



## LAWYER TO LAWYER MENTORING PROGRAM

### WORKSHEET DD

## INTRODUCTION TO CLIENT DECISION-MAKING & INVOLVEMENT

Worksheet DD is intended to facilitate a discussion about the responsibilities of the client and the lawyer in decision-making and the best ways to involve a client in their case.

### WHAT WENT WELL?

Start by sharing with each other a brief story of something that went well in your practice this week:

---

---

Share your reflection by on one of these questions: What caused the good event? What does it mean? How did you contribute? Others? How can you have more such events in the future?

### ACTIVITIES FOR TODAY

- Discuss the importance and necessity of involving clients in decision-making in their cases. See Tennessee Rules of Professional Conduct 1.2, 1.4, 1.6, and 2.1.
- Provide examples of the types of decisions in the mentor's practice in which he or she involves the client, including the ways in which the client is involved, the reasons for involving the client in those instances, and the reasons for not involving the client in certain decisions.
- Discuss the difficulty in knowing what instructions are given (or not given) by a client and some traps that a lawyer (particularly in the new lawyer's practice area) can fall into regarding identifying the client instructions.
- Share best practices that the mentor has adopted in his or her practice to document client instructions, including confirming in writing to the client about the instructions that were given and the steps that were or were not taken.
- Discuss the suggestions given in the attached article by Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*.



## **ACTION STEPS**

End the session by discussing what action steps you can take to either improve or set yourself up for future success based on today's discussion. Discuss how one or more of your Signature Strengths can help you achieve success in these steps.

---

---

## **RESOURCES**

### **TENNESSEE RULES OF PROFESSIONAL CONDUCT**

#### **I. CLIENT-LAWYER RELATIONSHIP**

##### **RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by RPC 1.4, shall consult with the client about the means by which the client's objectives are to be accomplished. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent, preferably in writing.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

##### **RULE 1.4: COMMUNICATION**

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when



the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**RULE 1.6: CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to the representation of a client unless:

- (1) the client gives informed consent;
- (2) the disclosure is impliedly authorized in order to carry out the representation; or
- (3) the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by RPC 3.3;
- (2) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;
- (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a fraud in furtherance of which the client has used the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;
- (4) to secure legal advice about the lawyer's compliance with these Rules; or
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or
- (3) to comply with RPC 3.3, 4.1, or other law.

**II. 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 such as moral, economic, social, and political factors that may be relevant to the client's situation.



View complete rule and comments at: <http://www.tsc.state.tn.us/rules/supreme-court/8>.

1-1-1999

# Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship

Marjorie A. Silver

*Touro Law Center*, [msilver@tourolaw.edu](mailto:msilver@tourolaw.edu)

---

## Recommended Citation

6 *Clinical L. Rev.* 259 (1999)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [ASchwartz@tourolaw.edu](mailto:ASchwartz@tourolaw.edu).

# LOVE, HATE, AND OTHER EMOTIONAL INTERFERENCE IN THE LAWYER/CLIENT RELATIONSHIP

MARJORIE A. SILVER\*

## INTRODUCTION

In the summer before their first semester, most law schools encourage students to read a host of books to prepare for the enterprise ahead. While their friends are lying on the beach reading escape novels, prospective law students are reading such classics as *The Nature of the Judicial Process*<sup>1</sup> and lighter fare about lawyering like *The Buffalo Creek Disaster*<sup>2</sup> and *A Civil Action*.<sup>3</sup> Come late August, first-semester students are already tarrying to assimilate the lawyer's tools of logical analysis and seeking to absorb The Rule of Reason. Meanwhile, their friends are still at the beach, perhaps reading pop psychology. One of these books, *Emotional Intelligence*,<sup>4</sup> held a place on *The New York Times*' nonfiction best seller list for many months, and continues to be widely read.<sup>5</sup> As far as I know, no law schools have yet to add it to their recommended summer reading list.

Perhaps they should. Lawyers need emotional intelligence as much as they need the other skills that make them Good Lawyers.<sup>6</sup>

---

\* Professor of Law, Touro College Law Center. I am indebted to my excellent research assistants, Kelly Caputo, Ray Keenan, Daniel McDonough, and Sandra Maliszewski. I wish to thank the outstanding support of the professional staff of the Touro Law Center Library. Thanks, too, to my colleagues in the clinical programs, Marianne Artusio, Bill Brooks, Rhonda Shepardson, and Lewis Silverman, who shared with me their experiences. Special thanks to Larry Grosberg, Michael Perlin and David Wexler, who offered valuable feedback on an earlier draft. I gave a talk based on the work for this Article at the First International Conference on Therapeutic Jurisprudence, July 1998, Winchester, England. Touro Law Center faculty research grants provided financial support.

<sup>1</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>2</sup> GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1976).

<sup>3</sup> JONATHAN HARR, *A CIVIL ACTION* (1995).

<sup>4</sup> DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (1997). The term "emotional intelligence" grew out of the work of Howard Gardner, a psychologist at the Harvard School of Education, who developed the theory of multiple intelligences. *Id.* at 37-39. It was further explicated by Yale psychologist Peter Salovey, who focused on how intelligence can be brought to bear on our emotions. *Id.* at 42.

<sup>5</sup> See Warren Bennis, *It Ain't What You Know*, Book Review, N.Y. TIMES Oct. 25, 1998, at 50 (book review of DANIEL GOLEMAN, *WORKING WITH EMOTIONAL INTELLIGENCE* (1998) describing Goleman as the author of the "hugely popular" *EMOTIONAL INTELLIGENCE*); James Traub, *Multiple Intelligence Disorder*, THE NEW REPUBLIC, Oct. 26, 1998, at 20, 21 (describing book as "wildly popular").

<sup>6</sup> Salovey described five main components of emotional intelligence, as recounted by

We are all simultaneously emotional and rational human beings, although some of us operate more comfortably at one extreme or the other.<sup>7</sup> In order to do our work well, we must be in touch with what we are feeling—and why.

This Article is about one aspect of the need for lawyers to confront their emotional side: their relationships with their clients. Specifically, it is about how that relationship may be enhanced by the lawyer's recognition and resolution of strong emotional reactions—positive or negative—towards a client. Conversely, a lawyer's inability to come to terms with such emotions may well adversely affect the representation.

The lawyer/client relationship, by its very nature, is usually characterized by an imbalance of power.<sup>8</sup> Although for some sophisti-

---

Goleman:

1. *Knowing one's emotions.* Self-awareness—recognizing a feeling as it happens . . .
2. *Managing emotions.* Handling feelings so they are appropriate . . .
3. *Motivating oneself.*
4. *Recognizing emotions in others.* Empathy, another ability that builds one's emotional self-awareness, is the fundamental "people skill" . . .
5. *Handling Relationships.*

GOLEMAN, *supra* note 4, at 42-43. See also HARROP A. FREEMAN, LEGAL INTERVIEWING & COUNSELING 50 (1964) (describing HEP (Health Engendering Person), a term coined by F.E. Fielder to describe a person who has the qualities to be good at counseling, negotiating, mediating or doing therapy).

<sup>7</sup> Carl Jung identified individuals as one type versus another: Extrovert vs. Introvert, Sensor vs. Intuitive, Thinker vs. Feeler. John E. Barbuto, Jr., *A Critique of the Myers-Briggs Type Indicator and Its Operationalization of Carl Jung's Psychological Types*, 80 PSYCHOL. REP. 611, 612 (1997); Robert R. McCrae & Paul T. Costa, Jr., *Reinterpreting the Myers-Briggs Type Indicator from the Perspective of the Five-Factor Model of Personality*, 57 J. PERSONALITY 17, 18-19 (Mar. 1989). According to Jung, one type predominates but individuals possess some degree of the other types. Jung noted that those "pure" types exist infrequently in actual life. Barbuto, *supra* at 613; David A. Cowan, *An Alternative to the Dichotomous Interpretation of Jung's Psychological Functions: Developing More Sensitive Measurement Technology*, 53 J. PERSONALITY ASSESSMENT 459, 462-63 (1989). The Myers-Briggs Type Indicator (MBTI) integrates Jungian theory on psychological types and aims to identify an individual's basic preferences as dichotomous in nature. *Id.* at 462; Barbuto, *supra* at 614. Criticism of the MBTI has focused on its forced choice-testing format, which is not continuous. *Id.* at 617-18. Continuous measurements would more accurately reflect individual personalities and account for an individual's preferences. *Id.* at 618. Some have stated that the dichotomous interpretation that the MBTI draws from Jungian theory is not in keeping with the theory itself. Cowan, *supra* at 461; McCrae & Costa, *supra* at 32. Various adjuncts have been proposed to improve the MBTI ability to evaluate individual differences along a continuum scale, so as to salvage important information lost in the current instrument's dichotomous approach. *Id.* at 36-37; Cowan, *supra* at 463-64; Barbuto, *supra* at 620-21.

<sup>8</sup> See ABA Formal Op. 92-364 (1992):

The factors leading to the client's trust and reliance on the lawyer also have the potential for placing the lawyer in a position of dominance, and the client a position of vulnerability. All of the positive characteristics that the lawyer is encouraged to develop so that the client will be confident that he or she is being well served can reinforce a feeling of dependence.

cated or wealthy clients, this imbalance may well be to the lawyer's disadvantage,<sup>9</sup> more often, the attorney holds the greater power.<sup>10</sup> In most cases, the client is a person with a problem that requires legal expertise, and is thus dependent on the attorney for redress.<sup>11</sup> The relationship between lawyer and client is often extremely intense; the degree, however, may vary with the nature of the representation.<sup>12</sup> A lawyer's representation of a client for a real estate closing may not be especially fraught with intensity.<sup>13</sup> Yet a client seeking to avoid deportation, incarceration or loss of custody of a child is likely to demand a great deal of attention from her attorney, not all of which will be of a legal nature. Unlike friendship, the obligations of caring are one-sided.<sup>14</sup> The lawyer's devotion to the client's needs is not reciprocated by the client. In these ways, the lawyer/client relationship mirrors other kinds of intense, non-reciprocal relationships involving inherent power imbalances: those of physician/patient, therapist/patient, pastor/counselee, and teacher/student. Such relationships inevitably invite misplaced emotional reactions. These misplacements are commonly known as transference and countertransference. It is the doctrine of countertransference—misplaced emotions by the attorney on her client—with which this Article is primarily concerned.

---

<sup>9</sup> See Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2686 (1993) ("Rather than being dependent on their lawyers . . . some clients may wield such power or act with such insistence that they dominate and intimidate their legal agents.").

<sup>10</sup> *Id.* at 2697. For a provocative challenge to the traditional role and privileged position of the lawyer in representation of subordinated people, see GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992):

Throwing around labels like "thoroughly oppressed" and "totally dominant" does seem to imply, after all, that power can sometimes reside on only one side of a relationship. . . . [But p]ower necessarily runs in all directions within relationships. No person . . . is ever *absolutely* powerless in any relationship, not battered women and not low-income people of color. . . . In fact, when we call a person or a group "subordinated" or victimized," we're always describing a state of relative powerlessness.

*Id.* at 41.

<sup>11</sup> See *id.* at 54 ("For all their reluctance in seeking a lawyer's help, many clients virtually turn over their situation to their lawyer and the legal culture.").

<sup>12</sup> See Ellmann, *supra* note 9, at 2686 ("Lawyers and clients are thrown together by the client need that generates the relationship. From this more or less intimate encounter can come strong feelings, particularly from the client for his lawyer, on whom the client may be dependent for emotional sustenance and legal aid ranging from criminal defense to estate planning.").

<sup>13</sup> See *id.* ("Some clients may need no personal sustenance from their lawyers, because they use the lawyers' services for entirely routine and unemotional transactions or projects.").

<sup>14</sup> See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060, 1074 (1976). See also Ellmann, *supra* note 9, at 2697 ("[T]he client receives more care from the lawyer than the lawyer ordinarily receives from the client.").



Part IA explores the phenomena of transference and countertransference. Part IB focuses primarily on how the imbalance of power that characterizes countertransference in most professional relationships creates a danger of sexual exploitation, and how the professions have responded to such problems. Part IC compares and contrasts the ways in which analysts and attorneys respond to countertransference and the disparity in their preparation for its occurrence.

Part IIA explores the importance of recognizing the emotional dimension in lawyering and the need for attorneys to accept and endeavor to understand their own emotional lives. As a vehicle for this discussion, this section uses a scenario involving a hypothetical lawyer experiencing different countertransference reactions to two clients. Part IIB explores why members of the legal profession resist accepting their emotional lives. Part IIC canvases the literature about lawyering and psychology in general, and lawyering and countertransference in particular. Part IID offers some reasons for optimism about the prospect that lawyers' resistance to acknowledging the power of their emotional lives and those of their clients may be softening. Such reasons include the evolving de-stigmatization of mental health issues among the population generally and the legal profession in particular, as well as the convergence of several schools of legal scholarship that embrace an awareness of the importance of psychological sensitivity and knowledge.

Part III suggests strategies for recognizing and resolving emotional interference in the lawyer/client relationship. Part IIIA identifies what individual attorneys can do to recognize countertransference reactions and diminish their power. As this section acknowledges, the diversity among lawyers and among different practice settings is likely to affect the incidence and intensity of problematic countertransference. Part IIIA then revisits the earlier hypothetical to suggest how an understanding of psychological processes might improve the outcome. Part IIIB offers some preliminary thoughts on what law schools and the practicing bar can do to help law students and lawyers cultivate their emotional intelligence.

