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A Theoretic Framework for Lawyering Behavior and Techniques of Legal Diagnosis

RICHARD T. OAKES*

Imagine a medium sized law firm (6-15 lawyers) located in the same professional office complex as a medical clinic of similar size. Both practices can provide a considerable range of professional services, for example:

Medical Clinic	Law Practice
obstetrics-gynecology (2 professionals)	family practice (2 professionals)
Internal Medicine (7 professionals)	general practice (7 professionals)
Surgery (3 professionals)	Litigators (3 professionals)
Pediatrics (3 professionals)	business practice (3 professionals)
Administration (1 professional)	Administration (1 professional)

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Both of these practice models could be found in nearly any major suburban area in America.

Using dramatic license, a theoretic client/patient can be created and given an appointment in both offices on the same day. It can be assumed that the client has been exposed to a toxic chemical agent about which little is known and that permanent, if not fatal damage has resulted from this unintentional tort. Physical symptoms would be present and the physician's prognosis might well be very pessimistic.

Visiting a lawyer is similar to visiting a doctor. In both situations a client/patient must surrender his individual will to the advice, and thus control, of an expert. Sometimes the surrender of individual will is in the nature of total abdication to that expert by the client.[1] Robert S. Redmount, a clinical psychologist and lawyer, describes as a formula for "[a]n inherent disproportion of power . . ., the maldistribution of [the client's] needs and [the professional's] skills."[2] The notion of professional autonomy is also involved in an attorney/client relationship.[3] Lawyers and doctors jealously guard their role in society and are concerned about their relationships with their peers. Once placed in a disproportionate power relationship, professionals are loath to give up that power. Lawyers are the settlors, beneficiaries and exclusive administrators of the trusteeship of the legal tradition.[4] Doctors have similar feelings about the medical profession. The professional mysteries of law and medicine are often perpetuated and protected by their practitioners.

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1. "Surrender" and "abdication" are synonyms that are used differentially to distinguish between a conscious giving over of control (surrender) and a considerably less cognitive process of giving up, or even worse, a preconception that giving over of control is a necessary precondition to the relationship (abdication).

2. Redmount, *New Dimensions of Professional Responsibility*, 3 J. LEGAL PROF. 43, 46 (1978). At page 46 the author observes that, "the professional should be obligated, as a matter of policy, to protect the clients' autonomy and decision making authority." And here lies the tension for the practitioner, between mutual conditioning and expectation on the one hand and the notion of some professional duty.

3. Cihlar, *Client Self-Determination or Interference*, 14 ST. LOUIS U.L.J., 604, 608 (1970). Professor Cihlar observes that law has failed to come to grips with the question of client self-determination. He regards this as an institutional problem since the lawyer has held himself or herself out as an advisor, the client expects just that—advice. In Cihlar's view this expectation on the part of the client encourages a "resolute" response on the part of the lawyer. "Whether due to felt or real inadequacy, or just sheer convenience, client preference often runs to 'letting my attorney handle the matter'." At 609 he points out an aspect of professional autonomy—the notion of the attorney's public duty as an officer of the court and thus implementor of societal values.

4. *See generally* Parsons, A Sociologist Looks at the Legal Profession, ESSAYS OF SOCIOLOGICAL THEORY, 374-77, 384-85 (Revised Ed. 1954); L. Brown & A. Dauer, PLANNING BY LAWYERS: MATERIALS ON A NON-ADVERSARIAL LEGAL PROCESS 74 (1978).

> The position of the legal profession in the social structure is thus an 'interstitial' one . . . secondly, it is organized around partly independent trusteeship of the legal tradition, with respect to which it has independent, formally and informally recognized monopolistic prerogative.

Id.

Dr. Andrew Watson discusses the natures of client/patient dependency and professionalism. He argues that, as a professional, the attorney assumes a societal role replete with expectations on the part of the client.[5] Watson describes four characteristics of professionals:

> 1. [the professional] . . . is the possessor of some highly technical knowledge and skill . . . [gained] . . . after lengthy education and training that is intrinsic to the performance of . . . professional services.
> 2. . . . because of the highly complex nature of these skills and knowledge, it is impossible for the client or patient to understand or evaluate the efficiency of the professional service, at least until after it has been performed . . . [e]ssentially he must accept this service on the basis of faith.
> 3. . . . [s]ociety assumes that the professional will place the vital interests of the client/patient above that of his own monetary gain or neurotic need for . . . power or manipulation.
> 4. . . .[t]he smaller society of peers will set up a more detailed standard of role demands and will evolve complex systems of rules with which to govern themselves.[6]

Thus, the expectations and roles of both professional and client are, to a great extent, predefined. It is critical for the professional to recognize these forces and preconditions before the relationship begins.

The way law is usually practiced often prevents an attorney from recognizing a client's true motives for coming into his office. The initial setting in which the attorney and client find themselves sometimes makes it difficult for the attorney to render effective advice. This problem is usually a failure on the part of the attorney to give expression to a client's goals through effective client counseling techniques. How then are lawyers to treat a client? It is unfortunate that most law students study the art of client counseling late in their law school careers, if at all. Much has been written about client counseling, but a theory of medical-style *diagnosis* has been largely ignored. This article presents a theoretical diagnostic framework within which an attorney can effectively approach a client's problem during the earliest stages of their relationship, as well as retrospectively evaluate the manner in which the problem was handled.

CLIENT MOTIVES AND EXPECTATIONS

For a number of psychological and sociological reasons a cli-

5. Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1, 2 (1963). Watson, a psychiatrist, has held concurrent appointment to faculties of both Law and Medicine at the University of Michigan.

6. *Id.* at 3; *see also infra* note 16.

ent/patient may be less hesitant to seek the advice of a doctor to resolve a medical problem than the advice of a lawyer to solve a legal problem. There may actually be less discomfort associated with a visit to the physician because the person seeking the advice of an attorney is likely to experience the guilt associated with the commission of a wrong or might have to admit mistakes or inabilities in his or her personal or business life. This feeling of failure is usually not present in the physician's examining room. For some persons, then, the surrender of individual will when the client consults a lawyer may represent a more difficult and critical choice than the one made when a patient enters a physician's office.

Because law and medicine are both "helping" professions, it is useful to explore the motives which bring a client/patient to the professional. A client and a patient may have very different expectations when they enter their professionals' offices. A patient is, doubtlessly, motivated by a desire to cure whatever physical infirmity leads him to seek the help of the physician in the first place. The client, however, may have motives other than just a desire to put his affairs in order. He may, for example, want to "get even" with his adversary and might seek out an attorney only too willing to assist him in that endeavor.[7]

Redmount recognizes three prototypical attorney personality types—belligerent, acquisitive, and conciliatory.[8] When he confronts these three prototypes with an outspoken, demanding, impatient and angry client, the result is most often litigation when this type of client is presented to the beligerent or aggressive attorney.[9] The anger of the client fits the expectations of the attorney, leaving the real reasons for the anger unexplored. Anger, like pain, is a symptom. If it is inadequately diagnosed, the anger rather than the problem becomes the driving force behind attorney action. The symptom, therefore, masks the malady, which might in the long run never be treated. The attorney and client, in opting for the expense and risk of litigation, reduce the likelihood of negotiation or conciliation. This litigious attitude renders effective counseling impossible.[10]

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7. Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972, 979, 986 (1961).

8. *Id.* at 986-87; *see also* REDMOUNT & SHAFFER, LEGAL INTERVIEWING AND COUNSELING 3 (1980).

> My concern is with the three counselors from whom Septimus Harding sought guidance. Early in the story he visited his old friend the bishop. Later, he visited his lawyer, Sir Abraham Haphazard, the attorney general. Finally, Septimus visited his son-in-law, Arch Deacon Grantly. The first of these counselors was mainly friendly, the second mainly acquisitive, and the third mainly paternal.

Id.

9. Redmount, *supra* note 7, at 986.

10. *Id.* (the view that the essence of legal service is litigation).

