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Legal Counseling and Lawyers' Fees: A Quadrilogue

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Legal Counseling and Lawyers' Fees:



Soderquist: In discussing legal counseling and lawyers' fees, is there an organizing theme, a framework to hang things on?

Shaffer: Could you say that there's an inevitable tension in professional life between the helping aspects of practice, when counseling is important, and the business aspects, a tension that betrays a certain ethic about the practice of law as a commercial enterprise?

Redmount: The lawyer-client relationship, any professional-client relationship, is a little bit synthetic, if you really mean the term "relationship" in a humanistic or a human relations sense.

Brown: What do you mean by "synthetic"?

Redmount: Not real. Kind of pretend. There really isn't much friendship involved.

Brown: We say in the profession that the one person you can hire who's really on your side, an independent adviser, is your lawyer. There's nobody else. The real estate agent is commissioned and only makes a fee if the deal goes through, but the lawyer can really give independent advice. Friendship doesn't have to be involved. But the tension Shaffer speaks of is real. I've sometimes wondered about how independent lawyers' advice is, because of this tension. Sometimes it suits the situation from the lawyer's point of view. It may be a matter of fees. I spend more time in a situation in which the fee is likely to be high than in a situation in which it is likely to be low. Counseling is certainly a situation in which I think that what lawyers do is in some measure geared to their own self-interest. And that's partly a matter of fees.

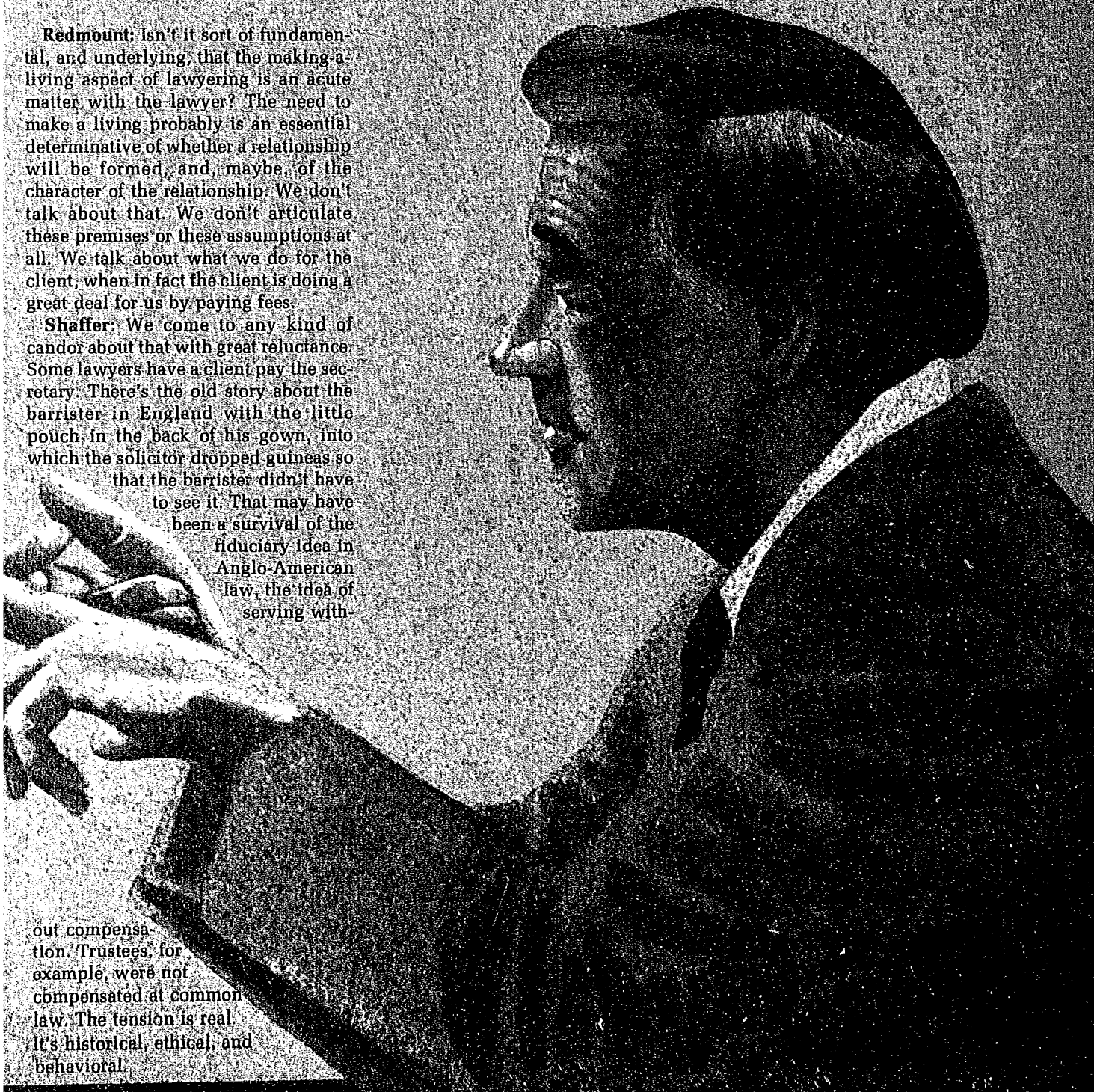
This "quadrilogue" grew out of concern about the amount and quality of legal counseling clients receive from their lawyers and the relationship of lawyers' fees to legal counseling. The participants are Louis M. Brown, a professor of law at the University of Southern California; Thomas L. Shaffer and Larry D. Soderquist, law professors at Notre Dame; and Robert S. Redmount, a clinical psychologist and practicing lawyer in Hamden, Connecticut.

