempt to control Lawyers often regard lawyer-to-lawyer professional exchanges as a fundamental service in matrimonial law
- Clients may seek to negotiate with spouse directly

Power and Decision-Making

- Decision-making is crucial to the successful resolution of a case
 - Establishing goals
 - Devising tactics
 - Making/accepting offers
 - Deciding whether to proceed to trial

Power and Decision-Making cont'd

- In trial situations, general rule:

client decides the “ends”

and

the lawyer decides the “means”

- Lawyer's duty of care to client may require that some decisions of strategy be made independent of client wishes

Decision-Making Process

- Respective roles of lawyer and client in the decision-making process are a reflection of the dynamics of power within the lawyer-client relationship
- Lawyers help clients reach appropriate decisions through “legal counseling” by:
 - Seeking to define client needs and goals
 - Proposing and evaluating potential solutions
 - Predicting outcomes

Decision-Making Process cont'd

- The lawyer's role in legal counseling and the degree of client participation in the decision-making process have been debated extensively:
 - Who should decide what actions to pursue - lawyer, client, or both?
 - How to balance client's autonomy with duty to prevent self-inflicted harm?

Models of Lawyering

- Different models of lawyering attempt to define the distinctions between various approaches to client counseling/ lawyer-client interaction.

Models of Lawyering

Section III



Traditional Model of Client Counseling

- Long-held, “authoritarian” approach:
clients have problems
and
professionals have solutions
- Lawyer dominates interactions and defines the lawyer- client relationship

Traditional Model of Client Counseling cont'd

- Client essentially passive; delegates decision-making responsibility to lawyer
- Lawyer does not regard client as competent to participate fully in resolving legal problems
 - Little meaningful exchange between client and lawyer
 - Client input not valued; clients seeking active involvement may be resented

Client-Centered Counseling Model

Background

- Genesis in 1950's re-examination of professional-client relationships in a variety of fields
- Challenged belief that professionals had the right to "control" clients to best serve their needs
- Participatory approach stressed collaboration between professional and client, and acceptance by client of personal responsibility

Client-Centered Counseling Model cont'd

Characteristics

- Grounded in belief in client's intelligence, moral soundness, dignity, and autonomy
- Problems are identified from the client's perspective
- Client is actively involved in exploring solutions to problems
- Client's personal circumstances and values are considered by the lawyer when providing counsel

Client-Centered Counseling Model cont'd

Characteristics cont'd

- Client's emotional state and concerns regarded as important
- Client is encouraged to make decisions
- Lawyer explicitly and repeatedly expresses intention to help the client
- Lawyer often reluctant to provide advice
 - even when requested to do so, out of fear of “imposing” solutions

Client-Centered Approach – Advantages

- Client autonomy fosters sense of empowerment
 - Especially important in situations where client is able to make intelligent choices, but has little power
 - Appropriate when empowered client demands autonomous model
- Client best able to view the problem “holistically”
 - Can comprehend the non-legal aspects of the situation – social, economic, and emotional – better than the lawyer; better able to select an appropriate solution
 - Consideration of totality of client circumstances highly relevant in matrimonial law cases

Client-Centered Approach – Advantages

- Client may have enhanced feelings of control over life during difficult period
 - reducing anxiety generated by unfamiliar legal process
- Greater client participation/investment in resolution of problems results in greater client satisfaction
- Lawyer is more likely to perceive client as “more fully realized” person
 - enhancing the lawyer-client relationship

Dominance of Client-Centered Models

- Many law professors have backgrounds in legal services, or in large firms with powerful clients
- An autonomous model is useful in law clinic settings, where inexperienced law students:
 - May be unaware of personal biases
 - May have little experience devising solutions to problems appropriate to the circumstances of their clients

Client-Centered Model – Disadvantages

- Client may be unable to make intelligent, informed decisions (due to mental, physical, or psychological impairment)
- Client may desire lawyer to take more active role in decision-making than a strictly autonomous model allows
- Ethical concerns may require a lawyer to actively persuade a client to select an alternative course of action

Client-Centered Model – Disadvantages

- Client autonomy may be harmed by lawyer's unwillingness to provide important advice
 - Out of reluctance to “impose” views on client
- Resistance to providing client with advice implies client unable to resist lawyer's suggestions
- Client-centered counseling is time-consuming for the lawyer, and therefore more costly for the client

Lawyers Performing Non-Traditional Roles: ADR (Alternate Dispute Resolution)

Mediator

- Mediation non-adversarial; can be appropriate in divorce cases because of sensitive emotional factors.
- Lawyer generally does not function as lawyer when mediating.
- In family mediation lawyer may function as lawyer, as “impartial” advisor to both parties, advisor to one party, or as part of an interdisciplinary team.