Redmount urges that there is nothing wrong with this behavior as long as it is intentional.[11] The 1981 Draft of the American Bar Association Commission on Evaluation of Professional Standards Rules recognizes the range of lawyering quite explicitly.[12] The Draft identifies

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11. *Id.*

12. FINAL DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT: American Bar Association Commission on Evaluation of Professional Standards. This supplement to the October, 1981 issue of the American Bar Association Journal contains the final draft of the Model Rules of Professional Conduct as prepared and published by the American Bar Association Commission on Evaluation of Professional Standards on May 30, 1981; at 5:

PREAMBLE: A LAWYER'S RESPONSIBILITIES

As a representative of clients, a lawyer performs various functions. As an advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of fair dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor, and to a limited extent, spokesman for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

COUNSELOR

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations as well, such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT: SCOPE OF ADVICE

A client is entitled to straight forward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's moral and may put advice in as acceptable a form as honesty permits. However, a laywer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be the domain of another profession. Family matters can involve problems within the professional competency of psychiatry, clinical psychology or social work; business matters may involve problems within the competency of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

NOTES:

CODE COMPARISON

There is no direct counterpart to Rule 2.1 in the disciplinary rules of the code. DR5-107(B) provides that "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." BCEC7-8 states that "Advice of a lawyer to his client need not be confined to purely legal considerations . . . in assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible . . . in the final

the lawyer's role as advocate, advisor, negotiator and intermediary.[13] It is useful to pursuade law students early that lawsuits are often sparked by ill feeling, as much or more than by the mere potential of redress through a cause of action. In order to successfully avoid litigation whenever possible, adequate diagnosis of client motives and goals is necessary. To achieve that result, it is important to educate client counseling students in the nonadversarial legal processes. Students should be encouraged to confront their self images and adversarial attitudes, which translate a few years later directly into the practice of law.

THE EFFECT OF LEGAL EDUCATION

Early in their education, law students learn to distinguish sharply between what is legal and nonlegal and to focus only on "legal facts."[14] Robert Redmount analyzes the psychological effect that legal education has on law students:

> The morphological characteristics of legal education are of considerable importance. They are an essential part of the interaction between the law teacher and the law student. Typically, the first concern is with the awareness of experience, or with what is somewhat facilely called the "facts of the case." "Facts" in legal education are prefatory and this implies secondary importance in teaching and learning. They are in the nature of an account that serves and sustains . . . subsequent inquiry. It is the means and end of the subsequent inquiry that is the web of law learning. . . .
>
> They [legal facts] do not concern themselves with the attitudes, the uncertainties, and the conflicts that lay heavily in the thoughts and feelings . . . .[15]

Redmount argues that the humanistic side of the lawyer/law student becomes blunted as he or she develops a legal frame of reference.[16]

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analysis, however . . . , the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client."

13. *Id.* at 18-21.

14. Redmount, *Humanistic Law Through Legal Education*, 1 CONN. L. REV. 201, 202 (1968).

15. *Id.* at 202-03.

16. *Id.* at 203-06.

It is in humanistic terms that there is the greatest lack or loss as a consequence of the kind of intelligence about facts shared by the law teacher and the law student in law learning. The student's more natural and untutored sensitivities to facts and to the psychology of experience are blunted rather than developed. His regard for such matters as the human consequences of law may be deemed irrelevant unless it fits the narrower institutional framework of rights and wrongs as determined by law and equity. Least and worst of all, perhaps, he learns and develops no framework, method, or skills in fact inquiry. He must rely mostly on logical interpolations from direct observation or account with little or no intuitive or psychological skill. His judgments are impressionistic and are not carefully grounded in any reliable interpretive framework for human behavior. A narrow, undeveloped view of fact problems and a disposition to be preclusive about fact situation tends to be encouraged. The law teacher, as a product of the system, generally has nothing further or better to offer the student regarding the determination

Doctors/medical students have a similar problem as they develop a clinical frame of reference. When a client/patient visits the professional with a problem, the doctor/attorney may be tempted to cure the initial discomfort they are both likely to feel with a few words about the weather or some other irrelevant topic. Little time is spent, however, before the lawyer or the doctor begins to probe for the "legal" or "medical" facts. Attorneys and doctors thus avoid confronting client and patient emotional discomfort as well as their own.[17] This usual method of relating to the client/patient has been explored by both Redmount and Andrew Watson and is important because the cli-

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and the importance of a meaningful and thorough fact inquiry. In truth, since his strength and contribution lies in other kinds of inquiry, he may view a more intent concern with facts as a matter of some threat or irrelevance.

It is the interpretation of experience, more than awareness, that engages the law teacher. In the realm of fact inquiry this means that he is mostly concerned with definition and standards for facts. Implicit are premises that suggest that facts are unruly and the framework within which they fit or operate is either excessively attenuated or lacking in definition or system. Facts from differing contexts and having differing importance and differing degrees of validity tend to be equated and lumped together. . . . Psychologically, the process tends to whittle away at experience. It restricts the range of acceptable observation and inquiry, at the same time, orders judgment in terms of specific and isolated phenomena rather than in terms of continuous and meaningful experience.

Fact disputation, as distinguished from fact inquiry, is the stimulus for legal and pedogogical concern. Conflict, disagreement and uncertainty act as a pressure for succinct definition and decisive judgment around which the legal view and concern with facts is built. This narrowing process is felicitiously served by traditional logical modes of investigation that are also historically concerned with the systematic classification more than with the character of experience.

. . . .

. . . The law student, lawyer-to-be, is so saturated with the exercise of intellectual power under the magistracy of legal authority that he almost unknowingly develops an arrogance toward human beings and about the interpretation of life experience. He develops an aura of certainty in the use and power of his professional and personal skills that fortifies self-confidence and commands respect. It at the same time renders him more or less rigid and unperceptive, and intolerant to other approaches to and interpretations of experience. He is able to develop strong conviction but he unknowingly lacks sensitivity. The struggle to develop a consistency of interpretation, so important in legal education, is a struggle to develop conformity. Implicit is an antipathy to change. . . .

The law teacher-law student interaction, by the endemic character of legal education, is mostly in the nature of a vigorous intellectual assault. Initially, it is an assault by the agency of the law teacher upon the student's emotional and moral sensitivities. The student's reaction is likely to be one of hurt, resentment and bewilderment. However, survival demands the suppression of feeling, and identification with the aggressive masticating process. In time, and with the aura that power and authority is given in law any how, the student learns to identify with and even to admire the law teacher who is overpowering. They are arm-in-arm combatants and a strong sense of fraternity develops. There are later divisions and mutations of loyality that witness strong, insular fraternal bonds among practicing attorneys, among judges, and among low teachers.

To many, the law learning experience and the human interaction that is involved is initially and not infrequently ultimately disillusioning. In particular, it is the absence of respect for the sensitivity in human experience that offends. Assaultiveness, even under the guise of intellectual inquiry and where there is no counterbalance in learning experience, becomes a demeaning human experience.

Id.

17. *See id.* at 201-02; *see also* Watson, *supra* note 5, at 2.

ent's/patient's true goals and motivations and perhaps even the malady are masked as a result.

Legal education persuades the lawyer that psychology and sociology are "soft sciences" lacking guide posts for interpretation. A client's emotions, therefore, are regarded as "exceptional" and undesireable. Psychological problems are, therefore, avoided or ignored by the rationalist lawyer. Because lawyers do not really trust psychologists, the skills necessary to diagnose client motives, goals and behavior are disregarded.[18] Thus, in Redmount's view, intuitive and interpretive skills are discouraged and often remain undeveloped in the lawyer.[19] He concludes that legal education "[does] not serve the lawyer who is consulted on a variety of personal, social and institutional problems. . . ."[20]

Watson takes a slightly different approach from Redmount. While Redmount analyzes professionalism in general, Watson proceeds to analyze the lawyer in particular. He begins with the observation that the lawyer as professional is under considerable stress and anxiety,[21] and

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18. Redmount, *supra* note 14, at 209-10.