## I. TRANSFERENCE, COUNTERTRANSFERENCE AND THE ATTORNEY/CLIENT RELATIONSHIP

### A. *Psychoanalytical Transference and Countertransference*

The concept of transference was first introduced by Sigmund Freud in 1910 in his lectures on psychoanalysis:

In every psycho-analytical treatment of a neurotic patient the strange phenomena that is known as "transference" makes its appearance. The patient, that is to say, directs towards the physician a

degree of affectionate feeling (mingled, often enough, with hostility) which is based on no real relation between them and which—as is shown by every detail of its emergence—can only be traced back to old wishful phantasies of the patient which have become unconscious.<sup>15</sup>

Although Freud focused on the manifestation of transference in psychoanalytic treatment, he observed that the phenomenon was not limited to psychoanalysis, and, indeed, was manifest in all human relationships.<sup>16</sup> Human beings carry emotional baggage from early relationships and unload that baggage in the relationships they form later in life. Transference may involve strong positive (love-transference)<sup>17</sup> or negative (hate-transference)<sup>18</sup> emotions. Freud cautioned analysts to resist urges to act on transference, and encouraged them to learn to deal with it appropriately.<sup>19</sup> Although transference was first viewed as a hindrance to the work at hand, Freud and others later came to see it as an extremely useful tool to advance analysis.<sup>20</sup>

Freud soon named the related phenomenon of the analyst's response to the patient's transference: countertransference.<sup>21</sup> Yet not much beyond this naming occurred in the exploration of countertransference for the next forty years.<sup>22</sup> Since then, however, countertrans-

---

<sup>15</sup> Sigmund Freud, *Five Lectures on Psycho-Analysis, Leonardo da Vinci, and Other Works, Fifth Lecture*, in XI THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 51 (James Stachey ed., 1957) (1910).

<sup>16</sup> *Id.* at 51-52. See also LEWIS R. WOLBERG, M.D., *THE TECHNIQUE OF PSYCHOTHERAPY* 309 (1954).

<sup>17</sup> Sigmund Freud, *Observations On Transference-Love*, in XII THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 159-71 (James Stachey ed., 1957) (1911-13); STEVEN B. BISBING, LINDA MABUS JORGENSEN & PAMELA K. SUTHERLAND, *SEXUAL ABUSE BY PROFESSIONALS: A LEGAL GUIDE* 460 (1995); Leon J. Saul, *The Erotic Transference*, 31 *PSYCHOANALYTIC Q.* 54 (1962); H.F. Searles, *Oedipal Love in the Countertransference*, 40 *INT. J. PSYCHOANAL.* 180 (1959).

<sup>18</sup> Sigmund Freud, *Introductory Lectures on Psycho-Analysis (Part III)*, in XVI THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 444 (James Stachey ed., 1957) (1916-17); D.W. Winnicott, *Hate in the Countertransference*, 3(4) *J. PSYCHOTHERAPY PRAC. & RES.* 350 (1994).

<sup>19</sup> Freud, *Observations on Transference-Love*, *supra* note 17, at 170; Freud, *Introductory Lectures, Part III*, *supra* note 18, at 444.

<sup>20</sup> Freud, *Introductory Lectures, Part III*, *supra* note 18, at 444; HEINRICH RACKER, *TRANSFERENCE & COUNTERTRANSFERENCE* 18 (1968); Joseph Sandler, *Countertransference and Role-responsiveness*, 3 *INT. REV. PSYCHOANAL.* 43 (1976).

<sup>21</sup> Sigmund Freud, *Nuremberg Congress Paper: The Future Prospects of Psycho-analytic Theory*, in XI THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 144-45 (James Stachey ed., 1957) (1910).

<sup>22</sup> See RACKER, *supra* note 20, at 130; Therese Benedek, *Dynamics of the Countertransference*, 17 *BULL. MENNINGER CLINIC* 201 (1953). Benedek describes that the tradition of having the patient lie on a couch with the analyst sitting behind the patient grew out of Freud's concern about countertransference. "Freud frankly admitted that he used this arrangement inherited from the days of hypnosis, because he did not like 'to be stared at'; thus, it served him as a protection in the transference-countertransference duel." *Id.* at

ference has received a great deal of attention, by Freudians and non-Freudians alike.<sup>23</sup>

The literature yields a wide range of definitions for both transference<sup>24</sup> and countertransference.<sup>25</sup> Some define countertransference

---

202; Theodore J. Jacobs, *The Analyst and the Patient's Object World: Notes on an Aspect of Countertransference*, 31 JAMA 619, 620 (1983).

<sup>23</sup> See, e.g., Linda Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1244-45 n.98 (1996) (quoting CARL G. JUNG, *THE PRACTICE OF PSYCHOLOGY: ESSAYS ON THE PSYCHOLOGY OF THE TRANSFERENCE AND OTHER SUBJECTS*, paras. 164-67 (Herbert Read et. al. eds. & R.F.C. Hull trans., 2d ed. 1966)). See also Thomas L. Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference*, 45 NOTRE DAME LAW. 197, 204-14 (1970) (discussing significance of transference throughout all schools of psychotherapy).

<sup>24</sup> See, e.g., ANDREW S. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* 23-24 (1976) ("In the legal interview setting, [transference] includes all of the reactions stimulated by the reality of the lawyer's involvement as well as some unreal and distorted impressions derived from prior experiences and their resultant patterning of the client's psychic life."); WOLBERG, *supra* note 16; Jill M. Crumpacker, *Regulation of Lawyer-Client Sex: Codifying the "Cold Shower" or a "Fatal Attraction" Per Se?*, 32 WASHBURN L.J. 379, 391 (1993) ("transference," refers to the process by which a client projects onto a lawyer certain traits which may not be based in reality, but which stem from the client's previous associations with important persons in her life." (citing Lawrence Dubin, *Sex and the Divorce Lawyer: Is the Client Off Limits?*, 1 GEO. J. LEGAL ETHICS 605 (1988) (citing ANDREW WATSON, *PSYCHIATRY FOR LAWYERS* 4 (1978))). For additional interpretations, definitions & constructions of transference, see Shaffer, *supra* note 23, at 205-06.

<sup>25</sup> See ROSEMARY MARSHALL BALSAM & ALAN BALSAM, *BECOMING A PSYCHOTHERAPIST* 92 (1974) ("The therapist, too, often experiences an uneven mixture of available and less available feelings while with the patient. The unconscious responses are most correctly called *countertransference*."); FREEMAN, *supra* note 6, at 50 (attorney's positive or negative responses to client); RACKER, *supra* note 20, at 127-29 (surveying various definitions of countertransference); HOWARD F. STEIN, *THE PSYCHO-DYNAMICS OF MEDICAL PRACTICE: UNCONSCIOUS FACTORS IN PATIENT CARE* 3 (1985) ("all nonrational elements of the physician's work;"); Eugene Baum, *Countertransference and the Vicissitudes in an Analyst's Development*, 64 PSYCHOANALYTIC REV. 539, 540 (1977) (countertransference as interference that needs to be worked through); Benedek, *supra* note 22, at 205-06 ("therapists reactions to transference of the patient" or "analyst's projection of an important person of his past into his patient."); Theodore Jacobs, *On Countertransference Enactments*, 34 J. AMER. PSYCHOANAL. ASS'N 289, 290 (1986) ("influences on [the therapist's] understanding and technique that stem both from his transferences and from his emotional responses to the patient's transferences"); Judy L. Kantrowitz, *Follow-up of Psychoanalysis Five-to-Ten Years After Termination: III. The Relationship of the Transference Neurosis to the Patient-Analyst Match*, 38 J. AMER. PSYCHOANAL. ASS'N 655, 656 (1990) (less inclusive than "all inadvertent expressions of personal characteristics"); Otto Kernberg, *Notes on Countertransference*, 13 J. AMER. PSYCHOANAL. ASS'N 38, 38-39 (1965) (summarizing others' definitions as unconscious reaction to patient's transference or total emotional reaction to patient); William D. Langford, Jr., *Criminalizing Attorney-Client Sexual Relations: Towards Substantive Enforcement*, 73 TEX. L. REV. 1223, 1239 (1995) (therapist's transfer of feelings about others onto patient); Margaret Little, *Counter-Transference and the Patient's Response To It*, 32 INT. J. PSYCHOANAL. 32, 32 (1951) (list of various definitions); Annie Reich, *Further Remarks on Counter-transference*, 41 INT. J. PSYCHOANAL. 389, 389-90 (1960) (term is wrongly defined by others as total response to patient; conscious responses only if they reach "an inordinate intensity or are strongly tainted by inappropriate sexual or aggressive feelings, thus revealing themselves to be determined by unconscious infantile strivings"); Owen Renik, *Analytic Interaction: Conceptualizing Technique in Light of the*

narrowly as the professional's reaction to transference;<sup>26</sup> others describe it to include the entire range of the professional's emotional responses to the client/patient.<sup>27</sup> Still others suggest that the term countertransference is a misnomer, and that countertransference occurs as an entirely distinct, independent phenomenon.<sup>28</sup>

As with transference, countertransference exists in all human relationships,<sup>29</sup> but is most notable and potentially problematic in those relationships involving an imbalance of power.<sup>30</sup>

### B. Countertransference and Sexual Exploitation in Professional Relationships

Countertransference acquired notoriety in large measure due to its manifestation in scandalous and not infrequent sexual relationships

---

*Analyst's Irreducible Subjectivity*, 62 PSYCHOANAL. Q. 553, 565 (1993) ("It has been said justifiably, that one person's countertransference is another person's empathy. . . . What we have been used to calling countertransference in the widest use of the term, is the ever-present raw material of technique."); Searles, *supra* note 17, at 187 (transference responses "carried over from figure of analyst's own early years, without awareness that his response springs predominantly from an early life source, rather than being based mainly upon the reality of the present analyst-patient relationship"); Lucia E. Tower, *Countertransference*, J. AMER. PSYCHOANAL. ASS'N 224, 225-26 (1956) (surveying range of definitions).

<sup>26</sup> See, e.g., H.P. Blum, *Countertransference and the Theory of Technique: Discussion*, 34 J. AMER. PSYCHOANAL. ASS'N 309, 311 (1986) ("In Freud's formulation of the classical view, countertransference is an interfering counterreaction to the patient's transference which stems from the analyst's own unresolved intrapsychic conflicts."); Shirley Feldman-Summers, *Sexual Contact in Fiduciary Relationships*, in SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS 203 (Glen O. Gabbard ed., 1989) (reaction to patient's transference).

<sup>27</sup> See, e.g., Paul Heimann, *On Countertransference*, 31 INT. J. PSYCHOANAL. 81 (1950) (all feelings towards patient); Cynthia Mitchell & Karen Melikian, *The Treatment of Male Sexual Offenders: Countertransference Reactions*, 4(1) J. CHILD SEXUAL ABUSE 87, 87 (1995) (all of therapist's conscious and unconscious reactions to patient).

<sup>28</sup> See, e.g., STEIN, *supra* note 25:

Transference and countertransference can be identified dynamically as the same phenomenon: They both refer to how human beings use one another for unconscious purposes. They differ with respect to who is doing so, not what is being done. Transference in the clinical relationship denotes the patient's displacement and exteriorizing of internal issues onto the clinician; countertransference denotes the reverse. J. T. McLaughlin, *Transference, Psychic Reality and Countertransference*, 50 PSYCHOANAL. Q. 637, 655-60 (1981). McLaughlin would not limit countertransference to the analyst's reactions to the patient or the analysis, but rather sees it as a ubiquitous phenomenon encompassing all of the analyst's psychic reality. See also Adolph Stern, *On the Countertransference in Psychoanalysis*, 11 PSYCHOANAL. REV. 166, 167 (1924) (countertransference is "the transference that the analyst makes to the patient"). *Contra*, Hanna Segal, *Countertransference*, 6 INT. J. PSYCHOANALYTIC THEORY 31, 33 (1977) (countertransference and transference are *not* same phenomena).

<sup>29</sup> See STEIN, *supra* note 25, at 47; Tower, *supra* note 25, at 232-34.

<sup>30</sup> See Linda M. Jorgenson & Pamela K. Sutherland, *Lawyers' Sex with Clients: Proposal for a Uniform Standard*, 12 (11) FAIR\$HARE 11 n.38 (Nov. 1992) (citing Schaffer, *supra* note 23, at 214-15 (quoting 16 COLLECTED WORKS OF CARL G. JUNG 218 (H. Read, M. Fordham & G. Adler, ed., 2d ed. 1966))).

between numerous therapists and their patients, often with dire consequences for the emotionally vulnerable patients.<sup>31</sup> Such relationships understandably were condemned by the profession. Both the American Psychiatric Association and the American Psychological Association adopted ethical rules forbidding such sexual relationships.<sup>32</sup>

<sup>31</sup> See, e.g., MARILYN R. PETERSON, AT PERSONAL RISK 1-2 (1992); PETER RUTTER, SEX IN THE FORBIDDEN ZONE 5-6 (1989) (especially when male is in power position); Dean T. Collins, *Sexual Involvement Between Psychiatric Hospital Staff and Their Patients*, in SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS 159 (Glen O. Gabbard ed., 1989); Virginia Davidson, *Psychiatry's Problem with No Name: Therapist-Patient Sex*, 37 AM. J. PSYCHOANALYSIS 37, 46-47 (1977); Feldman-Summers, *supra* note 26, at 202-03; Paul N. Gerber, *Commentary on Counter-Transference in Working with Sex Offenders: The Issue of Sexual Attraction*, 4(1) J. CHILD SEXUAL ABUSE 117, 118-19 (1995) (in work with sex offenders); Kenneth S. Pope, *Teacher-Student Sexual Intimacy*, in SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS 172-73 (Glen O. Gabbard ed., 1989) (problem of not dealing with countertransference in training psychotherapists because of educator-student intimacy problems); Kenneth S. Pope, *Therapist-Patient Sex Syndrome: A Guide for Attorneys and Subsequent Therapists Assessing Damage*, in SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS 45, 46 (Glen O. Gabbard ed., 1989); Leonard L. Riskin, *Sexual Relations Between Therapists and Their Patients: Toward Research on Restraint*, 67 CAL. L. REV. 1000, 1003 (1979) (over 5% of male psychotherapists surveyed admitted to sexual intimacy with patients during treatment); Tower, *supra* note 25, at 230, 232. See also Robert D. Glaser & Joseph S. Thorpe, *Unethical Intimacy: A Survey of Sexual Contact and Advances Between Psychology Educators and Female Graduate Students*, 41 AM. PSYCHOLOGIST 43 (1986) (survey revealing prevalence of sexual contact between psychology educators and students). For additional articles, see MICHAEL L. PERLIN, 3 MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 12.09, at 29 n.180 (1989 & Supp. 1998).