A "Quadrilogue"

Redmount: Isn't it sort of fundamental, and underlying, that the making-a-living aspect of lawyering is an acute matter with the lawyer? The need to make a living probably is an essential determinative of whether a relationship will be formed, and, maybe, of the character of the relationship. We don't talk about that. We don't articulate these premises or these assumptions at all. We talk about what we do for the client, when in fact the client is doing a great deal for us by paying fees.

Shaffer: We come to any kind of candor about that with great reluctance. Some lawyers have a client pay the secretary. There's the old story about the barrister in England with the little pouch in the back of his gown, into which the solicitor dropped guineas so that the barrister didn't have to see it. That may have been a survival of the fiduciary idea in Anglo-American law, the idea of serving with-

out compensation. Trustees, for example, were not compensated at common law. The tension is real. It's historical, ethical, and behavioral.



Redmount: It clearly comes up when the issue is the continuity of the relationship. When there is a long-term relationship, and time-consuming counseling is involved—on an hourly basis, for example—the fee can become a distracting and uncomfortable factor, especially for a client who can't afford it.

Brown: The fee is absolutely significant with respect to the commencement of a lawyer-client relationship, especially one that will require a good deal of counseling. A lawyer ordinarily doesn't commence a client relationship unless he envisions an adequate fee. Sometimes he'll close his eyes to that, but on the whole he's got to be relatively certain he will be well paid. If he can't be, in some situations, then the relationship doesn't even get started. That may be a frequent occurrence.

Redmount: What impact does that have on the image of a lawyer as a person available to help, or one who is disposed to offer help? What does that do in terms of his credibility as a helping person?

Soderquist: I suppose we can agree that it doesn't do much for the lawyer's image and credibility as someone disposed to help. But, focusing on legal counseling, perhaps that first question is: "How disposed are lawyers to help?"

Lawyers' attitudes about legal counseling

Shaffer: There's the problem. Lawyers often aren't disposed to help—they aren't adequately concerned with ministering to human beings. This can be traced to the law school dogma that problems are more important than people. It is even prior to the lawyer's worries about making a living.

Brown: There's a lot in that. Law schools have not, until recently, even regarded the client as a significant factor within legal education. If we con-

tinue to get the idea across that the lawyer-client relationship has jurisprudential significance, we might be able to take a second step and get people to realize that the client is more than a factor or a concept: he is also a human being.

Soderquist: Most lawyers would say the object of what they do is to help human beings. But they fail to understand they have to achieve that goal by doing more than handling technical legal problems. This goes back to the traditional law-school teaching approach, in which legal questions are discussed vigorously and human needs are considered very little. Law schools traditionally have done very little to prepare lawyers for a counseling role. If a client needs counseling, for example, a divorce client who has a wide variety of problems—legal, financial, and emotional—the skill the lawyer uses in helping with these problems is pretty much self-taught.

Brown: That's so, but we need to differentiate counseling and therapy. Law students and lawyers often do not make that distinction. In discussing the psychological relationship between attorney and client in some of my classes, the reaction and discussion seem to turn to treating the client's mental condition. I think lawyers also feel, somewhat, that if they were to get into serious legal counseling, they would be getting into therapy.