> Psychologists, like other beleaguered advocates, tend to claim too much for their methods and findings, even to the point of arrogance. . . . Rationalists, including the law community, are exceedingly distrustful and skeptical, and at times intemperate. In large part, this reflects the disappointment and defensiveness that attaches to a lack of substantial skill and knowledge in explaining behavior, and to the lack of an effective critical framework.
>
> . . . .
>
> Psychological constructions of behavior are blends of intuitive observations and sophisticate speculation that are difficult to assess by conventional evidentiary tests. . . . Facts are difficult to assess appropriately if they are isolated from the motivational framework that attends them. And, motive cannot properly be reduced to a few simple rules of implication.

Id.

19. *See id.* at 209.

20. *Id.* at 215. See also id. at 214 for Redmount's analysis of the essential configuration of law:

(1) a value emphasis on order and rectitude as both means and end in conduct;
(2) a theoretical-deductive framework of analysis heavily invested with ethical constructs of duty, right, privilege, and the like;
(3) an assumptive system regarding facts as fixed elements of experience subject to logical construction within a system of mechanical linkage; and,
(4) technological system of investigation and decision, based on reason and convention, to make regulation and sanction viable.

Redmount comments that this configuration operates well only when there is a "unitary composition of experience" based upon:

(a) a single value emphasis;
(b) a vested structure of authority;
(c) an adjudicative and a largely declarative function reinforced with sanctioning power; and
(d) a regard for facts as having static properties.

Compare with Watson's thinking on the characteristics of the "professional." *See supra* note 5.

21. Watson, *supra* note 5, at 3 (referring to the lawyer's dual loyalty to client and bar: "From the psychological standpoint, it is difficult to imagine placing a human being in a more demanding situation.")

that his or her legal education has contributed to the lack of diagnostic skills necessary to properly diagnose a client's problem:

> Though it takes some time to make full impact, usually by Thanksgiving holidays, most members of a freshman class are brought nearly to panic by their awareness that they do not understand what is being demanded of them, nor can they figure out how to meet the pressure. The great anxiety produced by this process progressively forces students to make some kind of psychological defense adjustment to avoid and diminish ongoing pain. The anxiety-muting defensive maneuvers, instead of settling on specific stress situations of the classroom, will be generalized progressively to block emotional awareness. Many law students will progressively surround themselves with a suit of psychological armor that makes them more and more impervious to the emotional aspects of most, if not all, situations. . . .
>
> From the psychologically probable result just described, a profound and overriding need develops among many lawyers to avoid situations that might penetrate their defensive armor and make them uncomfortable. This is not a unique reaction, for all persons, regardless of their role or personality, develop the psychological equipment to maintain as much equanimity as possible.[22]

As a result, students do not develop interviewing techniques necessary to fully probe and adequately diagnose a client's problem. Dr. Walter H. Slate has observed:

> [I]n analysing my own roles in the interviewing process, I have learned that the obvious questions that are not asked are always subconsciously avoided for a reason; that when I do not consciously think to investigate a relevant area, or investigate it inadequately, it is due to either ignorance, anxiety or fear—and this can be either within me or within the informant. In this case, I believe I did not develop the area . . . [of inquiry] . . . because I subconsciously knew what his reaction would be. I liked the informant and did not want to embarrass him; the possibility of this made me uneasy.[23]

As a result of their legal education, it is the tendency of lawyers to think of themselves as advisors in the acquisition, management and final disposition of property, both corporeal and noncorporeal,[24] thus sidestepping the human and emotional difficulties encountered by the

22. *Id.* at 13-14. Watson does note that a certain amount of psychological armoring is needed by all professions, but suggests that in law this idea may have gone too far.

23. Dr. Walter H. Slate, "Case Analysis of a Revolutionary," reprinted from Studying the Venezuelan Polity; Explorations in *Analysis and Synthesis* edited by Frank Bonilla and Jose A. Silva Michelena—a joint publication of the Center for International Studies, Massachusetts Institute of Technology, Cambridge, Massachusetts, and Centro de Estudios del Desarollo, Universidad Central de Venezuala, Caracas, May (1966) Publication C/66-6, at 454.

24. Redmount, *supra* note 7, at 975 (would add as attorney functions the preservation or acquisition of status or political power).

client. This attitude, however, discourages development of the client's real goals, which is necessary to effectively resolve the client's problem in the most cost-efficient manner. An attorney who does not develop a method of discovering a client's motives, personality and goals is likely to establish stereotypical categories in which to place clients according to their perceived problems. In addition, an attorney who does not get to know his or her clients may manipulate them into causes of action with which he or she is familiar and has confidence. When an attorney lacks early interview diagnostic skills, an interview might result in a premature diagnostic closure short of an exposure of the client's true needs,[25] perhaps resulting in immediate or aggressive action on the part of the attorney.[26] When this happens motivation is never even perceived. The attorney has pontificated to the client regarding the nature and status of the law and has quickly announced a diagnosis of the client's problem coupled with a remedy. Certainly a physician experiences the same phenomena with regard to the patient's demand for a diagnosis followed by medication. A prescription is expected at the close of an encounter with the doctor. In a different way, the attorney feels the same pressure to medicate. The physician, of course, runs the risk of over-medicating or medicating in a fashion which masks symptoms. The lawyer runs the risk of setting into motion a series of events that may run exactly counter to the client's true goals, and; of course, the lawyer taking such action continues to mask the symptoms of the legal malady. The interpretation of symptoms and the masking of the true malady presents a problem that can be solved by proper diagnosis. Even the subtleties of client behavior in the office, if carefully observed, can significantly contribute to the diagnostic process.[27]

DIAGNOSIS AS A CLIENT COUNSELING TOOL

How should lawyers initially approach a client? One suggestion is to urge law students and lawyers to think about the *client* rather than the client's *apparent problem*. One technique designed to lead the attorney

25. Redmount, *supra* note 2, at 48. Redmount's first stage of any counseling/interview process is "knowing the client's intention . . . to clarify, crystallize, and interpret the client's needs and problems." *Id.*

26. *See id.* at 49 ("Simple statements of intention by the professional or the client may be inadequate, inappropriate, or misleading." *See also* Brown & Brown, *What Counsels the Counselor? The Code of Professional Responsibility's Ethical Considerations—A Preventive Law Analysis*, 10 VAL. U.L. REV. 453, 458-59 (1976).

> The advisor's task in determining [client] purpose is made more difficult because a client may state his request for guidance in terms of a proposed solution to an unstated problem, or he may be somewhat secretive about the basic problem, or he may not really know or be able to identify his purpose and goal.

Id.

27. Redmount, *supra* note 2, at 49.

to a more accurate diagnosis of client purposes, goals and motivations is to obtain the client's history. A history provides a framework within which the attorney can exercise the initiative in the interviewing process. This gives a linear aspect to the interview that the client understands. The interview has a beginning, a middle and an end.[28] The client can thus attempt a chronological approach in telling his story. Redmount defines this beginning or first stage as the development of awareness and information. The objects of this awareness are:

1. client characteristics, dispositions, and behavior,
2. realities and possibilities in the client's fact situation, and
3. characteristics and viability of the counselor-client relationship.[29]

Dr. Paul Ossmann's[30] early critique of this article suggested the application of a medical methodology to the taking of a patient/client history. Instead of a purely chronological approach, a client/patient is first asked for some degree of self-diagnosis. The physician/attorney asks for a symptom description. Thus the professional first receives the "Presenting Complaint." The physician/attorney then proceeds to the "History of the Present Illness." Questions such as "How Long? When? or Where?" are appropriate at this point. The questions asked of the client/patient at this second stage by a doctor and a lawyer may be identical. The physician will seek the cause of the cancer while the lawyer is in search of a defendant or the answers to questions concerning the substantive law of negligence, jurisdiction and venue or damages. The next phase of the medical history model is the "Past Medical History." Once again the attorney's search is similar to the physician's, but the attorney seeks the "legal history" of the client. Has the client/patient been through litigation before? Was there a preexisting medical condition? Here the physician is in search of other causes for disease, as will be the attorney.