<sup>32</sup> American Psychiatric Association, *The Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry*, 130 AM. J. PSYCHIATRY 1058, 1061 (1973); APA Ethical Standards for Psychologists, Principles 6 ("sexual intimacies with clients are unethical") (APA 1977); *id.* at 7 ("psychologists do not exploit their professional relationships with clients, supervisees, students, employees, or research participants sexually or otherwise") (APA 1981). See Glaser & Thorpe, *supra* note 31, at 43; Linda Fitts Mischler, *Reconciling Rapture, Representation and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 GEO. J. LEGAL ETHICS 209, 215 n.26 (1996).

Although the ancient Hippocratic Oath proscribed sexual relations between physicians and their patients, see Phyllis Coleman, *Sex in Power Dependent Relationships: Taking Unfair Advantage of the "Fair" Sex*, 53 ALB. L. REV. 95, 110 (1988); Riskin, *supra* note 31, at 1000, not until 1989 did the American Medical Association's Council on Ethical and Judicial Affairs issue Opinion 8.14 on Sexual Misconduct, which explicitly codifies such a prohibition. See Paul S. Applebaum, Linda M. Jorgenson and Pamela K. Sutherland, *Sexual Relationships Between Physicians and Patients*, 154 ARCHIVES OF INTERNAL MED. 2561 (1994); ABA Formal Op. 92-364, n.18 (1992) (adopted by the AMA House of Delegates on December 4, 1990, "finding all sexual relationships between doctor and patient to be potentially exploitative and detrimental to the physician's medical judgment and to the patient's trust). See also BISBING, JORGENSON & SUTHERLAND, *supra* note 17, at 26. The American Medical Association stated with respect to idealization:

The professional physician-patient relationship frequently evokes strong and complicated emotions in both the physician and patient. It is not unusual for sexual attraction to be one of these emotions. Many commentators agree that sexual or romantic attraction to patients is not uncommon or abnormal; . . . The emotions of admiration, affection, and caring that are part of a physician-patient relationship can become particularly powerful when either party is experiencing intense pressures or

Psychotherapists have often faced civil liability for sexual liaisons with their patients.<sup>33</sup> Recently, a number of jurisdictions have moved towards criminalization of such relationships.<sup>34</sup>

Sexual relationships are problems in other professions as well.<sup>35</sup> The greater the degree of power-dependency, the higher the incidence of exploitative sexual encounters between professionals and the recipients of their services.<sup>36</sup> We rarely if ever hear about sexual relationships gone wrong between mail carriers and letter receivers, butchers and their customers, or even hair dressers and their clients. There appears to be something inherent in the power relationship of caring professions that fosters opportunities for abuse.<sup>37</sup>

In recent years, the problem has been an especially grave one for

---

traumatic or major life events.

American Medical Association's Council of Ethical and Judicial Affairs, *Sexual Misconduct in the Practice of Medicine*, 266 JAMA 2742 (1991).

Other professional codes contain similar proscriptions, *See Riskin, supra* note 31, at 1003, as do a number of state statutes. *See, e.g., Sexual Exploitation in Psychotherapy Act*, ILL. REV. STAT. ch. 70, pr. 801 *et seq.* (1989). *But see* Andrew S. Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 U. MICH. J. L. REF. 248, 251 (1975) (ethical codes help professionals ignore underlying emotional issues).

<sup>33</sup> *See, e.g., Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986); *Corgan v. Muehling* 173 Ill.2d 296, 574 N.E.2d 602, 606-07 (1991); *Cotton v. Kamby*, 101 Mich. App. 537, 300 N.W. 2d 627 (1980); *Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968). *See also* Coleman, *supra* note 32, at 99 (recommending civil liability and professional discipline as well as criminal charges); Linda Mabus Jorgenson & Pamela K. Sutherland, *Fiduciary Theory Applied To Personal Dealings; Attorney Client Sexual Contact*, 45 ARK. L. REV. 459, 468 (1992).

<sup>34</sup> *See* PERLIN, *supra* note 31, § 12.09, at 305.

<sup>35</sup> *See* RUTTER, *supra* note 31, at 6; SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS, xi-xii, *passim* (Glen O. Gabbard ed., 1989); Ann H. Britton, *Sexual Abuse in the Professional Relationship*, 11 HAMLIN L. REV. 247 (1988) (surveying problems of professional sexual abuse and their outcomes); Coleman, *supra* note 32, at 95; Feldman-Summers, *supra* note 26, at 202; Leslie R. Schover, *Sexual Exploitation by Sex Therapists*, in SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS (Glen O. Gabbard ed., 1989). For discussion of problems in the pastoral relationship, *see* BISBING, JORGENSEN & SUTHERLAND, *supra* note 17; Marie Fortune, *Boundaries or Barriers? An Exchange*, 111 THE CHRISTIAN CENTURY, No. 18, at 5 (1994); William E. Hulme, *Sexual Boundary Violations of Clergy*, in SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS (Glen O. Gabbard ed., 1989); *Doe v. Samaritan Counseling Center*, 791 P.2d 344 (Alaska 1990) (defendant Counseling Center may be liable for mishandling of transference phenomenon by pastoral counselor who engaged in sexual relations with plaintiff); *Langford v. Roman Catholic Diocese of Brooklyn*, 177 Misc.2d 897, 677 N.Y.S.2d 436 (Sup. Ct. Kings County 1998) (dismissing parishioner's claim against pastor for alleged sexual molestation due to First Amendment religion clause constraints). For problems of teacher/student sexual exploitation, *see* Pope, *supra* note 31. Pope notes special problems in Psychology Ph.D programs. *Id.* at 171.

<sup>36</sup> *See* Coleman, *supra* note 32, at 95-97 (describing continuum of presumption of exploitation based on power dependency). *But see* Mischler, *supra* note 32, at 245-49 (arguing that power imbalance is not as pronounced in attorney/client relationships as it is in other professional relationships).

<sup>37</sup> *See* PETERSON, *supra* note 31, at 34.

lawyers,<sup>38</sup> who have faced disciplinary charges<sup>39</sup> and civil liability<sup>40</sup> for sexual liaisons with their clients. The most egregious cases tend to arise in family law practice.<sup>41</sup> In 1992 the ABA issued formal opinion 92-364, which, while not prohibiting sexual liaisons between lawyers

<sup>38</sup> See Caroline Forell, *Lawyers, Clients and Sex: Breaking the Silence on The Ethical and Liability Issues*, 22 GOLDEN GATE U. L. REV. 611 (1992) (overview of California, Oregon, and Illinois attempts to address attorney-client relations as well as stimulus for those attempts); Jorgenson & Sutherland, *supra* note 30, at 12-13; Thomas Lyon, *Sexual Exploitation of Divorce Clients: The Lawyer's Prerogative?*, 10 HARV. WOMEN'S L.J. 159 (1987).

<sup>39</sup> See Jorgenson & Sutherland, *supra* note 33, at 499 n.11 (informal survey of state bar associations' disciplinary proceedings dealing with sexual harassment and contact by attorneys). See e.g., *People v. Zeilinger*, 814 P.2d 808 (Colo. 1991) (public reprimand for engaging in sexual relations with client in marital dissolution action); *People v. Gibbons*, 685 P.2d 168 (Colo. 1984) (disbarring suspended attorney for, *inter alia*, engaging in covert sexual relation with client); Committee on Professional Ethics and Conduct of the Iowa State Bar Association, 436 N.W.2d 57 (Iowa 1989) (suspending license for three months for violation of DR 1-102(A)(3) and (6) for having sex with client whom lawyer represented in custody proceedings); *Drucker's Case*, 577 A.2d 1198 (N.H. 1990) (two-year suspension for, *inter alia*, sexual relations with client); *In the Matter of Feinman*, 225 A.D.2d 200 (N.Y. 4th Dep't 1996) (six-month suspension for, *inter alia*, sexual relationship with client whom attorney represented in criminal matter.); *In the Matter of McClure*, 204 A.D.2d (N.Y. 3d Dep't 1994) (prosecutor suspended for five years for having sex with 20 year old defendant); *In the Matter of Bowen*, 542 A.D.2d 45 (N.Y. 3d Dep't 1989) (two-year suspension for, *inter alia*, sexual misconduct with client). See also, e.g., following cases involving sexual harassment of clients: *In the Matter of Darrell Adams*, 428 N.E.2d 786 (Ind. 1981); *In re Raymond Howard*, 912 S.W.2d (Mo. 1995) (indefinite suspension for, *inter alia*, unwanted sexual advances); *Matter of Bernstein*, 237 A.D.2d 89 (N.Y. 2d Dep't 1997) (attorney disbarred for ten counts of making sexually suggestive remarks to female clients); *In the Matter of Romano*, 231 A.D.2d 299 (N.Y. 1st Dep't 1997); *In the Matter of Gilbert*, 194 A.D.2d 262 (N.Y. 4th Dep't 1993) (one-year suspension for making unwanted and unsolicited sexual advances to clients and secretaries); *Matter of Rudnick*, 177 A.D.2d 121 (N.Y. 2d Dep't 1992) (two-year suspension for, *inter alia*, having coercive sexual relations with client); *State ex rel. Okla. Bar Ass'n v. Sopher*, 852 P.2d 707 (Okla. 1993) (public reprimand for unwanted sexual advances towards client).

<sup>40</sup> See, e.g., Catherine Holand Petersen & Candace Mathers, *Developing Personal Relationship, Impairing Attorney-Client Relationship*, 14(2) FAIR\$HARE 26 (Feb. 1994) (discussing specific malpractice case finding liability). *But see Kling v. Landry*, 226 Ill. App. 3d 329 (1997); *Suppressed v. Suppressed*, 206 Ill. App. 3d 918 (1990) (no cause of action stated by plaintiff's allegations of seduction by attorney in absence of actual harm to representation).

While there may be overlap, consensual relations between attorneys and clients are distinguishable from sexual harassment and sexual assault of clients by attorneys. See, e.g., *Matter of Bernstein*, 237 A.D.2d 89 (N.Y. 2d Dep't 1997) (attorney disbarred for ten counts of making sexually suggestive remarks to female clients); *In the Matter of Romano*, 231 A.D.2d 299 (N.Y. 1st Dep't 1997) (attorney suspended for personally conducting physical examination of clients).

<sup>41</sup> See, e.g., Lyon, *supra* note 38 (exploring causes and effects of sexual relations between divorce lawyers and their clients and comparing them to therapist-client relationship). Currently, New York's absolute ban against sexual relationships between lawyers and clients applies only in matters involving domestic relations. 22 NYCRR § 1200.3 [DR 1-102(A)(7)]. The genesis of this prohibition was a 1993 report issued by the Chief Judge's Committee to Examine Lawyer Conduct in Matrimonial Matters. See e-mail correspondence between Kathleen R. Mulligan Baxter, Counsel, New York State Bar Association and Sandra Maliszewski, 9/29/98 (on file with author).

and clients outright, strongly discouraged them and identified various problems that could result in a violation of rules of professional responsibility.<sup>42</sup> The opinion concluded that in disciplinary or other proceedings, an attorney who has engaged in sexual relations with a client would have the burden to prove such relations *did not* impair the representation.<sup>43</sup> Some state codes of professional responsibility now include sexual relationships between lawyer and client in the categories of sanctionable conduct.<sup>44</sup> Proposals for adding such prohibitions are pending in other jurisdictions.<sup>45</sup> The literature—academic and other—is rife with recommendations pro and con the regulation

---

<sup>42</sup> ABA Formal Op. 92-364 (1992).

<sup>43</sup> *Id.* See Jorgenson & Sutherland, *supra* note 30, at 13 (proposing rebuttable presumption as least restrictive way to deal with problem).

<sup>44</sup> A survey of the States reveals a variety of approaches to regulation of attorney-client sexual relations: CALIFORNIA: CAL. CODE RPC 3-120 & CAL. BPC § 6106.9 (1997): attorneys are prohibited from requiring or demanding sex from client incident to or as condition of representation, employing coercive influence over client to enter sexual relations, or maintaining preexisting relationship which would violate other rules of professional conduct); FLORIDA: F.S.A. BAR RULE SEC. 4-8.4(I): attorneys are prohibited from engaging in sexual relations with clients that exploit lawyer/client relationship, excluding preexisting sexual relationships); MINNESOTA: M.S.A. RPC 1.8(k): attorneys are prohibited from having sex with current clients unless there is preexisting sexual relationship); New York: 22 NYCRR § 1200.29-a (eff. June 30, 1999): attorneys are prohibited from requiring or demanding sexual relations as condition of representation, employing coercion, intimidation or undue influence in entering into sexual relations, or, in domestic relations matters, having sexual relations with client that begin after representation commences; OREGON: ORCPR DR5-110: attorneys cannot engage in sexual relations with current clients or with representatives of current clients except for preexisting relationships; DR5-101(B): prohibits maintaining preexisting sexual relationship that could prejudice client's case and create conflict of interest); WEST VIRGINIA: WV RPC 8.4(G): prohibits lawyer from having sexual relations with client unless preexisting consensual relationship). See Appelbaum, Jorgenson & Sutherland, *supra* note 32, at 2563-65 nn.31-33 and accompanying text; Abed Awad, *Attorney-Client Sexual Relations*, 22 J. LEGAL PROF. 131 (1998); Michael Daigneault, *Client-Attorney Relationships: The Danger of "Going To Far,"* THE FEDERAL LAWYER, June 1995, at 13, 15.