I hope I am correct in observing that there is a real difference between counseling and therapy. I think lawyers ought to do counseling. I'm not sure that we are competent to do therapy or ought to do it. The distinction may not be a sharp one at times. No doubt a certain amount of counseling spills over into some sort of therapy.

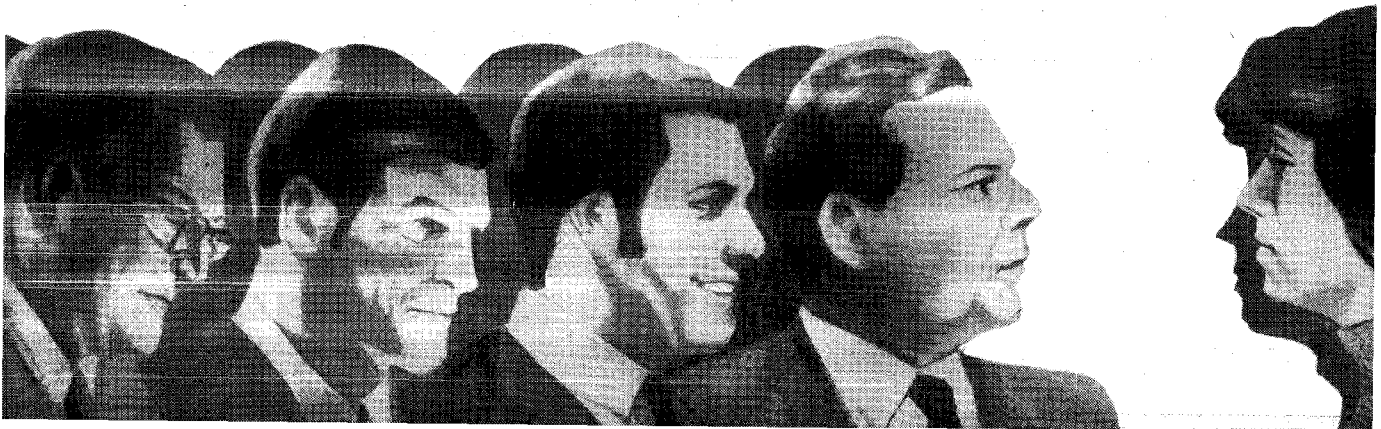
Redmount: Let's not step in where angels fear to tread. The issue of differentiating counseling from therapy is a conundrum that splits mental health

professionals. Individuals have their idiosyncratic views, but there is a lack of consensus. The issue mainly seems to turn on some concept of problem severity and on how to distinguish procedures that deal with the different degrees of severity. The difficulty in understanding problems in counseling or therapy is that they operate on a continuum of severity. There are not "sane" or "insane" people, but people with problems that, from a mental health point of view, vary in degree of intensity, complexity, solvability, and so on. We are dealing with shadings from the norm and not with an "either-or."

When the lawyer seeks to "resolve" the issue of counseling versus therapy, his concern is not with a conceptual understanding of problems and procedures. Rather it has to do with establishing the limits on his own feelings of competence and with being assured that he will not find himself in a psychological thicket. To this end, he may develop some arbitrary differentiation between counseling and therapy, but it will be just that—arbitrary, and probably self-serving.

Shaffer: There are at least two separate areas of legal counseling, one relating to substantive and procedural law—when the lawyer counsels the client about what the law is and how to proceed—and the other relating to human needs and human interactions. Let's just focus on the latter, loosely defined, without getting into a definitional thicket. Law schools have certainly done very little to prepare lawyers to be counselors. And lawyers generally say they aren't very good at it. But, in my experience, lawyers' counsel is valuable nevertheless, and lawyers tend to be pretty good at counseling.

Brown: Even without training, lawyers have tools that aren't available to others and that can have significant psychological effects. For example, in a



divorce situation, a lawyer may, rather than proceed immediately to the task of obtaining a divorce, discuss with the client in great detail the practices, procedures, and consequences of divorce from a legal point of view. He may do this in the hope that reconciliation may take place.

Soderquist: Carefully used, the technique of introducing a client to all the ramifications of what he is contemplating can be effective. When used by a lawyer who is insensitive to the client's human needs, however, that technique may be potent but bad; the lawyer may use it to manipulate the client to do what he thinks best for the client, rather than using it to help the client make his own choice. But, if lawyers basically are good counselors, why don't they do more of it?

Shaffer: Well, Harrop Freeman found that lawyers are not likely to feel their counseling time is as useful to clients as time spent writing letters, pushing people around, or looking up law. If that's so, it means lawyers don't think their counseling is as valuable as that of psychologists, psychiatrists, clergymen, and physicians.