Suggested here is an application of the concepts and principles of nonpreemptive counseling. Although it may seem to be a contradiction, nondirective counseling does not necessarily imply a lack of leadership on the part of the attorney. Clearly the attorney must direct the interview process. The taking of a history, therefore, should extend

28. Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98, 99 (1969). The author describes counseling as a process with a beginning (perception and definition) a middle (calculation and decision) and an end (implementation, adjustment and review).

29. *Id.* at 100. The author also notes "[r]elevant party characteristics and dispositions may be obscure, apparent or real." See also *id.* at 101 for further discussion. No attempt is made here to progress beyond Redmount's first stage—the diagnostic stage of counseling. Neither are the specifics of techniques examined.

30. Dr. Paul Ossmann, Internal Medicine, Oxboro Clinic, Ltd., Bloomington, Minnesota; Dr. Ossman was also an Army physician in Vietnam.

backwards in time to a point significantly before the aggravating or important event described by the client until the attorney has sufficient information to ask pertinent questions. It is neither scientifically soft nor time wasteful to ask a client questions such as, "What brought you into your business?" or "What do you want to happen?" Equally important is an inquiry into the client's family situation.

The attorney should also discover the frequency with which the client resorts to lawyers. The answer to this inquiry will tell the attorney a great deal about the degree of anxiety or fear and even resentment that the client might be experiencing. This establishes, among other things, the client's attitude towards the law and the legal profession. Frequent resort to attorneys may indicate a need for the preventive practice of law on the part of the client.

It is also important to recognize whether a client desires and expects not just a practitioner of the law, but a social engineer or even a magician or shaman. The client who is motivated by socio-political concern is usually obvious. This type of altruistically motivated client may be proposing a class action, for example. Such a client, or clients, may be either sophisticated and frequent users of the legal system, or may regard the resort to a lawyer as an unusual singular event. This careful classification, as opposed to stereotyping, assists the attorney in analyzing the amount of information the attorney needs from the client to determine what the dominant motivations are for the client's visit. These motives are to be sharply distinguished from the client's goals, which may be either extremely narrow and short term or broad and long-term in nature. One client may be attempting to affect an entire industry or the policy of a major governmental institution. On the other hand, a client whose resort to the attorney is a singular occurrence, may be motivated more by necessity, fear or anxiousness. In this respect the taking of a history is vital in assisting the attorney to understand and carefully classify the client and also helps the client to understand his or her own motivations.

The second phase of this historical approach to interviewing elicits a history of the events which led the client to seek advice and the client's description of the events. In short, the lawyer requires the client to explain why the appointment was made in the first place. The question is "Why are you here?", rather than, "What can I do for you?" The latter question invites a self-diagnosis on the part of the client and a premature decision as to appropriate remedy. Students of client counseling are encouraged to ask the "Why?" questions and the "What do you want to happen?" questions to reduce the possibility of a premature diagnostic conclusion on the part of the interviewer. What follows

are exercises designed to aid in developing an effective approach to client counseling.

Teaching Exercises

Role playing exercises by law students in the classroom are a very effective teaching tool. Once the student-interviewer understands the client's motivation, it is possible to inquire into the client's real goals. Only when the true motivation and the goal are discovered is it possible to inquire into the client's view of what is wrong or needs to be done. This lawyer-assisted self-diagnosis is useful, whereas unassisted self-diagnosis is preemptive and premature. In order to carry out these teaching exercises, it is necessary to establish some basic rules.

The fact patterns of problems to which the rules apply should be kept as simple as possible. Some problem constructs that can be suggested for classroom use are expressed in terms of client problem and goal classification:

1. The failing business.
2. The entrepreneur.
3. The new business.
4. The disagreeable partner.
5. The questionable undertaking.
6. The citizens' group seeking redress of a specific grievance.
7. The citizens' group seeking redress in the nature of basic societal or structural change.
8. The uninsured, or underinsured defendant in tort negligence.
9. The accused criminal client.
10. The plaintiff or defendant in a contract action.
11. The defendant-guarantor on a note.
12. The domestic relations client.
13. The simple defective goods or service complaint.
14. The victim of an unintentional tort.

This suggests a five-part problem planning model:

1. *Problem Construct*: A failing business described only in terms of a lawsuit or a series of lawsuits.
2. *Client's Presumptive Diagnosis and Solution*: A petition in bankruptcy or a defense against a creditor's lawsuit.
3. *Motivation*: Fear of failure or fear of financial loss.
4. *Masked Goal*: To retire or perhaps enter a new business.
5. *Lawyer's Diagnosis*: Refinancing of a business, improvement of management or reorganization of the business organization.

As shown above, the lawyer's diagnosis is not framed exclusively in terms of a legal remedy. Of course the client's presumptive diagnosis may be exactly correct.

There are also rules for the students adopting the role of clients:

1. Answer only the question that is asked.
2. Assume the posture of a wronged or injured party.
3. Assume a posture of anxiousness.
4. Give honest responses.
5. Ask for "law-stuff", i.e.: Can I sue? Is that right? How much can I get for that? What's going to happen? What should I do?
6. Put forward a self-diagnosis and preferred remedial action, i.e.: placing in receivership, sue for money damages, get a court order, etc.
7. Resist attempts at disclosure of true motivation and goals. Make the questioner ask the question more than once. Respond honestly to a clear demand for a description of the motivation and the goal.

Having described the problems and posited a framework for problem constructs, it is necessary to go beyond the rules of response outlined above and to inquire into a diagnostic theory for the interviewer.

THE TRIAGE

The triage is a well-known medical concept. It is an outcome-oriented diagnostic tool. The first triage presented is the Basic Outcome-Oriented Triage. Especially in terms of traumatic injury, patients can be divided into three categories: (1) those who are clearly dying; (2) those who will require a long and expensive recovery; and (3) those who can recover in a short time with minimum expense. As to the first category, the physician must decide whether to apply "heroic medical measures" to the dying patient, or simply alleviate pain during the process of death. For the attorney, the first aspect of this triage is not nearly as clear. Although it is necessary for the attorney to engage in an outcome-oriented analysis, much like the medical triage, it is in the first and primary category of that triage that the attorney encounters the greatest difficulty.

A. The Basic Outcome-Oriented Legal Triage

Nearly Hopeless Case	Marginally cost-effective or non-cost effective	Cost Effective Advice

Early in the law school experience students are persuaded that there is no wrong without a remedy. There is, at least on a theoretical plane, no exact comparison to a diagnosis of imminent death. Although lawyers know that there are hopeless cases, a lawyer's premise is that there is nearly always something that can be done to alleviate the client's

problem or to minimize the client's losses. In spite of recent developments in the area of heroic medical measures, there are still cases in which the physician reaches the conclusion that the medical facts can no longer be altered. The lawyer, however, has greater freedom to manipulate the facts or to change the facts in the future. The client may be a defendant in a case which is, on its face, hopeless in terms of a defense. However, that same client can be admonished to cease a given business practice and in that sense, the "legal disease" is cured. Therefore, the first possibility in a legal triage would be more correctly labelled the "nearly hopeless" case.

At the other end of this triage is cost effective legal advice, which constitutes the most ideal situation. This extreme is represented by the situation when the legal fees will be reasonable in terms of the result, the result will reflect the goal of the client, and finally, the attorney will profit in a business sense from engaging in his or her role as an attorney. Between these two extremes, and analogous to the long and expensive recovery of the medical patient, is the marginally cost effective case or the noncost effective case. One example of this would be the defendant or plaintiff who may well prevail, but only at great cost. In this middle area, the most flexibility and imagination in diagnosis must be applied. Ultimately the lawyer must ask, "How much justice can you afford?" When the lawyer's resources are limited, a referral may be necessary. When it is the client whose resources are limited, however, the solution is tougher. The question of resources does not rest entirely on economic grounds for either the doctor or the lawyer for there are more subtle questions that must be answered. Can the client/patient physically stand the contemplated protracted litigation/operation? Will he live long enough? Is he up to the emotional and psychological stress of the indicated treatment? (Chemotherapy, surgery, trial, etc.). Abdication or surrender of important decisions to the professional may be so complete that the client/patient gets a lawsuit and an operation, neither of which he desires or can tolerate.