<sup>45</sup> The Kansas Bar Association recently approved Rule 1-17, which is pending before the Kansas Supreme Court. The proposed rule prohibits an attorney from engaging in a sexual relationship with a current client or a representative of the client if the contact would or is likely to damage or prejudice the client, excluding preexisting sexual relationships. See *Item of Interest-Board Seeks Comments on Sex with Clients Proposal*, 66 J. KAN. B. ASS'N 3 (1997). The Pennsylvania State Bar's Ethics Committee published a proposal to prohibit attorney/client sexual relations similar to that issued by Kansas, but it was later withdrawn. Instead, it was issued as an ethical opinion. See PA Ethical Op. 97-100, 1997 WL 671579. The ABA's Ethics 2000 Commission has floated a similar rule for comment. Proposed Rule 1.8(k), *Attorney/Client Sexual Relationships* (lawyers prohibited from having sexual relations with client unless consensual sexual relationship preexisted commencement of lawyer-client relationship).

Other states have issued ethics opinions containing similar prohibitions, including Kansas (Kansas Ethics Op. 94-13: sexual relations which post-date representation are prohibited) or have disciplined attorneys for sexual relationships with clients even in the absence of a specific rule, see, e.g., *Disciplinary Counsel v. DePietro*, Ohio S. Ct. No. 92-56 (Dec. 30, 1994); *State ex rel. Okla. Bar Ass'n v. Sopher*, 852 P.2d 707 (Okla. 1993).



of sexual liaisons between attorneys and clients.<sup>46</sup> At least one commentator has recommended criminal liability for such abuses of the fiduciary relationship.<sup>47</sup>

Indeed, the relationship among transference, countertransference and sexual relations has received a good deal of attention in legal scholarship, case law, and as the subject of regulation.<sup>48</sup> It is not my intention to reiterate that discussion here. Rather, I wish to shift the focus away from the sexual culmination of transference/countertransference and examine instead the ways in which a variety of powerful emotions may affect lawyers in their relationships with their clients, so that attorneys may learn to understand, harness and handle such emotional reactions in more positive and constructive ways.

### C. Countertransference in Practice

Not all emotional engagement between lawyer and client is inappropriate or harmful. It is important to distinguish, for example, empathy from countertransference. Despite some intimations in the psychoanalytic literature to the contrary,<sup>49</sup> empathy—an aspect of good counseling<sup>50</sup> and good lawyering<sup>51</sup>—is not the same as countertransference.<sup>52</sup> Empathy is the quality of metaphorically walking in

<sup>46</sup> See, e.g., Jeffrey A. Barker, *Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?*, 40 UCLA L. REV. 1277 (1993) (focusing on the legal and medical professions and questioning the adoption of criminal penalties for professional-client sexual relations); Crumpacker, *supra* note 24, at 379; Yael Levy, *Attorneys, Clients and Sex: Conflicting Interests in the California Rule*, 5 GEO. J. LEGAL ETHICS 649 (1992) (proposing to limit California rule to banning attorney-client sexual relationship only when client is “vulnerable” or when nature of care is emotional); Lyon, *supra* note 38, at 159 (regulation perpetuates stereotype of women as unable to resist sexual advances); Mischler, *supra* note 32, at 209 n.3 (and sources cited therein); Joanne Pitulla, *Unfair Advantage*, A.B.A. J. 76 (Nov. 1992) (reluctance of legal profession to acknowledge problem of attorney-client sexual relations).

<sup>47</sup> Langford, *supra* note 25, at 1223.

<sup>48</sup> See, e.g., Mischler, *supra* note 32.

<sup>49</sup> See RACKER, *supra* note 20, at 135-36 (“[I]t should be borne in mind that the disposition to empathy . . . springs largely from the sublimated positive countertransference, which likewise relates empathy with countertransference in the wider sense.”).

<sup>50</sup> See A.M. Cooper, *Some Limitations on Therapeutic Effectiveness: The “Burnout Syndrome” in Psychoanalysis*, 55 PSYCHOANALYTIC Q. 576, 579 (1986) (“psychoanalysis will fail if the analyst cannot find points of empathic contact with his patient”).

<sup>51</sup> See Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 CLIN. L. REV. 605, 605 (1999) (“There are two important things to remember about empathy—it is necessary, and it is impossible.”); Bruce J. Winick, *Dealing With Client Denial in the Advance Directive Context: A Challenge for the Therapeutically-Oriented Preventive Lawyer*, 4 PSYCHOL. PUB. POL’Y & L. (forthcoming, 1999) (citing commentators who have emphasized importance of empathy in lawyer/client relationships). *But see* Mills, *supra* note 23, at 1243-44 n.91 (citing critiques of value of empathy in lawyering).

<sup>52</sup> See FREEMAN, *supra* note 6, at 15, 50 (“Good interviewing is empathy. . . . Empathy is shared identification. It is to ‘feel with’ rather than ‘sorry for’ a person. . . . Either emotional over or under involvement is detrimental.”); LEWIS R. WOLBERG, 2 THE TECH-

someone else's shoes so as to understand that person's needs and desires.<sup>53</sup> Although similarities exist between countertransference and empathy, it is for our purposes useful to view countertransference as unharnessed emotions—emotional responses gone awry.<sup>54</sup> Empathy is an important tool for The Good Lawyer and should be cultivated; countertransference, unchecked, is likely to cause problems.<sup>55</sup>

In the practice of psychoanalysis and psychotherapy, countertransference may manifest itself in a variety of ways, as positive (love)<sup>56</sup> or negative (hate).<sup>57</sup> For the therapist, understanding its operation is essential,<sup>58</sup> both to avoid impairment of the therapy,<sup>59</sup> as

---

NIQUE OF PSYCHOTHERAPY 143 (4th ed. 1988); Blum, *supra* note 26, at 322-23 (“In both adult and child analysis, countertransference confuses empathy and should not be confused with empathy”).

<sup>53</sup> See DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 40 (1991) (citing CARL ROGERS, in G. EGAN, *THE SKILLED HELPER* 87 (3d ed. 1986)):

Empathy in its most fundamental sense . . . involves understanding the experiences, behaviors, and feelings of others as they experience them. It means that [lawyers] must, to the best of their abilities, put aside their own biases, prejudices, and points of view in order to understand as clearly as possible the points of view of their clients. It means entering into the experience of clients in order to develop a feeling for their inner world and how they view both this inner world and the world of people and [events] around them.

See also Ellmann, *supra* note 9, at 2681, 2699-700.

<sup>54</sup> See Baum, *supra* note 25, at 540.

<sup>55</sup> See Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 *HOFSTRA L. REV.* 1295, 1366, n.183 (1993) (“Once the professional has ‘worked through’ his or her counter-transference reactions, he or she is best situated to form a professionally ‘empathic relationship’ with the patient. In contrast, professionals who deny that they have any personal responses to clients, and therefore do not work them through, are likely to be somewhat handicapped in their professional interactions with the client.”); Winick, *supra* note 51 (countertransference as inhibiting empathy). *But see* Meier, *supra* at 1352 (“In the legal profession, counter-transference is operating beneficially wherever people are personally committed to their work due to strong empathy for the population they serve. For instance, womens’ identification with womens’ rights issues such as domestic violence can fuel a strong empathy for battered women clients, conviction about their cause and strong advocacy on their behalf.”).

<sup>56</sup> See Crumpacker, *supra* note 24, at 391 (“[E]ighty seven percent of therapists report having sexual feeling[s] toward clients . . . [t]he other thirteen percent are liars.” (quoting Dr. Glen Gabbard of the Menninger Clinic of Topeka, Kansas, in Gordon Slovut, *Therapists Who Have Sex With Patients Betray A Trust*, *MINNEAPOLIS-ST. PAUL STAR TRIB.*, Oct. 15, 1992, at 1E)).

<sup>57</sup> See Winnicott, *supra* note 18, at 350 (“However much [the therapist] loves his patients he cannot avoid hating them, and fearing them, and the better he knows this the less hate and fear will be the motive determining what he does to his patients”). See *supra* notes 17-18 and accompanying text.

<sup>58</sup> See FRIEDA FROMM-REICHMAN, *PRINCIPLES OF INTENSIVE PSYCHOTHERAPY* 3-4 (1950); STEIN, *supra* note 25, at 4; WOLBERG, *supra* note 52, at 142; Richard Almond, *The Analytic Role: A Mediating Influence in the Interplay of Transference and Countertransference*, 43(2) *J. AM. PSYCHOANALYTIC ASS'N* 469, 471, 484 (1995); Gerber, *supra* note 31, at 117-18; Mitchell & Melikian, *supra* note 27, at 90-92 (in treating male sex offenders);

well as to use countertransference affirmatively in furthering the therapy's progress.<sup>60</sup> The literature abounds with case studies of therapists recognizing and wrestling with countertransference responses with varying degrees of success.<sup>61</sup> While there is debate about its utility, there is near universal acceptance that countertransference exists and that it is a force with which to contend. For effective psychotherapy, an understanding of countertransference must be both doctrinal and personal. Analysts-in-training, for example, both study the theory and then explore their own countertransference responses in their personal analysis and re-analysis.<sup>62</sup> Neither law students nor attorneys generally receive any such training, however, and thus they generally have no access to a structured protocol for addressing countertransference.

Countertransference, insufficiently understood, creates the danger of boundary violations, which both therapists and lawyers alike must avoid. Boundary violations are the crossing of the line between

---

Renik, *supra* note 25, at 554 (describing prevailing view); Saul, *supra* note 17; Segal, *supra* note 28, at 36; Jenny Smith, Coll Osman & Margaret Goding, *Reclaiming the Emotional Aspects of the Therapist-Family System*, 11(3) *AUSTL. & N.Z. J. FAM. THERAPY* 140, 146 (1990).

<sup>59</sup> See FROMM-REICHMAN, *supra* note 58, at 198-99; LEON J. SAUL, *PSYCHODYNAMICALLY BASED PSYCHOTHERAPY* 329-30 (1972); Freud, *Nuremberg Congress Paper*, *supra* note 21, at 144-45; Kantrowitz, *supra* note 25, at 657; Hans W. Loewald, *Transference-countertransference*, 34 *J. AM. PSYCHOANALYTIC ASS'N* 275, 275 (1986); Pope, *supra* note 31, at 50; Kenneth S. Pope & Glen O. Gabbard, *Individual Psychotherapy for Victims of Therapist-Patient Sexual Intimacy*, in *SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS* 99 (Glen O. Gabbard ed., 1989); Annie Reich, *On Countertransference*, 32 *INT. J. PSYCHOANAL.* 25, 28 (1951); Reich, *supra* note 25, at 389, 392; Martin A. Silverman, *Countertransference and the Myth of the Perfectly Analyzed Analyst*, 54 *PSYCHOANALYTIC Q.* 175, 175-77 (1985); Stuart W. Twemlow & Glen O. Gabbard, *The Lovesick Therapist*, in *SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS* 86 (Glen O. Gabbard ed., 1989).

<sup>60</sup> See GREGORY P. BAUER, *THE ANALYSIS OF THE TRANSFERENCE IN THE HERE AND NOW* 79 (1993); PETER L. GIOVACCHINI, *2 TACTICS AND TECHNIQUES IN PSYCHOANALYTIC THERAPY* x (1975); Heimann, *supra* note 27, at 81, 83; Judy L. Kantrowitz, *The Beneficial Aspects of the Patient-Analyst Match*, 76 *INT'L J. PSYCHO-ANALYSIS* 299, 302 (1995); Kernberg, *supra* note 25, at 43; Loewald, *supra* note 59, at 282; Searles, *supra* note 17, at 180; Winnicott, *supra* note 18, at 351.

<sup>61</sup> Case studies of avoiding its interference with the therapy: see, e.g., Almond, *supra* note 58, at 484-86; Maxine Anderson, *The Need for the Patient to be Emotionally Known: The Search to Understand a Counter-Transference Dilemma*, 8(3) *BRIT. J. PSYCHOTHERAPY* 247 (1992); Silverman, *supra* note 59, at 181-97; Gertrude R. Ticho, *Cultural Aspects of Transference and Countertransference*, 35 *BULL. MENNINGER CLINIC* 313, 318-22 (September 1971); Tower, *supra* note 25, at 231. Case studies on its utility to advance the therapy: see, e.g., Theodore Jacobs, *Posture, Gesture, and Movement in the Analyst: Cues to Interpretation and Transference*, 21 *J. AMER. PSYCHOANAL. ASS'N* 77, 90 (1973); Kantrowitz, *supra* note 60, at 303-07; Sandler, *supra* note 20, at 45-47.