Brown: The point you make about lawyers' inferiority complex ought to be emphasized. A friend of mine, who is a leading bankruptcy lawyer, once told me that at current hourly rates, there isn't time for "nonlegal" counseling. He then added that social workers would probably do the job better.

Soderquist: I'm not sure lawyers think counseling would not be as valuable to their clients as technical solutions to legal problems. I do believe they don't think it's their job. When speaking with a divorce client, for example, a lawyer may say to himself, "This one sure needs a shrink," and then fail to see that it's part of his role to do more than file the divorce papers and do the best job he can in arguing for more alimony.

The comments of your friend bring

something else to mind. He didn't say a psychiatrist would probably do a better job at counseling; he said a social worker probably would. If lawyers believe they can't charge as much for counseling as they can for other tasks, they look for excuses to push it off on a less highly-paid person. Along this line, a minister friend has told me of his anger at psychiatrists who take their \$50 an hour for conveniently scheduled sessions and then, by being unavailable to patients, leave the clergy to handle psychiatric emergencies in the middle of the night.

A couple of questions arise: First, if lawyers change their approach to counseling and, as Shaffer says, "minister to human beings," will the lawyer's job take more time, and, if so, how much more? Second, would clients be willing to pay the extra fee?

Brown: If a lawyer counsels in an attempt to meet the human needs of his client, he frequently believes, perhaps wrongly, that the amount of time consumed in counseling will be lengthened. The idea behind this belief is that it takes less time to tell a client what to do than to arrive at a collaborative course of action.

Shaffer: We don't know whether time spent by lawyers increases or decreases when a serious counseling approach is taken. Some psychotherapy research suggests that client-centered methods take the least time. If one assumes that the initial object in a psychologist's interview is to get the basic facts, it can be demonstrated from tapes of sessions that Carl Rogers got the facts more quickly than the confrontive therapist, Frederick Perls, or the rational-emotive therapist, Albert Ellis. The same comparison may well hold true for the varying styles in legal counseling. Arguing with clients—being a tyrant and cross-examiner—wastes a lot of time.

Redmount: I think you're on thin ground in suggesting that personal attention to and exploration with the

client takes less time and gets to problems and problem resolution more quickly. This is, from clinical observation, only occasionally the case. The rationale for taking time is not efficiency but substantiality. Time well used means that a more substantial and meaningful service is provided, and this both justifies the use of time and warrants the extra expense. Many, if not most, clients would agree. Those who do not, or cannot afford this time, can look to other alternatives. Educating the client may be a factor of some importance. It, too, is a proper and necessary function of legal counseling, granting that this may or can come close to proselytizing and be self-serving for the professional.

Soderquist: Many small-firm lawyers seem almost to have a fetish about getting, as quickly as possible, the "facts and nothing but the facts" needed to handle a matter from a technical standpoint. When I first encountered this, I was impressed with the lawyer's incisiveness; I've ceased to be impressed. I think big-firm lawyers are more willing to hear clients out, but often they don't see counseling as their role and don't try to do it. In the latter situation, time and expense are not so often factors.

A lawyer doing the proper counseling job generally will spend more time with clients. The important question is: How much more total time would be spent on a matter? I'm convinced not much more would be spent if the lawyer were serious about counseling. I have two reasons:

First, lawyers' "technical" work is time-intensive, while the kind of counseling I foresee for lawyers is not. Even a simple real estate sale matter, for example, can take several hours. If a lawyer is efficient with respect to time, he could, for example, spend half an hour with his client, just getting the facts necessary for a technician's handling of the job and having the papers



signed, and five hours making up the papers, reviewing another lawyer's documents, writing letters, making and answering telephone calls, and attending a closing. If the lawyer doubled the time with his client, the total time of six hours would only increase 11 per cent. On matters taking more time for non-counseling work, the percentage of increase from spending more time with clients obviously would be less. This assumes, of course, that lawyers are not likely to become involved in such pursuits as the kind of marriage counseling done by marriage counselors, or any sort of attempted psychotherapy. These kinds of things would be time consuming, and I don't believe lawyers should try them.

I'm thinking more of lawyers doing such things as (a) evidencing a concern for the human needs of clients; (b) attempting to help clients understand the human aspects of their legal problems and the ramifications in human terms of their legal situation or a contemplated course of legal action; (c) using counseling skills to find out what a client really wants or needs, even if that is hidden from the client, and helping him understand his desires or needs; and (d) spotting those clients who need counseling help from other professionals. If what needs to be done in this area will take very much time, it's almost certain to be outside the lawyer's area of competence.