If the client/patient's case presents the nearly hopeless case discussed above, and if we assume that the client's situation will be fatal, the physician is faced with a limited number of choices. The resource question is, of course, presented immediately. If the economic, physical, emotional and psychological resources exist, heroic measures may be undertaken. This of course is the ideal situation. More likely however, the client/patient will lack resources in one of these areas. The dialogue between physician and client/patient must then center around outcome predictions and client/patient choices. Heroic measures may be passed over in favor of alleviation of pain and maintenance of an

ambulatory state. The client/patient thus decides against protracted hospitalization and extension of life span in favor of mobility with reduction of pain.

However unpleasant the results, the attorney must engage in this type of diagnostic process in order to adequately advise the client. Bringing the bad news to the client/patient may be among the most difficult tasks the attorney and the doctor have to face. Nonetheless, it is essential that the client/patient be made aware of the lawyer's diagnosis in terms of a rough triage. Informing the client of a cost-effective method of treatment of the legal ill is useful in alleviating anxiousness, threat, or fear. It is also essential that the client be made aware of the nearly hopeless situation in terms of achieving the client's stated goal. Therefore the application of this legal triage to the client and the client's case cannot be something the attorney analyzes entirely internally. The basic purpose of diagnosis is to inform the client, which is very much a joint effort on the part of the attorney and the client. This diagnostic process represents a starting point in the dyadic interaction between the attorney and the client.

B. The Professional Level of Effort Triages:

The Degree of Difficulty Triage

Most Difficult	Moderately Difficult Work	Least Difficult

The Degree of Enjoyment or Index of Boredom Triage

Most Enjoyed	Boredom (a shifting index)	Least Enjoyed

It is important for the attorney to then proceed from this outcome-oriented diagnostic base, on a conscious level, to a second triage—The Professional Level of Effort Triage. This is an inevitable process, but is often entirely internalized by the attorney. There are several different ways to analyze the professional level of effort triage. One approach is to think of this triage in terms of a set of possibilities, along learning curves, or in terms of economics as the alternatives representing benefit or loss to the attorney. The purpose of suggesting this set of classifications is to raise the level of understanding of what may be an unconscious set of considerations on the part of the attorney, and to

encourage the attorney to analyze his or her own behavior in a very self-conscious fashion.

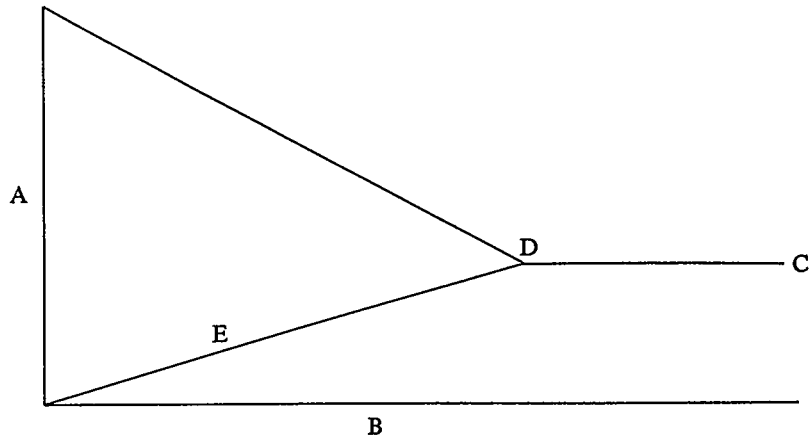
A professional level of effort triage can be broken arbitrarily into the legal work the attorney considers most difficult, moderately difficult or least difficult. One could substitute three degrees of enjoyment and derive an entirely different triage. The hardest work is not necessarily the least enjoyed. Exactly the contrary may be true. It is in the middle ground, or what is labelled here an index of boredom, that the enjoyment of professional effort method of analysis fails. This sort of self-diagnosis of attorney behavior is necessary in order to counter the tendency on the part of an attorney to postpone the hardest and the most boring undertakings before him. Most systems of file rotation within law offices permit attorneys to make choices about how and when they shall expend their time, and tempts the practitioner into procrastination. Notice here that the discussion is entirely separate from the consideration of what type of client has retained the attorney and how well the attorney gets along with the client. The various levels and types of demands made by the client on the attorney is also not yet considered. The focus here is almost entirely on the type of work that the attorney concludes must be engaged in, in order to satisfy the goals of the client.

C. The Learning Curve Triage

Short Learning Curve	..... Moderate Length Learning Curve	Long Learning Curve

Another, and perhaps more concrete, way of analyzing the work of the attorney is to apply a learning curve analysis. The attorney can, for example, regard the work required on a client's file as representing a short, moderate, or long learning curve. The term learning curve is used here to describe not only time but a presumed reduced level of effort in terms of the pace at which the attorney acquires additional competence to serve the client's needs. The best example here would be a field of law with which the attorney is not immediately familiar. A change in a statute, an adoption of a code, or set of rules in a given jurisdiction can change the attorney's learning curve from its peak of time and efficiency to zero. The rate at which a specific attorney acquires a given skill or absorbs a body of knowledge is quite variable. No two learning curves will be exactly the same. Although this is never a straight line, it can be described that way mathematically with the caveat of individual variation:

FIGURE #1.



In Figure #1 described above, Line A represents the beginning of the learning curve, at which point the attorney knows the least about the work undertaken on a specific file. Line A represents the expenditure of time per file. Line B represents a given section of the attorney's professional lifetime. B could represent a day, a month or a year. Line C is the learning curve itself. As the attorney repeats similar tasks, efficiency (described as Line E) increases. As efficiency increases, the time expended is reduced. The optimal point of time and efficiency is reached at point D. The question for the attorney is how long a period of time will expire (Line B) and how much effort will be required (usually expressed also in Time-Line A), before the optimal point D is reached. The location of point D (which varies) identifies for the attorney his or her location with the learning curve triage. The result of this analysis is that the attorney is able to estimate how fast and at what level of effort, he or she will be required to work to satisfy the client's needs. The learning curve triage represents an effort to consciously analyze a very concrete problem in abstract terms.

There is a direct relationship here to the reasonableness of fees, choice of area of practice, and the decision to refer to another attorney. The learning curve triage is quite similar to the professional level of effort triage, and is almost instinctive for the practitioner. When we raise this process to a conscious level and express it graphically, the abstract figure takes on meaning for the attorney. If the angle of decline between the top of line A and point D (time/effort) is shallow, then point D will not be reached as soon along line B (attorney's professional life span). This is important since point D represents not only

a theoretic point of efficiency in terms of delivery of service, but also ought to represent the maximum economic benefit level that the attorney can anticipate from future client files of a similar nature.

Utilizing the graph in Figure #1 above, it is possible to pose two critical questions to lawyers. The first question is what portion should the client pay, if any, by way of fees, for the attorney's own learning and skill acquisition process at the earliest point in the learning curve (top of Line A)? The second question is what benefit the client should enjoy, by way of reduced fees, when the attorney has achieved Point D on the learning curve? Perhaps the answer for the student, and the practitioner, is indicated by how far along Line B, Point D occurs. The client of course, should not be compelled to pay for the attorney's learning process. And consequently, the farther along Line B that Point D occurs (the shallower the learning curve), the more the attorney has earned the increased profitability he or she now enjoys.

It is possible to be quite concrete in one's application of this rather abstract analysis. We do so by placing a finite limit on line B. If Line B represents one year, then it can be established that that line represents between 1,400 an 2,050 billable professional hours. Line B can thus be extended into multi-year increments of relatively equal size. We thus describe a new variation of our learning curve in Figure #2.

Line A represents the average time expended on a given type of client problem, expressed in Chart form as a frequency. Point D_1 repre-

FIGURE #2.