<sup>62</sup> See FROMM-REICHMAN, *supra* note 58, at 42; Pope & Gabbard, *supra* note 59, at 100; Reich, *supra* note 59, at 28. *But see* Twemlow & Gabbard, *supra* note 59, at 85 ("offenders were more likely than non-offenders to have undergone therapy or analysis").

professional and client that defines the helping relationship within which they interact.<sup>63</sup> Sexual intercourse with a distraught and emotionally vulnerable patient or client is a relatively obvious example of such a boundary violation. Yet boundary violations certainly may occur even without sexual transgressions.<sup>64</sup> It is not sufficient merely to resist sexual impulses towards one's patient or client.<sup>65</sup> Harm to the relationship and consequent harm to the victim may happen without any physical or sexual component.<sup>66</sup> And liability may accompany that harm, even in the absence of sexual contact.<sup>67</sup> It may well be that such boundary violations are more likely to result in liability when the actor is a psychotherapist.<sup>68</sup> However, attorneys, too, are not without risk of incurring liability for boundary violations short of sexual relations.<sup>69</sup> Recent attempts to regulate sexual relations between lawyers

---

<sup>63</sup> See PETERSON, *supra* note 31, at 74-75:

Boundaries are the limits that allow for a safe connection based on the client's needs. When these limits are altered, what is allowed in the relationship becomes ambiguous. Such ambiguity is often experienced as an intrusion into the sphere of safety. The pain from a violation is frequently delayed, and the violation itself may not be recognized or felt until harmful consequences emerge.

<sup>64</sup> See BISBING, JORGENSEN & SUTHERLAND, *supra* note 17, at 461, 463-64; PETERSON, *supra* note 31, at 3; Carter Heyward, Book Review, *When Boundaries Betray Us: Beyond Illusions of What is Ethical in Therapy and Life*, by Marie Fortune, THE CHRISTIAN CENTURY, May 18, 1994, at 524; Hulme, *supra* note 35, at 185-86 (clergy-counselor); Twemlow & Gabbard, *supra* note 59, at 86.

<sup>65</sup> See RUTTER, *supra* note 31, at 195; WATSON, INTERVIEWING AND COUNSELING, *supra* note 24, at 85.

<sup>66</sup> See *Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968):

Once Dr. Freeman started to mishandle the transference phenomenon . . . it was inevitable that trouble was ahead. It is pretty clear from the medical evidence that the damage would have been done to Mrs. Zipkin even if the trips outside the state were carefully chaperoned, the swimming done with suits on, and if there had been ballroom dancing instead of sexual relations.

*Id.* at 761.

<sup>67</sup> See *id.*; BISBING, JORGENSEN & SUTHERLAND, *supra* note 17, at 1423 (citing *Zipkin*). Most malpractice is likely the product of shoddy or dishonest lawyering; boundary violations represent a different kind of malpractice, potentially less obvious as a transgression of one's fiduciary duty. That is, there is an inherent distinction between that which we must presume to be a *conscious* abuse of the lawyer's fiduciary duty, and that which may result from an unconscious succumbing to countertransference feelings.

For therapists at least, there is no insurance coverage for boundary violations. BISBING, JORGENSEN & SUTHERLAND, *supra* note 17, at 468 n.72 (quoting from Am. Psych. Assoc.-Sponsored Professional Liability Insurance Program, description of coverage). See *New Mexico Physicians Mutual Liability Co. v. LaMure*, 860 P.2d 734, 742 (N.M. 1993). *But see* *St. Paul Fire and Marine Insurance Co. v. Mitchell*, 296 S.E.2d 126 (Ga. App. 1982) (psychiatrist's mishandling of transference by having sexual relations with client was within malpractice insurer's duty to defend, but genuine issues of material fact existed as to whether act constituted medical malpractice or intentional sexual assault).

<sup>68</sup> See *Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968).

<sup>69</sup> See Daigneault, *supra* note 44, at 15:

And what about the instance of non-sexual relationships between attorneys and their clients? If states are concerned that an attorney will become too emotionally in-

and clients, however, fail to account for such other kinds of boundary violations.<sup>70</sup> Nonetheless, lawyers need to be sensitive to the possible crossing of boundaries *before* the fiduciary relationship is abridged.<sup>71</sup>

Avoidance of liability is certainly one reason why it is critical that we understand how our unconscious processes may impair our lawyering abilities. But malpractice liability and disciplinary sanctions need not be—indeed, they should not be—the major impetus. To strive to be the best lawyers we can be, we must learn to be self-aware and to develop the ability to critically analyze our participation in the lawyer/client relationship.

## II. CONFRONTING THE EMOTIONAL DIMENSION IN LAWYERING

### A. *The Importance of Confronting Emotions in Lawyering*

“Know thyself.”<sup>72</sup> “The unexamined life is not worth living.”<sup>73</sup> Much of the advice offered in the literature develops from these ancient and fundamental tenets.<sup>74</sup> In both our personal and professional lives, looking inward is necessary for self-actualization.<sup>75</sup> One cannot

---

volved, therefore prejudicing the client or the representation, then prohibiting only “sexual relations” does not completely address the problem in its entirety. Two adults are capable of engaging in a passionate relationship without engaging in physical intimacy. One might speculate as to how the states intend to prove that introducing sex into a relationship between the attorney and client is what places the professional representation at risk.

<sup>70</sup> Arguably, therefore, they may be under-inclusive. See Daigneault, *supra* note 44, at 15. See also Langford, *supra* note 25, at 1240 (citing Jorgenson & Sutherland, *supra* note 33, at 478-79). They may be over-inclusive as well. See Mischler, *supra* note 32 (arguing against regulatory prohibitions on all attorney/client sexual liaisons).

<sup>71</sup> Professor Lawrence Dubin’s excellent video, WHAT WENT WRONG? CONVERSATIONS WITH DISCIPLINED LAWYERS (1985), exposes an example of another kind of boundary violation. One lawyer speaks of his emotional over-involvement with an emotionally unbalanced client who was a victim of rape. He allowed the client to use him as a round-the-clock confidant, social worker, as well as lawyer. He describes how he feared that this client—who had called him several times to take her to the hospital after suicide attempts—was too emotionally vulnerable to withstand either a criminal rape trial or civil litigation arising out of the rape. Thus he let the statute of limitations in both the criminal and civil cases pass without telling her so until it was too late. See also Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 64 (“In addition to sexual violations, the most frequent boundary infractions are financial or emotional exploitation of clients.”).

<sup>72</sup> Inscription at the Delphic Oracle, from PLUTARCH, MORALS in JOHN BARTLETT, FAMILIAR QUOTATIONS, 62 (15th ed. 1980).

<sup>73</sup> Socrates in PLATO, APOLOGY, 38a, in THE OXFORD DICTIONARY OF QUOTATIONS 512 (3d ed. 1986).

<sup>74</sup> See, e.g., GOLEMAN, *supra* note 5, at 46; RACKER, *supra* note 20, at 20; WATSON, INTERVIEWING AND COUNSELING, *supra* note 24, at 24, 80; Andrew S. Watson, *The Lawyer as Counselor*, 5 J. FAM. L. 7, 18 (1965) (“In the last analysis, skillful interviewing is intimately related to self-awareness . . . . It is jokingly said, that the principal barrier to self-analysis rests in the blindness of the analyst.”).

<sup>75</sup> Self-actualization, as defined by the founder of Humanistic Psychology Abraham

know whether a decision is rational or otherwise appropriate unless one looks within to examine the irrational forces bearing on that decision.<sup>76</sup> Lawyers must develop awareness of the unconscious behavioral traits and impulses that affect their interactions with clients<sup>77</sup> and others.<sup>78</sup>

Thus it would behoove lawyers to understand basic psychological concepts,<sup>79</sup> not so that we may become therapists<sup>80</sup> but so that we might be better legal counselors. We serve our clients best if we have emotional intelligence, if we are able to understand their fears, hopes and dreams. In fact, whether we undertake the task consciously or otherwise, when we counsel our clients we are dealing with their

Maslow, is the coming together of a person

in a particularly efficient and intensely enjoyable way . . . in which he is more integrated and less split, more open for experience, more . . . fully functioning, more creative, . . . more ego-transcending, more independent of his lower needs, etc. He becomes in these episodes more truly himself, more perfectly actualizing his potentialities, closer to the core of his Being, more fully human.

ABRAHAM H. MASLOW, *TOWARDS A PSYCHOLOGY OF BEING* 97 (2d ed. 1968).

<sup>76</sup> See James R. Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 VA. L. REV. 735, 756-57 (1978) (quoting C.G. Schoenfeld, *Law and Unconscious Motivation*, 8 HOW. L. REV. 15, 25-26 (1962)).

<sup>77</sup> See FREEMAN, *supra* note 6, at 7; MARK K. SCHOENFIELD & BARBARA PEARLMAN SCHOENFIELD, *INTERVIEWING AND COUNSELING CLIENTS IN A LEGAL SETTING*, 313, 325 (1977); Elkins, *supra* note 76, at 760-61; Robert S. Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972, 985 (1961); Watson, *Lawyer as Counselor*, *supra* note 74, at 16.

<sup>78</sup> See, e.g., John Mixon & Robert P. Schuwerk, *The Personal Dimension of Professional Responsibility* 58 LAW & CONTEMP. PROBS. 87, 103 (1995):

[A]n otherwise mature lawyer who responds to authority figures with the patterns of response used in relating to a father, mother, or sibling (with, for example, belligerence, anger, excessive submissiveness, or passive aggressiveness) cannot deal effectively with judges, police, senior partners or opposing lawyers.

See also WATSON, *INTERVIEWING AND COUNSELING*, *supra* note 24, at 147 (among members of law firm).

<sup>79</sup> See ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING* 19 (1990); WATSON, *INTERVIEWING AND COUNSELING*, *supra* note 24, at 11, 26.

The body of scholarship known as "Therapeutic Jurisprudence" argues for bringing social science in general, and psychology in particular, to bear on both our system of laws and the individual practice of law, so as to maximize therapeutic and minimize anti-therapeutic consequences. See, e.g., David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y. L. SCH. J. HUM. RTS. 759, 759-62 (1993); David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUBL. POL'Y & L. 220, 231 (1995).

<sup>80</sup> See BASTRESS & HARBAUGH, *supra* note 79, at 20-21; FREEMAN, *supra* note 6, at 7, 51; WATSON, *INTERVIEWING AND COUNSELING*, *supra* note 24, at 11; James R. Elkins, *A Counseling Model for Lawyering in Divorce Cases*, 53 NOTRE DAME LAW. 229, 264 (1977-78); Shaffer, *supra* note 23, at 237. In fact, the lawyer as counselor is engaged in a distinctly different task than the therapist as counselor; nonetheless there is much that the lawyer may learn from the therapist regarding technique, skills and attitudes. See Hugh Brayne, *Counselling Skills for the Lawyer: Can Lawyers Learn Anything from Counsellors?*, 32 THE LAW TEACHER 137 (1998).

psyches.<sup>81</sup> The Good Lawyer must be accountable for this responsibility.<sup>82</sup>

Furthermore, to avoid boundary violations, lawyers must acknowledge that emotional responses are triggered in virtually every human encounter. The goal need not be—indeed could not be—to eradicate these responses. Rather the goal should be to recognize them, analyze how, if at all, they may affect the lawyer/client relationship, and resolve them appropriately.<sup>83</sup> Therefore the lawyer must understand the dynamics of transference and countertransference in lawyer/client relationships. Whether or not we so acknowledge, our unconscious exerts powerful force on our thoughts and actions.<sup>84</sup> Of course not all acting up of the unconscious and not all emotional reactions are problematic. But acceptance that they *might* be problematic is an essential first step in recognizing the situations in which they may impair the representation, and identifying means to avoid such impairment.<sup>85</sup>

It seems likely, for example, that for every lawyer who succumbs

<sup>81</sup> See BASTRESS & HARBAUGH, *supra* note 79, at 25; FREEMAN, *supra* note 6, at 49-52; WATSON, INTERVIEWING AND COUNSELING, *supra* note 24, at 149; WATSON, PSYCHIATRY FOR LAWYERS, *supra* note 24, at 9; Harriet F. Pilpel, *The Job Lawyers Shirk*, 220 HARPERS 67, 70 (1960) (“[W]e are virtually the only profession dealing with people that makes no attempt to learn anything about them.”).

<sup>82</sup> In addition to helping a lawyer understand and deal with transference and countertransference in the lawyer/client relationship, an understanding of psychological principles will help a lawyer in interviewing and fact-gathering. See BASTRESS & HARBAUGH, *supra* note 79, at 26; WATSON, PSYCHIATRY FOR LAWYERS, *supra* note 24, at 11. It also will enable a lawyer to determine when to refer a client to a professional in another field, such as a psychotherapist. FREEMAN, *supra* note 6, at 232-33; WATSON, INTERVIEWING AND COUNSELING, *supra* note 24, at 149.

<sup>83</sup> See Watson, *supra* note 32, at 268 (“While the conflicts will arise regardless of how they are handled, the way they are normally resolved when not understood is to banish them from awareness through one of the psychological defense mechanisms.”). Peterson notes the relevance of this insight to all of the helping professions:

We also relate to professionals out of our childhood experiences with authority figures. If we were abused in our family, we may be careful not to question the professional. If we were neglected, we may hunger after a warm and sympathetic ear. If we fought our parents for control, we may respond combatively and battle the professional for the power. If the professional does not understand the origin of our presumptive response, has no limits, or is frightened of our anger, he or she may inadvertently feed our paranoia or encourage the negative ways we express our entitlement.

PETERSON, *supra* note 31, at 39.

<sup>84</sup> See FREEMAN, *supra* note 6, at 50; WATSON, INTERVIEWING AND COUNSELING, *supra* note 24, at 93; David B. Saxe & Seymour F. Kuvin, *Notes on the Attorney-Client Relationship*, 2 J. PSYCHIATRY & L. 209, 209-10 (1974); Watson, *supra* note 74, at 11.