Second, the practicalities of the lawyering situation would limit the percentage of time on a client's matter a lawyer would spend counseling the client. Clients realize appointments with other clients must be kept. They also realize lawyers can't devote more than a certain amount of time to each client. Let's say busy lawyers now schedule half-hour appointments for initial interviews. That probably makes things too rushed and forces lawyers to push aside human concerns in an attempt to get the facts out. Increasing the initial appointment to one hour would alleviate some of the time pressure. It also would probably provide all the time the client desired, or felt he could expect, for the first visit. After that visit, or perhaps one more, the lawyer would probably begin his time-intensive legal work, building a high ratio of nonclient time to counseling time. The time spent on the client's human needs should in large measure be left up to the client, with the client making the decisions partly on the basis of whether he wishes to pay for it.

Willingness of clients to pay for lawyers' counseling

Redmount: I see only Soderquist suggesting that the client also may have an opinion as to the amount of time and the commensurate expense he is willing to underwrite in order to be helped. There is a knowledgeable answer here, and it comes from the most counseling-oriented of all counseling enterprises, mental health. The client frequently understands that time duration in counseling may be a matter of considerable uncertainty, even assuming that both counselor and client are committed to as expeditious a means of problem solving as possible. The client's needs typically are such that he will grant all the time needed, and pay for it, if he thinks he is being well-served and benefits substantially. The problem that may arise for the client is that he cannot afford the best or the most extended service, and this may set time limits or suggest alternative procedures or alternative consultation consistent with his ability to pay.

Shaffer: Every reliable study of what clients seek from lawyers and what they are willing to pay for, concludes that effort is a more important factor than results. People want lawyers who really try and who care about them. That seems obvious as a matter of reason, but it also seems clear as a matter of fact or a matter of social science. If that is so, and building on Soderquist's guess that serious legal counseling will increase costs by a factor of a small per cent, then I am encouraged. There are time and money enough for lawyers to be good counselors, to make a living at it, and to give better service to their clients.

Brown: I wonder whether the way a fee is set determines, in some measure, the counseling given a client. While reliable studies show that clients regard effort as more important than results, contingent fees are determined solely by results. It is probable that a large portion of the fees paid by individual clients to solo practitioners and smaller offices are contingent fees. I wonder what effect these fee arrangements have on the counseling aspects of a lawyer's activities. Also, most of these matters are "single-shot," which do not contemplate repeat or long-range relationships with a client. Perhaps the client regards the service as technical because the entire fee is measured by technical results. I think that studies of fees

should try to determine the effect on counseling of the manner in which fees are determined.

Soderquist: What you say about contingent fee situations is true. There are, of course, some cases in which clients are hard pressed or unwilling to pay more than a fair fee for technical legal service, so that there would be no room for a higher fee no matter what the lawyer did. But there are fewer of these cases than lawyers believe. In many cases, clients think fees are too high because they thought their problem was simple, when in fact it was not—or if it was simple, it was time consuming.

Shaffer: We are beginning to find that these clients can go to a "law store" or impersonal legal clinic. I think that's sad, though. What it may mean is that other lawyers will find it appropriate to give their clients more personal attention.

Soderquist: I hope so, and I see no reason to believe clients are not willing to pay for counseling on the same basis as other services. In fact, if the lawyer did more counseling, he would probably make his total fee more palatable. I base this on three things: first, the high ratio of lawyers' time necessarily spent on technical aspects of a problem in relation to time spent counseling; second, the lack of appreciation of clients as to how much time a lawyer spends away from them working on their problems; and third, the fact that satisfied clients are more willing to pay high fees than disgruntled ones.

There is also, of course, a more straightforward reason to believe clients would be willing to pay for lawyers' counseling. They know the lawyer gets a fee for work he does for clients. They also know there is usually a relationship between the time spent by the lawyer and his fee. Clients also know that other professionals charge for counseling and at a high rate. There may be a problem in getting clients to sit still for enough counseling (and I think they generally should decide what is enough) because of their fear of the fee, but I don't think they would assume anything except that they would pay for counseling on the same basis as anything else a lawyer does. The lawyer can do two things to get clients to accept enough counseling: (1) tell clients about the ratio of counseling time to other time the lawyer will need to spend on the matter (in effect, assure them the fee won't be much higher), and (2) tell them the counseling is necessary when it is necessary. ▲