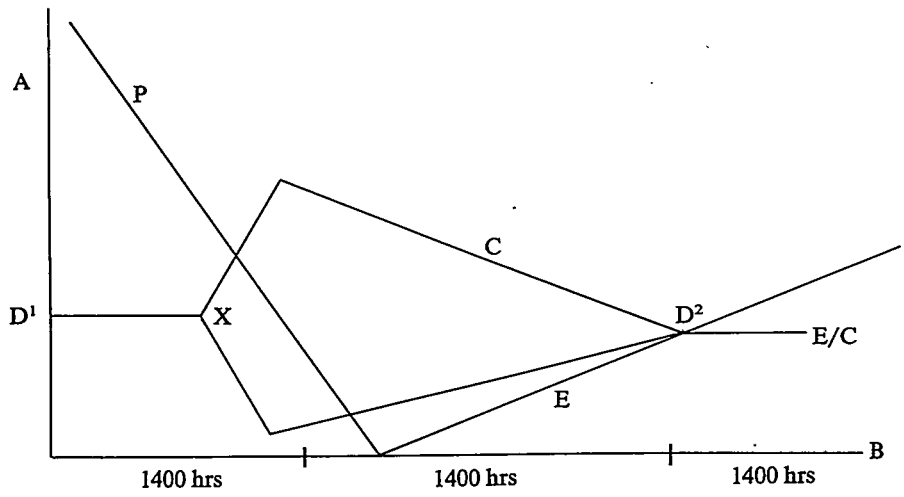
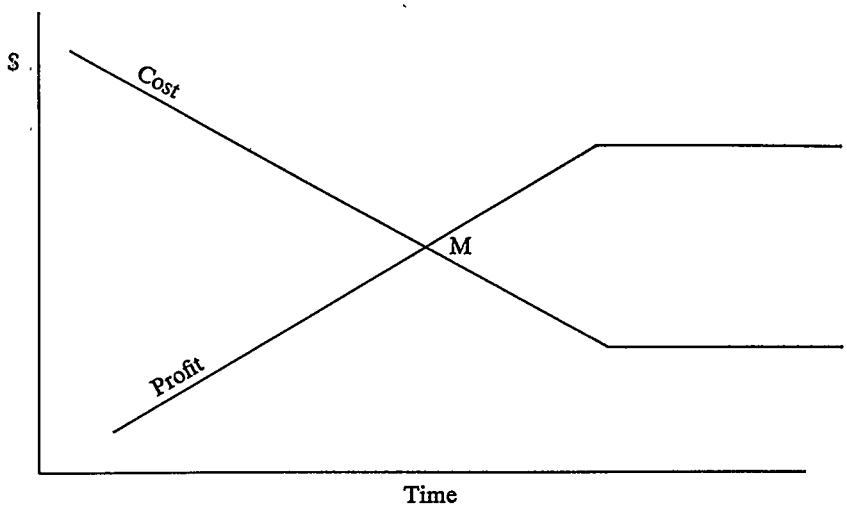


FIGURE #3.



sents the point at which efficiency and the learning curve have joined. Point X represents a change in law or a major code revision. The attorney then proceeds along Line C (the acquisition of knowledge and skill), and simultaneously along Line E (efficiency), towards point D_2. At this point, the learning curve and the efficiency curve have once again joined. In this theoretic framework, it is thus concluded that the attorney will expend something in excess of 1,400 hours to achieve point D_2. The other assumption is a relatively constant flow of this type of client problem across the attorney's desk. This is described mathematically as the modulation along the frequency line A. If that modulation (number and frequency of similar problems) is relatively steady, then the angle of lines C and E are much sharper and thus D_2 occurs much sooner. It is possible for the truly excellent records keeper to project profitability over time (Line P).

A corrollary to the learning curve (described in Figures 1 & 2) is the cost/profit curve.

Point M (marginal profit) occurs in Figures 1 and 2 at some point near Point D or D_2 and is theoretically identifiable in time on Figures 1 and 2 along Line B. Theoretically then M equals D. We can thus overlay this triage upon the professional level of effort triage and the outcome-oriented legal triage and arrive at a final equation expressed as dollars over time.

$$\frac{\text{DOLLARS}}{\text{TIME}} = \text{DESIRED/NECESSARY HOURLY RATE}$$

If law is both profession and business, then this ultimate dollar over time equation is a necessary adjunct to the attorney's diagnostic process. The numeric portion of such a fraction can be constructed at the outset and in the abstract. The total desired number of effective work hours per year can simply be divided into the desired gross annual income. Aside from market forces, this equation represents an almost constant thought process for the practitioner. The mathematics, however, are not as easily applied to an individual case.

D. The Dollar Triage

High Economic Reward/ Regularity of Reward	.....	Moderate Economic Reward	.....	Low Economic Reward/ Postponement of Reward

The most familiar analysis to many practitioners is the dollar triage. Individual cases and clients can be thought of as representing high economic reward, which can also include the promise of regularity of reward, moderate economic reward or low economic reward. Under the category of low economic reward, the practitioner might well include the postponement of reward. The close of the tax year, for example, might militate in favor of postponement of reward. A moderate, or even a low economic reward may be preferred for its regularity. In these senses, notice that regularity of economic reward is identified as a subcategory within high economic reward.

E. Level of Service Triage

No Care Required	.....	Self-Care or Narrow Guidance	.....	Continued or High Level Care Required

Because of the attorney's ability to manipulate future facts by directing the action or inaction of the client, it is necessary for the attorney to predict the future. In many ways, that is what the client is asking for when seeking the expertise of counsel. In the same sense that the attorney is called upon to predict, and perhaps change the future for the client, the attorney must be able to predict a level of service in order to satisfy the goals of the client. This requires a different set of

diagnostic categories from the learning curve triage or the professional level of effort triage.

It is important to focus on the client's actual needs. The first of these would be exemplified by the client who quite obviously is not in need of legal care, or has a mistaken basis for anxiousness or fear. Perhaps it is the secretiveness of the legal profession that serves to lead the client who truly is in need of no services to the attorney's office. The ethical difficulty here of course, is that the attorney can, with some ease, alter the future facts so as to introduce the requirement of legal care, or engage in the expenditure of billable time when intuitively and from the beginning, the attorney knows that legal services are unnecessary. The second category in our client's service triage is represented by the client who requires only self-care or, at most, narrow guidance as to future conduct. Some similar ethical difficulties arise here. Our triage is completed by the client who requires a continuing or high level of care.

Questions concerning how often the attorney will be involved in the activities of the client in the future are the sort that are answered by the three considerations of the Level of Service Triage. Although this form of analysis begins as an internal process limited to the attorney, it is also useful in terms of describing to the client what should happen in the future and giving the client sufficient information in order to form his or her own dollar equations. This triage presents an interesting possibility for posing ethical questions to students in terms of preventive legal care. Because of the attorney's ability to control future events and the attorney's specialized knowledge, the client can be placed in an unrealistic position within the triage. In order for an informed ethical decision to be made, the client's real needs somewhere within this framework must be identified. It is in the middle area of the triage that the attorney is tempted to maximize profits.

F. Advice Sought Triage

Purely Legal Advice	Financial and Economic Advice	Personal Advice

The attorney should also attempt to predict the type of advice that the client will seek. The various diagnostic methods already discussed help to answer that question.

A high level of anxiousness, anger or fear can indicate to the attorney that more than purely legal advice will be sought in the future. This

process is also helpful in predicting that point in time at which the attorney has reached the limit of his or her effective ability to serve the client and the need to involve other professionals. These other professionals might range from accountants to psychiatrists.