<sup>85</sup> See PETERSON, *supra* note 31, at 40-41; SCHOENFIELD & SCHOENFIELD, *supra* note 77, at 315; Shaffer, *supra* note 23, at 214, 236. For the importance of understanding unconscious processes in order to avoid such impairment in negotiations, see Melissa L. Nelken, *Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School*, 46 J. LEGAL EDUC. 420, 423 (1996).

to a sexual liaison with a client, a hundred are tempted but resist. Imagine such a lawyer, and observe where countertransference might cause problems:

### *Love Countertransference*

Adam is a 50 year-old lawyer with a mainly criminal law practice and a solid reputation as an ethical, competent and thorough attorney. Belle seeks representation for a felony drug charge. She is young, lovely, and treats Adam with awe. Adam finds himself strongly attracted to her. He looks forward to their meetings. It comes to pass that the prosecutor offers Belle a plea deal. Adam discusses the deal with Belle, but for some reason does not push it very hard (as he might with other clients). Belle denies her guilt to him. Adam believes her. He tells her that if she is innocent, then they should go to trial. Placing her trust in his advice, she agrees. They go to trial. Belle is convicted and sentenced to twice the time she would have served had she accepted the deal the prosecutor offered.

### *Hate Countertransference*

Now imagine Adam with a different client, Carl. Carl shares two characteristics with Belle. He is the same age, and has also been arrested on a felony drug charge (no relationship to Belle's alleged offense). Carl has a strong effeminate affect. Adam finds Carl annoying and obsequious, and dreads their encounters. Despite Carl's claim of innocence—Carl says he was framed by a neighborhood miscreant who threatened "I'm gonna get you, faggot"—Adam pushes the deal offered by the prosecution. Carl begins to cry. This annoys the hell out of Adam, who yells at the young man for crying and tells him to "grow up and act like a man." Carl, cowed, agrees to the plea.

Now both of these scenarios might profitably be analyzed in terms of lawyer ethics and professional responsibility. Did Adam provide competent representation?<sup>86</sup> Did Adam adequately investigate the charges against Belle and Carl before rejecting or pushing the plea deals offered by the prosecution in their respective cases?<sup>87</sup> Should he be accountable for these actions? What if Carl was in fact innocent? However, the question with which we are here concerned is *why* Adam acted so differently in the two situations. If Adam did breach

---

<sup>86</sup> See AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1 (1983).

<sup>87</sup> See *id.* See also AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Ch. 4, *The Defense Function*, 4-4.1 (Duty to Investigate) (1992).



his professional responsibilities in these cases, what is the explanation?

It might be useful to know more about Adam. He has been married to the same woman for twenty years. His marriage has reached the comfort and complacency of its middle years. Also, Adam has a twelve year-old son who cries easily when his feelings are hurt. If we knew something about countertransference, we might be able to proffer a good guess as to why Adam behaved in these situations as he did.<sup>88</sup> And if Adam acquired a degree of self-awareness, he might know as well, and perhaps avoid such aberrant behaviors.<sup>89</sup>

### B. Resistance to Emotional Awareness

Most of us have difficulty acknowledging the influence of the unconscious in our daily lives.<sup>90</sup> Inappropriate emotional responses may befall any professional in a caring relationship with someone over whom he has power.<sup>91</sup> Among the helping professions, lawyers tend to be especially resistant to acknowledging the power of the unconscious.<sup>92</sup>

The genesis of this Article grew out of that resistance. I teach Professional Responsibility, a required upper-level course at Touro

---

<sup>88</sup> Cf. T.P. Hackett, *Which Patients Turn You Off? It's Worth Analyzing*, 46(15) MED. ECON. 94, 96 (1969):

A doctor who remains oblivious of his bias may not only be less able to help a patient, but may literally hurt him. For instance, I recall the surgery instructor who taught us how to use a sigmoidoscope. He was a burly guy who still looked like the football player he'd been in college. I observed — as did other interns — that when he performed sigmoidoscopies on effeminate men, he would never use enough lubricant, thus causing them considerable and unnecessary pain. I give him the benefit of the doubt and say he was unaware of what he was doing. He made no derisive comments about such men, but what he did to them spoke the true feelings he couldn't acknowledge: He needlessly hurt them. It wasn't malpractice, but it was not good medicine.

<sup>89</sup> See *infra* text at notes 217-35.

<sup>90</sup> See Freud, *Fifth Lecture*, *supra* note 15, at 52:

We must, I think, take into account two special obstacles to recognizing psycho-analytic trains of thought. In the first place, people are unaccustomed to reckoning with a strict and universal application of determinism to mental life; and in the second place, they are ignorant of the peculiarities which distinguish unconscious mental processes from the conscious ones that are familiar to us.

<sup>91</sup> Problems that befall lawyers also befall medical practitioners. See STEIN, *supra* note 25, at 38, 47, 68, 184, *passim*; G.L. Bibring, *Psychiatry and Medical Practice in a General Hospital*, 254 N. ENGL. J. MED. 366 (1956); James E. Groves, *Taking Care of the Hateful Patient*, 298 NEW ENG. J. MED. 883 (1978); Hackett, *supra* note 88; Solomon Papper, *The Undesirable Patient*, 22 J. CHRONIC DISEASES 777, 779 (1970); KATHY ZOPPI, *Sexuality in the Patient-Physician Relationship*, 268 JAMA 3142, 3142, 3146 (1992).

<sup>92</sup> See Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329 (1987) (denial of unconscious and irrational as underpinning of legal system).

College Law Center. Several years ago, in one particular class, we were examining regulation of sexual relations between attorneys and clients. We were discussing ABA formal opinion 92-364 and its reasoning as to how sexual relations between lawyers and clients may cause attorneys to violate their fiduciary responsibilities.<sup>93</sup> A question popped into my head that I tossed out to the students: "What if an attorney has strong amorous feelings towards a client but refrains from acting on them? Might that not muck up the competency of the representation, even without physical consummation?" The reaction of the class was swift and strong. "1984!," exclaimed one student. "Thought police!," cried another.<sup>94</sup>

This led me to contemplate lawyers' intolerance for believing in the power of emotions, as well as our inherent antipathy towards crediting psychic influences on how we perform our craft. There are a number of possible explanations for the scope and intensity of this resistance. First, the psychological profile of the typical law student or lawyer is of one who is drawn to logical thinking and rationality.<sup>95</sup> Studies using the Myers-Briggs personality indicators<sup>96</sup> have found that the great majority of high-functioning law students and lawyers are "thinkers" rather than "feelers."<sup>97</sup> Such thinkers tend to devalue

---

<sup>93</sup> See *supra* note 8.

<sup>94</sup> See Daigneault, *supra* note 44, at 15:

And what about the instance of non-sexual relationships between attorneys and their clients? If states are concerned that an attorney will become too emotionally involved, therefore prejudicing the client or the representation, then prohibiting only "sexual relations" does not completely address the problem in its entirety. Two adults are capable of engaging in a passionate relationship without engaging in physical intimacy. One might speculate as to how the states intend to prove that introducing sex into a relationship between the attorney and client is what places the professional representation at risk.

<sup>95</sup> See Watson, *supra* note 74, at 9; Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 101-02 (1968).

<sup>96</sup> For a discussion of the Myers-Briggs assessment tool, see *supra* note 7.

<sup>97</sup> See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1361-62 (1997) (describing studies indicating that "lawyers who are more objective, rational, and logical in decision-making style were the most satisfied"); *id.* at 1365-66, 1392-93 (describing studies showing that law students and lawyers differ from general population by "marked preference for Thinking over Feeling," and that this "has remained a constant over time, independent of gender influences"); Deborah Cassens Moss, *Lawyer Personality*, A.B.A. J. 34 (Feb. 1991) ("The truly happy lawyers tend to be logical, dispassionate problem solvers."); Paul Van R. Miller, *Personality Differences and Student Survival in Law School*, 19 J. LEGAL EDUC. 460, 463-65 (1967):

A . . . basic difference. . . arises from the existence of two distinct and sharply contrasting ways of coming to conclusions. One way is by the use of *thinking*, which is a logical process, aimed at an impersonal finding. The other way is by the use of *feeling*, which is the process of appreciation, equally reasonable in its fashion, bestowing on things a personal, subjective value.

*Id.* at 463 (quoting ISABEL B. MYERS, THE MYERS-BRIGGS TYPE INDICATOR 52

emotional responses.<sup>98</sup> This is then reinforced throughout traditional legal education by means such as the Socratic Method,<sup>99</sup> and its emphasis on the Rule of Reason.<sup>100</sup> In most traditional law school classes, students who proffer their “feelings” about a legal principle or outcome—without supporting such feelings with “rational” arguments—risk facing condescension, if not outright ridicule, from professors and peers alike.<sup>101</sup> Upon graduation and admission to the

---

(Princeton, N.J.: Educational Testing Service, 1962). For a discussion of the Myers-Briggs dichotomy, see *supra* note 7.

<sup>98</sup> See Daicoff, *supra* note 97, at 1372-73; Amiram Elwork & G. Andrew H. Benjamin, *Lawyers in Distress*, in DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 569, 574-76 (1996).

<sup>99</sup> See Bernard L. Diamond, *Psychological Problems of Law Students*, in *LOOKING AT LAW SCHOOL* 69-70 (Stephen Gillers ed., 4th ed. 1997):

Certainly, if Anna Freud's principle of identification with the aggressor holds as true for the educational process as it does for the developmental process of the child, the Socratic method must provide the major source of the lawyer's notorious insensitivity to the fine points of human emotional relationships. The Socratic method is a marvelous device for the emphasis of the purely logical, abstract essence of the appellate case. The deductive precision of such Socratic dialogue can further the illusion, claimed by Langdell, that law is a true science.

The process described in the text has a disproportionate impact on women. See LANI GUINIER, MICHELLE FINE & JANE BALIN, *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 66-67 (1997) (“The way things are done in law school (the Socratic method, time issue-spotting exams, large classrooms, unpatrolled and informal networks) devalues and distorts those characteristics associated with women, such as empathy, relational logic, and nonaggressive behavior.”). The Socratic method is also used to teach psychiatrists. WATSON, *PSYCHIATRY FOR LAWYERS*, *supra* note 24, at xix (preface to 1968 edition).

<sup>100</sup> See Mixon & Schuwerk, *supra* note 78, at 95; Watson, *supra* note 74, at 11; Andrew S. Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1, 12-13 (1963):

The anxiety-muting defensive maneuvers, instead of settling on the 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.

See also Eleanor M. Fox, *The Good Law School, The Good Curriculum, and the Mind and the Heart*, 39 J. LEGAL EDUC. 473 (1989):

From the nineteenth century, law school faculties have tended to favor mind over heart, except for the 1960's, when we sacrificed mind to heart. We have tended to ignore the student as whole human being. A change may be on the horizon. For the 1990's, there is a call for interrelatedness, for experience-based talking and listening, and for a new sensitivity.

*Id.* at 482.

<sup>101</sup> See Paul N. Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 461-62 (1970):

The trouble with our existing forms of education is that they are anchored to a dualistic vision of man that forces the splitting and polarization of “intellect” and “feeling,” of “mind” and “body.” To be rational, to control yourself, to be objective and uninvolved, is good. To be irrational, to lose your head, to be subjective and emotionally involved, is bad.

\* \* \*

bar, most lawyers may find little if anything in daily practice that validates or rewards emotion rather than reason.<sup>102</sup>

Thus the disposition with which the average student enters the study of law, the training received in law school, and the reinforcement that comes with practice, all contribute to lawyers' inclinations to deny the power or influence of their emotions. Lawyers, therefore, are likely more resistant than professionals in other fields (doctors,<sup>103</sup> teachers, pastors) to acknowledge the force of the unconscious on the decisions they make or to recognize countertransference reactions they visit on their clients.

Such repression of emotions takes its toll.<sup>104</sup> It is no secret that the practice of law can be extremely stressful.<sup>105</sup> The quantity of work, the pressure from clients, the high stakes involved, the worry over making payroll, all contribute to this stress. Added to these real-life, tangible pressures is the moral conflict that arises over the value

---

Neither the legal tradition nor the liberal temperament, which feeds a large part of contemporary legal theory, has ever been very hospitable to the life of feeling. Daicoff, *supra* note 97, at 1381 (law school exacerbates Thinking over Feeling tendencies, resulting in emotional distress); *id.* at 1405 (citing study concluding that Feelers are often criticized for being overly sentimental); Robert S. Redmount, *Humanistic Law Through Education*, 1 CONN. L. REV. 201, 203 (1968) ("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.").

<sup>102</sup> See Daicoff, *supra* note 97, at 1405 (citing study concluding that adversarial mentality wears on lawyers who are Feelers); SCHOENFIELD & SCHOENFIELD, *supra* note 77, at 325; WATSON, *PSYCHIATRY FOR LAWYERS*, *supra* note 24, at 3. Shaffer & Elkins suggest that emotions are generally given no thought in professional relationships outside of therapy. THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING & COUNSELING* 56 (3d ed. 1997). "In the world of feeling, a lawyer has no more expertise or knowledge than the client." *Id.* at 60. *But see* Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA J. SOC. POL'Y & L. 75 (1989) (describing studies and literature supporting theory that women bring ethic of care to legal practice which is responsive to clients' needs, including emotional needs).

<sup>103</sup> *But see* STEIN, *supra* note 25, at 36-37 (suggesting reasons why physicians resist acknowledging countertransference responses to patients).