Lawyers Performing Non-Traditional Roles: Alternate Dispute Resolution (ADR)

Section IV



Collaborator

- Collaborative lawyer serves as member of interdisciplinary team; divorce matters frequently addressed
- Recognition that for clients, “divorce is not primarily a legal event”
- Client-centered, values-based approach strives for enhanced, “deep” conflict resolution
- New orientation: commitment not to go to court

Mediator

- Mediation non-adversarial; can be appropriate in divorce cases because of sensitive emotional factors
- Lawyer generally does not function as lawyer when mediating
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Utilizing Models of Lawyering

Selecting an appropriate model: some considerations

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 - Some cultures regard decision-making as a group process.
 - Some racial groups may be reluctant to participate fully in information gathering because of mistrust.

Utilizing Models of Lawyering

Section V



Selecting an Appropriate Model: Considerations

- Interpersonal characteristics: personality, culture, race, and gender impact clients' communication needs
 - Past trauma may render a client unable to exercise autonomy without special assistance, or render the client more in need of opportunities to act autonomously
 - Skill/experience of the student/lawyer, with client-centered models affording most guidance to neophyte

Client-Centered Models: Interview Techniques

- Encourage clients to communicate (**floor control, topic control**)
 - Client may be embarrassed by disclosures
 - Client may fear information may harm case to case
- Binder and Price promote use of “facilitators”
 - Non-judgmental “empathetic understanding”
 - “Active listening” which repeats client’s statement
 - Critics suggest these tactics manipulate clients through false “pose” of non-judgmental empathetic acceptance

Client-Centered Models: Interview Techniques cont'd

- Other client-centered linguistic tactics such as “open-ended questions” may fail in practice
 - Legal interviewers “trolling for facts” may ignore significant information “embedded” in client responses, often in opening moments of interview
 - Interviewers may miss information by steering client toward predetermined topic
- Power may shift from client to lawyer when meeting changes from “interview” to “counseling session”

Concerns for the Family Law Practitioner

Section VI



Competency Required in a Wide Range of Areas

- Deals with multiple client issues, rights, and responsibilities (e.g. custody, taxation, bankruptcy, abuse)
- Demands knowledge of a broad range of law essential
- Differs from other areas of law in practice and procedures

Competency Required in a Wide Range of Areas cont'd

Matrimonial law

- Deals with complex, emotion-laden problems
- Unlike most “act-oriented” legal rules, those impacting family law are “person-oriented”
- Client emotions and attitudes are central to family law problems

Competency Required in a Wide Range of Areas cont'd

Matrimonial law cont'd

- Lawyers must be interdisciplinary (*sensitive to cultural, psychological, and social factors*)
- Lawyers must recognize their limitations
 - Identify/enlist the services of other professionals when required
- Lawyers must recognize that stress and fear interfere with informed, rational decision-making

Duty of Self-Care for the Family Law Practitioner

- Lawyer's psychological health threatened by "vicarious trauma"
 - Result of empathetic connection with client trauma
 - May result in *fatigue, social withdrawal, increased sensitivity to violence, fear, despair, hopelessness, cynicism, decreased sensitivity*
 - Vulnerability of lawyers to vicarious trauma heightened by lack of training other "counselors" receive

Duty of Self-Care for the Family Law Practitioner cont'd

- Self-protective measures
 - Aim to include non-traumatized clients in caseload
 - Seek peer support
 - Learn to establish appropriate boundaries to prevent the client's problem from becoming the lawyer's
 - Consciously monitor one's own mental and emotional well-being

Role of Lawyers

Madeline Marzano-Lesnevich

Discussion Questions

- What are methods that can be used to encourage a client to volunteer information about his or her situation?
- How can a new lawyer assess the effectiveness of his or her interview technique?
- In the event a client appears to have unreasonable or unrealistic goals and expectations for the legal process, is it necessary for a lawyer address these with the client immediately? Is it acceptable to wait until a specific issue arises during the litigation of the case?
- In the event a client appears to have unreasonable or unrealistic goals and expectations for the legal process, is it acceptable for a lawyer to tailor his or her presentation or assessments to influence the client to alter those goals and expectations? Does this necessarily constitute a misuse of power?
- When representing a client who adopts a passive approach to litigation and evidences an intention to defer to the lawyer's judgment consistently, is it acceptable for the lawyer to assume greater decision-making authority? How does a lawyer determine the limits of that authority?
- When a lawyer believes a client he or she is representing is incapable of making important decisions, to what extent is the lawyer free to control the direction of the case?
- How does a lawyer make sure that he or she will be sensitive to possible special needs of a client, for example due to cultural or ethnic background?
- In a situation where a lawyer feels a client might have specialized needs, what steps should the lawyer consider?
- What steps should a lawyer take to maintain adequate self-protective measures with respect to the lawyer's psychological health? How will the lawyer assure that possible problems will be identified?