The various motivations that brought the client to the attorney in the first place may indicate that the client seeks far more than the attorney can provide. The first of the categories in this triage, pure legal advice, is the easiest to analyze. It is from this point forward that the analysis becomes complex. The client might desire not only legal advice but economic and financial advice. The client might also be seeking a combination of legal advice and personal advice. Finally, the client might be seeking all three—legal, personal and economic advice. The attorney should be ready to look beyond a client's initial emotional manifestations. It is not unusual for an attorney to anticipate the anxiousness, fear, inconvenience, stigma, or even shame associated with a criminal case or a domestic matter. This does not mean, however, that a business client will not share some of those same feelings when confronted with a serious business problem. The owner of a distressed business might well display the same anxiousness, fear, anger and inconvenience as would the client faced with a marital dissolution. In that sense, the failure of a partnership agreement represents a "business divorce." The practitioner should not classify the client or the client's feelings and reactions according to the case apparently presented. At first glance, this Advice Sought Triage seems similar to the Prediction of Service Triage. This is not necessarily the case. The former focuses on the client's needs as determined by the attorney. The latter focuses upon the client's desire.

G. The Success-Potential Triage

Low Success	Future Unclear	High Success
Potential or Negative Outcome Prediction	Lack of Clearly Foreseeable Outcome	Outcome Prediction

There is also an area of mixed diagnoses, almost entirely internalized by the attorney. Mixed diagnoses include things that are both objective and subjective in nature. The first of these mixed diagnoses triages is the Success Potential Triage, which is outcome oriented. The difference between the pure outcome-oriented analysis and the success potential analysis is that the latter requires a higher degree of prediction accuracy. The first category of this triage is exemplified by the case

representing a low success potential or a negative outcome prediction. In the middle category there is no clearly foreseeable outcome. The final category of this triage is described as a high success outcome prediction. This triage is a useful tool in self-analysis for the attorney to examine motivations for involvement in the client's case. A high success outcome prediction may overcome an earlier analysis showing low economic reward or substantial postponement of reward. The attorney should self-consciously engage in the process of deciding that the matter is to be undertaken on behalf of the client with a clear understanding of his motivations for doing so. The difficulty with the application of this diagnostic triage is that it is often difficult to make such projections early in the relationship with the client and prior to familiarity with the client's case. This is a process of information gathering that may have no measurable moment in time. Thus, it is likely that the attorney will engage in this type of analysis unconsciously. An overemphasis or focus on a high success outcome prediction which is inaccurate can lead the practitioner to place the client in a non-cost effective posture under our first outcome oriented triage.

H. The Recognition Potential Triages

Recognition by Peers Within the Profession

No Recognition ..... Low Recognition ..... High Recognition

Public Recognition

No Recognition ..... Low Recognition ..... High Recognition

Even more difficult to deal with than the Success Potential Triage is the Recognition Potential Triage, which involves recognition for the attorney as opposed to the client. Recognition is divided into recognition by peers within the profession, as well as recognition by the public. In this sense, this is a dual triage. Almost unconsciously, the attorney will engage in the process of deciding whether there will be no recognition, low recognition or a very high recognition level. This may have very little to do with success potential, realistic analysis of the client's need for service, or with cost effectiveness. It may also be entirely unrelated to economic reward of any sort.

This diagnostic tool can answer for the practitioner the question of why the particular tactic or effort is used in the first place. Once having engaged in this cognitive process, it becomes something that ought be freely shared with the client. The defense of a notorious case or the

undertaking of a matter that is *sui generis* are prime examples in this area. There is of course, nothing wrong with recognition of either sort. The difficulty lies in the situation where recognition is unconsciously motivating the attorney.

I. Client Demand Prediction Triage

No Demand	Moderate Demand for Information	High Legal of Personal Demand

One of the most difficult areas for the attorney is the prediction of client behavior. This can be described as a Demand Prediction Triage. Early in the relationship with the client, the attorney determines whether the client will have no demand, a demand only for information, or will represent a very high personal demand on the attorney. A particular client might also represent a demand which is highly critical in nature, often expressed in terms of explanation demands and critique of the attorney's work. One of the difficulties with the very demanding client is that the attorney often chooses the course of least resistance, which is a premature diagnostic closure. One commonly employed avoidance technique on the part of the attorney is to send the client away to gather further information or to act in some limited fashion. This is sometimes seen as legal first aid, but is in some cases, in truth, a placebo. Although difficult, the client demand analysis and prediction is a necessary and valuable tool for the attorney. The result of such a prediction will apply directly to the Level of Service Triage and the Degree of Enjoyment Triage.

J. Advice Compliance Triage

Low Advice Compliance	Moderate Advice Compliance	High Advice Compliance

Finally, the attorney must predict, as a matter of judgment, the level of cooperation to be expected from the client. Another way of stating this is to say that the attorney must identify where the client lies on an Advice Compliance Index. This is not to suggest that "client control" is either possible or desirable. Such a triage instead tells the attorney how much additional effort, persuasion and work will be necessary in order to insure advice compliance. An awareness of this problem, if it is a problem, causes the attorney to periodically re-evaluate with the client what the client's real goals are. A client's failure to comply with advice may mean that the attorney has misdiagnosed the client's motives or the client's real goals. It is also one way of testing the attorney's

own behavior against the client's desires. Clearly this triage has a relationship to the Client Demand and Enjoyment Triages. Diagnostic failure in these three areas can lead to the most extreme sort of professional frustration.

CRITICAL PATH

By summarizing the Triages graphically, it is possible to define a Critical Path through these various levels of diagnosis and analysis:

Nearly Hopeless	Marginally Cost Effective	Cost Effective
Most Difficult	Moderately Difficult	Least Difficult
Least Enjoyed	Moderately Enjoyed	Most Enjoyed
Short Learning Curve	Moderate Learning Curve	Long Learning Curve
High Economic Reward (Regularity of Reward)	Moderate Economic Reward (Regularity of Reward)	Low Economic Reward (Postponed Reward)
No Care	Self-Care or Narrow Guidance	Continued High Care
Pure Legal Advice	Financial Economic Advice	Personal Advice
High Success Potential	Moderate Success Potential —Lack of Clearly Foreseeable Outcome	Low Success Potential
High Peer Recognition Potential	Low Peer Recognition Potential	None
High Public Recognition Potential	Low Public Recognition Potential	None

No Client Demand	Moderate Demand or Information Only	High Level Demand
High Advice Compliance	Moderate Advice Compliance	Low Advice Compliance

Monte Woolley portraying Sheridan Whiteside in Moss Hart's and George S. Kaufman's *The Man Who Came to Dinner*,[31] provides an interesting scenario in which to apply the triages. Dear old Mr. Whiteside is a classic example of a difficult counseling situation for both the lawyer and the doctor. Whiteside was misdiagnosed as having a broken hip, a fiction he maintained for all three acts of the play, and he was confined for ten days as an invalid guest of his victimized hosts.

In the original play, Whiteside was not even suffering from the originally diagnosed broken hip. His one hundred and fifty thousand dollar lawsuit, in fact, was groundless as far as damages. Apparently he never internalized this fact and certainly never told his attorney. It was not until the final scene that he fell and truly injured himself.

The Sheridan Whiteside character is selected as a client because he is an identified theatrical persona whose characteristics can be measured against the various triages. Each triage thus becomes a short series of questions for the practitioner to reflect upon. A critical path can be traced through the triages using Whiteside as a client. Had he never suffered his real injury as the curtain fell, the Outcome Oriented Triage would classify his case as hopeless or nearly hopeless. Assuming he received the chemical injury suggested earlier in this article, cost effectiveness becomes a real possibility.

Whiteside's second theatrical injury would present little "degree of difficulty" for the attorney as a simple "slip and fall" case. Assuming instead the chemically imposed injury, the difficulties multiply. The case would then be unusual in its facts presenting problems of jurisdiction, discovery and proof. Regarding the Enjoyment Triage, again two different possibilities can be safely assumed. As an index of boredom, his theatrical injury will present a low level of professional enjoyment. The reverse, however, would be true for the imposed and more serious injury. The learning curves would also differ radically. The simple

31. Kaufman, George S. and Hart, Moss, THE MAN WHO CAME TO DINNER, Random House, New York (1939). (Dedicated to Alexander Woollcott by the authors, "For reasons that re nobody's business." Produced by Sam H. Harris, Music Box Theatre, New York, October 16, 1939; Music and Lyrics by Cole Porter); *see also* L. HALLIWELL, FILMGOERS COMPANION, SIXTH EDITION 466 (1978) (noting in a review of the 1941 film version that the portly, Falstaffian and difficult Whiteside character is based upon Alexander Woollcott).