<sup>104</sup> Professor Daicoff describes studies demonstrating that "more of the Feeling law students dropped out of law school than did the Thinking types, suggesting that Feeling may be more incompatible with the study of law, and suggesting that attorneys who preferred Feeling were less likely to be content in law practice." Daicoff, *supra* note 97, at 1366 n.149.

<sup>105</sup> A 1990 study found that attorneys experienced depression at a higher rate than any of 104 other occupations studied. Arleen Jacobius, *Coming Back From Depression*, A.B.A. J. 74 (April 1996). *See also* G. Andrew H. Benjamin & Bruce D. Sales, *Lawyer Psychopathology: Development, Prevalence, and Intervention*, in JAMES R. P. OGLOFF, *LAW AND PSYCHOLOGY: THE BROADENING OF THE DISCIPLINE* 281 (1992); Ellen I. Carni, *Stress and Productivity: For Better or Worse*, N.Y.L.J., Nov. 26, 1996, at 5, col. 1 (citing studies finding that U.S. lawyers suffer from clinical depression twice as often as general population).

of the lawyer's work.<sup>106</sup> The need to make decisions based on reason and role and to deny emotional conflict eats away at the attorney.<sup>107</sup> Commentators have noted that the inattention to interpersonal skills in law school contributes to the impairment of psychological well-being among law students and lawyers.<sup>108</sup> This undoubtedly contributes to the high rate of substance abuse and clinical depression among lawyers.<sup>109</sup> It likely also helps explain why so many lawyers are discontented with the practice of law.<sup>110</sup>

---

<sup>106</sup> See Watson, *supra* note 74, at 14:

The legal counselor in his professional operations, has from the offset a potentially difficult problem in that he must serve the best interests of his client, and at the same time maintain his responsibility to the bar. Thus he serves two masters who may have different goals and thus places him in the psychologically difficult position of balancing and judging the merits and relationships between these competing claims. I do not suggest that this is inappropriate or undesirable, but merely wish to point out that if one were to contrive a psychological situation which would produce great stress and anxiety, this set of circumstances could hardly be improved upon.

See also Amiram Elwork, *From Stress and Depression to Contentment: Psychology Can Change Your Life*, 13 *COMPLEAT LAW.* 54, 54-55 (1996) (“[M]any lawyers are . . . conflicted about their roles in society. Their duty to zealously promote their clients’ special interests creates hostility directed toward them by the general public and reduces their own sense of self-esteem.”).

<sup>107</sup> See Daicoff, *supra* note 97, at 1401-02 (describing study suggesting that “submerging or denying one’s care orientation and adopting a rights orientation in order to ‘fit in’ may result in psychological discomfort”).

<sup>108</sup> See Benjamin & Sales, *supra* note 105, at 289-90. “Conventional legal education that concentrates on the development of analytic skills while ignoring interpersonal development may increase distress levels and prevent the alleviation of symptoms.” *Id.*

<sup>109</sup> See *id.* at 296 (noting that one-third of practicing lawyers at any given time are likely suffering from depression, alcohol or drug addiction); Deborah Brooke, *Impairment in the Medical and Legal Professions*, 43 *J. PSYCHOSOMATIC RES.* 27, 27-29 (1997); Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 *GEO. J. LEGAL ETHICS* 547, 555-57 (1998) (summarizing studies demonstrating high incidence of depression, alcoholism and other psychological problems among lawyers); Susan Daicoff, *Making the Practice of Law Therapeutic for Lawyers: Lawyer Distress & Lawyering 2000* (presentation at the AALS Annual Meeting, New Orleans, LA, January 9, 1999) (graphs demonstrating disproportionate incidence of alcoholism, depression and other psychological distress among lawyers as compared to the general population). See also Carl Anderson, Thomas G. McCracken & Betty Reddy, *Addictive Illness in the Legal Profession: Bar Examiners’ Dilemma*, 7 *PROF. LAW.* 16, 18 (1996):

According to the “Report of the AALS Special Committee on Problems of Substance Abuse in the Law School” (1994), the Law Student Survey showed significantly higher usage rates by law students of alcohol and drugs, such as tranquilizers, barbiturates and marijuana, for each of three periods (lifetime, past years and past months) than by the high school or college graduates who also were surveyed.

<sup>110</sup> See ABA SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* 220-21 (1992) (*hereinafter* “MACCRATE”) (citing numerous bar association studies documenting significant job dissatisfaction among attorneys); Moss, *supra* note 97, at 34 (noting high incidence of dissatisfaction with practice of law, especially by women); Daicoff, *Asking Leopards*,

Lawyers' resistance to acknowledging the power of their emotional lives may help explain something else as well. There appears to be little awareness within our profession of the writings of those who have urged previous generations of lawyers, legal educators and law students to learn about basic psychology and the operation of unconscious processes in the practice of law.<sup>111</sup> The next section will examine that literature.

C. *Writings on Lawyering and Emotional Intelligence,  
1930 to the Present*

Jerome Frank's *Law and the Modern Mind*, published in 1930, was perhaps the first important American work to incorporate Freud's teachings into legal jurisprudence.<sup>112</sup> Judge Frank recommended that judges receive training in psychology so as to better understand not only the motivations of others, but their own less conscious tendencies:

[T]he judge should be not a mere thinking-machine but well trained, not only in rules of law, but also in the best available methods of psychology. And among the most important objects which would be subject to his scrutiny as a psychologist would be his own personality so that he might become keenly aware of his own prejudices, biases, antipathies, and the like, not only in connection with attitudes political, economic and moral, but with respect to more minute and less easily discoverable preferences and disinclinations.<sup>113</sup>

Frank fostered a school of legal realists who explored psychological aspects of jurisprudence.<sup>114</sup> In 1953, Judge Frank participated in a symposium in the *Ohio State Law Journal* on Psychology and Law.<sup>115</sup>

---

*supra* note 109, at 3-4 (summarizing studies demonstrating rise in lawyer dissatisfaction); Daicoff, *Lawyering 2000*, *supra* note 109 (charts demonstrating lawyer dissatisfaction). See also Debra Baker, *Cash-and-Carry Associates*, A.B.A. J. 40-44 (May 1999) (describing large number of associates cashing out after a few years due in significant part to dissatisfaction with grueling schedules and lack of training and mentors).

<sup>111</sup> I count myself as one among the ignorant majority. Before I began my research, I was unaware that anyone had thought or written about countertransference in the lawyer/client relationship, and I was certainly surprised at the extent of such literature. However, my former colleague, Michael Perlin, who has a much better memory than I, insists we once discussed the subject around the faculty lunchtable at New York Law School in 1986 or 1987.

<sup>112</sup> Jerome Frank, *The "Conceptual" Nature of Psychological Explanations*, in *LAW AND THE MODERN MIND* 356-61 (2d printing 1930). In 1943, Harold Lasswell and Myres McDougal had a vision of introducing the social sciences into legal education, at least at Yale. The revolution never came, and the experiment was pronounced a failure. See Fox, *supra* note 100, at 476.

<sup>113</sup> Frank, *supra* note 112, at 147 n.\*.

<sup>114</sup> See James A. Elkins, *A Humanistic Perspective in Legal Education*, 62 *NEB. L. REV.* 494, 505 n.45 (1983).

<sup>115</sup> Jerome N. Frank, *Judicial Fact-Finding and Psychology*, 14 *OHIO ST. L.J.* 183 (1953).

In his foreword to that symposium, Professor Warren Hill wrote:

It is small wonder . . . that [Freud's] formulations and insights which have so drastically altered thinking in other significant social disciplines have begun to seep through the conservative barriers of the legal profession, which, preeminently, has always concerned itself with attempting to understand and control human behavior through the use of various sanctions and rewards.<sup>116</sup>

The relevance of such theory to skills training was noted by Dean Erwin Griswold, formerly dean of the Harvard Law School. In a 1955 speech delivered in St. Louis, Missouri, Dean Griswold called upon the bar and the legal academy to recognize the need for human relations training in law school.<sup>117</sup> Dean Griswold urged lawyers to study social science literature on human relations.<sup>118</sup> Noting that the average lawyer spent far more time interacting with people than reading and arguing appellate cases, Dean Griswold argued that such training might help lawyers understand their clients' emotional needs, and keep their own in check.<sup>119</sup>

Dean Griswold's speech inspired Professor Howard Sacks, now Professor Emeritus at the University of Connecticut School of Law, to offer an experimental human relations course at Northwestern Law School during the 1957-58 school year.<sup>120</sup> The course, entitled Professional Relations, was apparently the first course at any law school to endeavor to apply human relations training to lawyers.<sup>121</sup> The experience persuaded Professor Sacks that further experimentation should continue.<sup>122</sup>

Professor Andrew Watson, a psychiatrist who later held a joint appointment at the University of Michigan law and medical schools, participated in a similar experiment first at the University of Pennsylvania, and later at Michigan.<sup>123</sup> In his endeavors to bridge the gap

---

<sup>116</sup> Warren P. Hill, *Foreword*, 14 OHIO ST. L.J. 2, 117-18 (1953).

<sup>117</sup> Erwin N. Griswold, *Law Schools and Human Relations*, 37 CHI. B. RECORD 199, 201 (1956).

<sup>118</sup> *Id.* at 202-04.

<sup>119</sup> *Id.* at 203-04.

<sup>120</sup> Howard R. Sacks, *Human Relations Training for Students and Lawyers*, 11 J. LEGAL EDUC. 316, 317 (1959).

<sup>121</sup> *Id.* at 321 n.13.

<sup>122</sup> *Id.* at 321. The course, offered without credit, was given for a total of eight hours in two-hour sessions over the span of two weeks. *Id.* at 322. Professor Sacks expressed the hope that other law teachers would join in the experiment, both in offering stand-alone courses such as Professional Relations and in integrating human relations training into the regular curriculum. *Id.* at 343.

<sup>123</sup> Andrew S. Watson, *The Law and Behavioral Science Project at the University of Pennsylvania: A Psychiatrist on the Law Faculty*, 11 J. LEGAL EDUC. 73 (1958); Andrew S. Watson, *Teaching Mental Health Concepts in the Law School*, 33 AM. J. ORTHOPSYCH. 115, 120 (1963).

between psychiatry and the practice of law, Watson published numerous articles<sup>124</sup> and two books<sup>125</sup> for a legal audience over a twenty-year period commencing in 1958. His work explored the clinical application of psychotherapeutic insights to legal education and the practice of law.<sup>126</sup> Watson repeatedly urged legal educators to incorporate exposure to basic psychiatric tenets, including countertransference, into mainstream legal education.<sup>127</sup>

In 1964, Harrop Freeman, a Cornell law professor, published the first coursebook devoted to the techniques and psychology of interviewing and counseling clients.<sup>128</sup> In a preface to the book, Dean Griswold praised the work for recognizing the importance of cultivating interpersonal skills for the effective practice of law.<sup>129</sup> Dean Griswold opined that by seeking to fill a void in legal education—a field devoted until then almost entirely to the Langdellian case method—Freeman's contribution was “almost as much a pioneering book as was Dean Langdell's *Cases on Contracts*.”<sup>130</sup> In addition to introducing students to the psychological aspects of the lawyering skills of interviewing and counseling, the book contained numerous case studies exploring transference and countertransference in actual lawyer/client interactions.<sup>131</sup>

Another important contributor to the field was Alan Stone, Professor of Law and Psychiatry at Harvard University.<sup>132</sup> In a 1971 law review article, Professor Stone lamented that sixteen years had passed since Dean Griswold had made his oft-cited declaration that legal education neglected human relations training. “In spite of Dean Griswold's enthusiasm,” Professor Stone wrote, “law schools . . . have largely ignored the responsibility of teaching interviewing, counseling,

---

<sup>124</sup> Watson, *Law and Behavioral Science Project*, *supra* note 123; Watson, *Teaching Mental Health Concepts*, *supra* note 123; Watson, *supra* note 100, at 1; Watson, *supra* note 74, at 7; Watson, *supra* note 95, at 91; Watson, *supra* note 32, at 248, 265-78.

<sup>125</sup> WATSON, *INTERVIEWING AND COUNSELING*, *supra* note 24; WATSON, *PSYCHIATRY FOR LAWYERS*, *supra* note 24.

<sup>126</sup> Professor Watson wrote extensively about transference and countertransference in the lawyering process. *See, e.g.*, WATSON, *INTERVIEWING AND COUNSELING*, *supra* note 24, at 23-26, 146-53; WATSON, *PSYCHIATRY FOR LAWYERS*, *supra* note 24, at 8-11.

<sup>127</sup> WATSON, *INTERVIEWING AND COUNSELING*, *supra* note 24, at 81-82; WATSON, *PSYCHIATRY FOR LAWYERS*, *supra* note 24, at 14; Watson, *Law and Behavioral Science Project*, *supra* note 123, at 74-75; Watson, *supra* note 32, at 265-78; Watson, *supra* note 100, at 16-20.

<sup>128</sup> FREEMAN, *supra* note 6. Although not technically a *casebook*—at least not in the traditional sense of the word—the book was published as part of West Publishing Co.'s American Casebook Series.

<sup>129</sup> *Id.* at ix.

<sup>130</sup> *Id.* at x.

<sup>131</sup> *Id.* at 59-229.