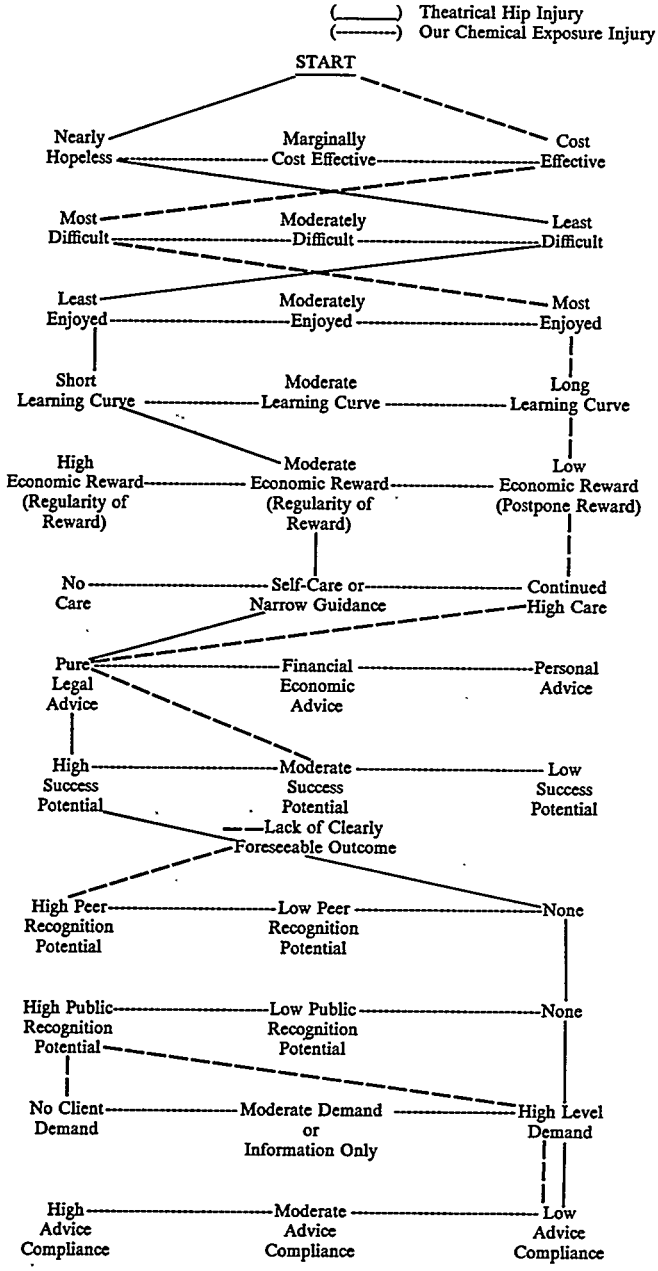
"slip and fall" is unlikely to require acquisitions of new skills or knowledge on the part of the attorney.

In spite of Whiteside's outrageous damages claims (pity the poor lawyer Samuel J. Liebowitz) the Economic Reward Triage can be classified as moderate for his second hip injury. Because of the unusual nature of the injury imposed upon him in this article, it is suggested that, although recovery would be large, it will probably be postponed through protracted litigation. Thus, this chemical injury case presents the opposite extreme of the Economic Reward Triage. As to the Level of Care Triage, the decision is more difficult. Since Whiteside's first "slip and fall" involved no injury, he required no care. His second injury may have required a relatively narrow spectrum of care. As to that second and real case then he must be classified in the middle of the Level of Care Triage. The injury imposed here however leads to another conclusion. Continued or high level of care seems more appropriate in that case. A different result occurs under the Advice Sought Triage. Given the personality of Sheridan Whiteside he would probably restrict the lawyer to pure legal advice. This is in spite of the fact that the chemical, and possibly fatal case imposed here, may also call for economic and personal advice.

The application of the Success Potential Triage is a little easier. The second hip injury will probably result in a successful outcome, perhaps even by way of insurance settlement. Whiteside is given the benefit of the doubt here (ignoring his first noninjurious pratfall) and that matter is rated as one with high success potential. A similar, but not identical, conclusion can be drawn as to the unusual chemical exposure case and that case can be labeled as having no clearly foreseeable outcome. The Peer and Public Recognition Triages also fall easily into place. In spite of Whiteside, the lawyer in the second "slip and fall" can expect no peer or public recognition. Just the contrary might be true in the chemical exposure case under both triages. Although the theatrical case requires virtually no client demand, it can be assumed that Whiteside is demanding indeed. Thus the Level of Demand Triage conclusion is the same for both cases.

In spite of the extreme and constant personality characteristics of Sheridan, we arrive at different critical paths through the triages depending upon the case presented.

THE SHERIDAN WHITESIDE
CRITICAL PATHS



CONCLUSION
("Legal Autopsy")

Some years ago (1955) Lewis M. Brown suggested that lawyers should engage in post-trial autopsies.[32] What is proposed here is different and goes beyond that suggestion. Returning to the medical analogy, a retrospective view of the legal Triages is suggested to confirm clinical diagnosis and to understand the process of both the legal malady and our relationship with clients.[33] This is more than opposing counsel and the court "letting their hair down" after a trial.

It is possible to take a retrospective view of the Sheridan Whiteside case. A misstep in the application of the diagnostic triages, or any one of them, could result in a failed case for the client. Lawyers lack the expertise of the pathologist, yet are more often than not their own pathologists. The attorney handling the theatrical "slip and fall" might look back and find that his or her analysis of the Economic Reward Triage was grossly in error by virtue of an uncritical view of the client's estimate of damages. Pity the poor lawyer who has made this diagnostic error and must now give the bad news to Whiteside. That same lawyer in the chemical injury case imposed here might in retrospect have erred in analysis of the Learning Curve Triage. Finally the lawyer might seriously misjudge Whiteside in the Advice Compliance Triage.

These triages, therefore, should be applied not only to legal diagnosis, but also to file review and closure procedure as well. This is most effective if carried out by another lawyer, perhaps a partner or associate. Dual "sign-off" requirements as a precondition to file closure rep-

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32. Brown, *Legal Autopsy*, 39 J. OF THE AM. JUDICATURE SOC'Y 47, 48 (1955) Brown is also the author of a *Manual of Preventive Law*, Brown comments in part:

> How could we do this? We could adopt a procedure for study of a case after decision is final. The judge, the plaintiff's attorney, and the defendant's attorney could each "let his hair down" and discuss the case. The clients need not, and should not, be present. This is an attorneys' private postmortem designed to acquire knowledge for the ultimate advantage of other clients.
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> But what we really ought to study is why this case really started in the first place. Which client made what mistake that led him into legal trouble? When was an attorney's advice first sought by each client? What was that advice? Now that we know the final judgment, we can ask whether that advice was correct. How could the litigation have been avoided? How much did the litigation cost? What about settlement negotiations?—Were there any? What was offered? Was it too much, too little, offered too soon, too late, or no offer at all?

33. Autopsy, WEBSTER'S DICTIONARY, word derived from the Greek, "Autopsia, a seeing with one's own eyes; 1. a personal inspection, ocular view, 2. postmortem examination; examination and dissection of the body after death to discover the cause of death." And see, Autopsy, GOULD MEDICAL DICTIONARY, "A medical examination of the body after death to confirm or correct the clinical diagnosis, to ascertain the cause of death, to improve understanding of disease processes and aid medical teaching." *See also*, Bucklin, *Forensic Pathology for Attorneys*, 12 CAL. W.L. REV. 2 (1976) (distinguishing and defining forensic pathology).

resent the mechanical device to insure the peer review. That peer review or legal autopsy might be critical or cursory. The best way to insure a critical and careful postmortem of your own files is to do the same for a colleague first. Used thus, the triages provide not only a meaningful diagnostic tool, but a useful evaluative one as well.