<sup>132</sup> ALAN STONE, *LAW, PSYCHIATRY, AND MORALITY* 199 (1984); Alan Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971).



negotiating, and other human relations skills, and Harrop Freeman's work has not generated a new Langdellian dynasty."<sup>133</sup> Professor Stone noted some attempts (such as those by Professor Watson) to introduce law students to psychoanalytic theory and the emotional dimensions of lawyering.<sup>134</sup>

A 1970 law review article by Professor Thomas Shaffer of Notre Dame Law School appears to have been the first to use transference/countertransference theory to inform legal doctrine rather than legal technique.<sup>135</sup> The article made several important contributions. It provided a detailed overview of psychoanalytic literature on transference and displacement as manifest in the lawyer/client relationship.<sup>136</sup> It suggested how transference could cause a grateful patient or client to leave a generous bequest to the helping professional, and offered a framework for how a court might decide whether such transference constitutes undue influence.<sup>137</sup> Additionally, noting Dr. Watson's

---

<sup>133</sup> Stone, *Legal Education*, *supra* note 132, at 428. Professor Stone notes the limitation of the Freeman book's case studies:

Cases like those collected by Professor Freeman do have some utility, but often they neither have the psychological depth nor the complexity that allows for rigorous analysis; nor do they involve the student personally in a way which permits the psychological elements to come to life and be comprehended at the level of emotionally significant learning.

*Id.* at 429.

Professor Stone discusses the relevance of the work of Carl Rogers—"one of the leading figures in the area of psychological counseling"—on "congruence" to lawyering skills. *Id.* at 433-34. As explained by Stone:

Rogers' concept of "congruence" involves an attempt by the interviewer to experience the feelings of the moment, to attain an awareness of the flux of emotional responses that ordinarily are dampened or go on outside the scope of attention, and to be willing and able to express these feelings to the client . . . . Rogers does not assume that this always, or even ever, is completely achieved, but it is a goal toward which the interviewer strives. It is the emotional compass which guides him in his counseling behavior.

If congruence were adopted as a goal by the new generation of lawyers, it would obviously imply a totally new professional demeanor which would have as its most salient feature the encouragement of human intimacy.

*Id.* at 434.

<sup>134</sup> "A number of techniques have been introduced at law schools to meet the need. These range all the way from course work entirely devoted to psychoanalytic theory and legal counseling to innovations which are directed at making law students more sensitive to emotional issues. The latter, more recent innovations, seem to be aimed at providing the future lawyer with some insight into his own emotional reactions. . . . Over the past few years a number of enterprising professors of law have adapted these group experiences [used by Watson in large criminal law classes] for small second and third-year elective courses." *Id.* at 436-37. For a review of Law & Psychiatry courses at American law schools as of 1965, see John M. Suarez, *Reciprocal Education—A Key to the Psychiatrico-Legal Dilemma*, 17 J. LEGAL EDUC. 316 (1965).

<sup>135</sup> Shaffer, *supra* note 23, at 197.

<sup>136</sup> *Id.* at 204-18.

<sup>137</sup> *Id.* at 218-35.

then recently published work, *Psychiatry for Lawyers*, it cautioned attorneys to recognize that transference (or countertransference) may occur in their relationships to their clients.<sup>138</sup>

In 1976, Professor Shaffer published *Legal Interviewing and Counseling in a NutShell*, part of the West Publishing nutshell series.<sup>139</sup> Unlike most nutshells, however, the material in this work *supplemented*, rather than summarized, available texts. In a subchapter entitled "Dependence," Professor Shaffer wrote extensively about transference, referencing the work of Freud, Jung, Rogers and others.<sup>140</sup> Interestingly, the word "countertransference" does not appear in these original materials.<sup>141</sup> Professor Shaffer, together with Professor James Elkins of the West Virginia University College of Law, revised these materials twice: once in 1987<sup>142</sup> and again in 1997.<sup>143</sup> These later editions each contained a separate section on countertransference.<sup>144</sup>

In addition to co-authoring the nutshell, Professor Elkins made several other contributions to the literature in which he advocated training in human relations and specifically noted problems of transference and countertransference.<sup>145</sup> Professor Elkins discussed the importance of self-awareness and insight for the practicing attorney, arguing that "[t]hrough self-study, the lawyer achieves a greater awareness of unconscious behavioral traits that affect interactions with clients."<sup>146</sup> In an article on counseling in divorce cases, Professor Elkins cautioned attorneys to be aware of inappropriate emotional responses on the part of both attorney and client, and made suggestions for resolving such problems.<sup>147</sup>

In a 1983 law review article, Professor Elkins argued for the revitalization of a humanistic perspective in legal education.<sup>148</sup> He ob-

---

<sup>138</sup> "Annoyance or impatience or anxiety in the lawyer . . . affects his clients far more than he realizes." *Id.* at 235-36. *See supra* note 125.

<sup>139</sup> THOMAS L. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1976).

<sup>140</sup> *Id.* at 160-80.

<sup>141</sup> Shaffer does, however, write about the need for the lawyer to have self-awareness. *Id.* at 181-93.

<sup>142</sup> SHAFFER & ELKINS, *LEGAL INTERVIEWING AND COUNSELING* (2d ed. 1987).

<sup>143</sup> SHAFFER & ELKINS, *supra* note 102.

<sup>144</sup> SHAFFER & ELKINS (2d ed.), *supra* note 142, at 66-71; SHAFFER & ELKINS (3d ed.), *supra* note 102, at 56-61. This material draws heavily on the work of Saxe & Kuvin, *supra* note 84.

<sup>145</sup> Elkins, *supra* note 80; Elkins, *supra* note 76; Elkins, *supra* note 114.

<sup>146</sup> Elkins, *supra* note 76, at 760.

<sup>147</sup> Elkins, *supra* note 80, at 243-44. In this article, Professor Elkins discusses at length Andrew Watson's work on recognizing and resolving transference and countertransference in the lawyer/client relationship. *Id.*

<sup>148</sup> Elkins, *supra* note 114.

served that a psychoanalytic approach, popular in the jurisprudence of the 1960's and early 1970's, had fallen into disfavor by the 1980's.<sup>149</sup> Professor Elkins speculated that the loss of interest might have been due to a growing realization among academics that psychoanalytic and humanistic perspectives were unlikely to engender substantial change in legal education.<sup>150</sup> "[L]egal educators," he said, moved to take up other concerns as they realized, "conscious[ly] or unconscious[ly], that counseling was not going to be the catalytic agent for change."<sup>151</sup>

Continuing what Professors Freeman, Shaffer and Elkins had begun, Professor Robert Bastress, also of West Virginia University College of Law, and Professor Joseph Harbaugh, now Dean at Nova Southeastern University Law Center, published a text on interviewing, counseling and negotiation that is now widely used in clinical courses to teach these skills and to introduce students to the various schools of psychotherapy.<sup>152</sup> As the authors explained, the text was designed to attune students to the less conscious variables of lawyering:

Awareness of psychological forces, personality makeup, and human motivation makes it more likely that you can accurately perceive the nature and extent of a client's problem and can formulate a responsive strategy. *That knowledge also allows you to more easily recognize what is going on inside your own mind and how your feelings or needs could affect your handling of a case and your relations with others. That self-insight is essential to effective lawyering.*<sup>153</sup>

Other writers, too, have noted the relationship of the unconscious, transference and countertransference to the practice of law.<sup>154</sup> For example, a 1977 law review article co-authored by Mark K. Schoenfeld, a law professor, and Barbara Pearlman Schoenfeld, a social worker, offered practical advice for recognizing and resolving "emotional interference" in the lawyer/client counseling relation-

---

<sup>149</sup> *Id.* at 508. See, e.g., JAY KATZ, JOSEPH GOLDSTEIN & ALAN M. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* (1967); Redmount, *supra* note 101.

<sup>150</sup> Elkins, *supra* note 114, at 508 n.56.

<sup>151</sup> *Id.* For a thoughtful analysis of why the profession and the academy have subordinated mental disability law scholarship and belittled its significance, see Michael Perlin, *Mental Disability, Sanism, Pretextuality, Therapeutic Jurisprudence, and Teaching Law*, Presentation at the Society of American Law Teachers Conference (SALT), Minneapolis, MN (Sept. 1994) (on file with the author).

<sup>152</sup> BASTRESS & HARBAUGH, *supra* note 79. Their book is one of two clinical texts regularly used in courses on interviewing, counseling and negotiating. The psychological dimension of the book may well contribute to its popularity among clinicians.

<sup>153</sup> *Id.* at 19 (emphasis added).

<sup>154</sup> See, e.g., Joseph Allegretti, *Shooting Elephants, Serving Clients: An Essay on George Orwell and the Lawyer-Client Relationship*, 27 CREIGHTON L. REV. 1, 6-7 (1993); Saxe & Kuvin, *supra* note 84, at 209-10; Schoenfeld, *supra* note 76, at 25.

ship.<sup>155</sup> A 1993 article by Professor Joan Meier discussed the importance of educating clinic students about the operation of countertransference in representation of domestic violence victims.<sup>156</sup> Professor Melissa Nelken authored a 1996 article on psychoanalysis and negotiation, that focused on the importance of lawyers' self-understanding to avoid counterproductive behavior.<sup>157</sup> Even more recently, Professor Linda Mills has written of the need for state actors to recognize and resolve their own traumatic countertransference reactions in interactions with victims of intimate abuse.<sup>158</sup>

#### D. *Overcoming Resistance to the Emotional Dimension of Lawyering*

As the preceding discussion suggests, many writers have attempted to educate the bar and the academy about the importance of understanding the operation of the unconscious on the practice of law. Yet most of this literature appears to be largely unknown outside of a small community with a particular interest in or inclination towards psychology. It is likely that the earlier-discussed phenomenon of resistance within the profession<sup>159</sup> is at least partly responsible for the relative obscurity of these writings.

There are several reasons for guarded optimism that the profession and the academy may be increasingly inclined to give credence to the power of psychic forces. One pragmatic impetus for lawyers is the greater awareness, if not greater incidence, of sexual abuse of clients.<sup>160</sup> Increased regulation of and sanctions for such relationships inevitably heighten interest in the root causes of the problems. But there are other, more hopeful signs that, as we enter the twenty-first century, emotional intelligence may come into its own as a recognized and essential attribute for lawyers. One such sign is the movement towards mainstreaming public discourse about mental and emotional illness. The second is a convergence of several threads of scholarship that focus on bringing humanism to bear on the lawyer/client relationship.

---

<sup>155</sup> Mark K. Schoenfield & Barbara Pearlman Schoenfield, *Interviewing and Counseling Clients in a Legal Setting*, 11 AKRON L. REV. 313 (1977).

<sup>156</sup> Meier, *supra* note 55, at 1349-56.

<sup>157</sup> Nelken, *supra* note 85.

<sup>158</sup> LINDA G. MILLS, *THE HEART OF INTIMATE ABUSE: NEW INTERVENTIONS IN CHILD WELFARE, CRIMINAL JUSTICE, AND HEALTH SETTINGS* 111-13, 116-18, 128, 150-51 (1998); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. (forthcoming Dec. 1999).

<sup>159</sup> See *supra* notes 90-104 and accompanying text.

<sup>160</sup> See *supra* notes 38-40 and accompanying text.

(1) *The Mainstreaming of Mental Health*

Both society in general and the Bar in particular are increasingly receptive to examining and addressing issues of mental health and well-being. In recent years, for example, there has been a burgeoning of programs offered by bar associations to address emotional problems such as depression, alcoholism and substance abuse experienced by their members.<sup>161</sup> As more of us encounter such problems among ourselves, our families, friends and colleagues, we are less likely to view such problems as moral failings, and more likely to see them as illnesses requiring appropriate attention and treatment.

Our culture in general is progressing towards de-stigmatization and increasingly open dialogue about emotional and mental problems. That trend is evident, for example, in recent legislation requiring greater parity in health insurance benefits for the treatment of emotional and mental illness.<sup>162</sup> We can find evidence as well in electoral

---

<sup>161</sup> See discussion of the problem at notes 105, 109 and accompanying text. Benjamin and Sales discuss the importance of effective Lawyer Assistance Programs (LAPs). Benjamin & Sales, *supra* note 105, at 297-301. Such programs now exist in all 50 states. Anderson, McCracken & Reddy, *supra* note 109, at 19; Robert A. Stein, *Aiding the Practice Impaired*, A.B.A. J. 82 (May 1999). The ABA publishes a directory of approximately 100 LAPs run by state and local bar associations. ABA COMMISSION ON LAWYER ASSISTANCE PROGRAMS, DIRECTORY OF STATE AND LOCAL LAWYER ASSISTANCE PROGRAMS (1998). The New York State Bar Association's LAP, for example, was established in 1990 to aid attorneys and their family members to deal with alcoholism and drug abuse. Tracey Tully, *Guiderland Judge Cited for Outreach*, TIMES UNION, May 15, 1997, at B2. Since its inception the Lawyer Assistance Program has assisted approximately 350 attorneys a year with alcohol and drug abuse. More recently, the LAP has been focusing on broader issues for attorneys, such as depression. Telephone interview with Ray Lopez, Director of the New York State Bar Association Lawyer Assistance Program (August 7, 1998).

Recent efforts to limit inquiry by bar examiners into an applicant's mental health history are yet another example of increasing de-stigmatization of emotional problems. See H. Rutherford Turnbull III, *Limiting Mental Health Inquiries: ABA urges bar examiners to narrow focus to current, recent disabilities*, A.B.A. J. 131 (April 1995); Allison Wielobob, *Bar Application Mental Health Inquiries: Unwise and Unlawful*, 24 Hum. Rts. 12 (Winter 1997); See also Anderson, McCracken & Reddy, *supra* note 109 (advocating rehabilitative approach to character and fitness inquiries into applicants' mental health and substance abuse problems). A 1994 resolution of the ABA House of Delegates provides as follows:

BE IT RESOLVED that the American Bar association recommends that when making character and fitness determinations for the purpose of bar admission, state and territorial bar examiners, in carrying out their responsibilities to the public to admit only qualified applicants worthy of the public trust, should consider the privacy concerns of bar admission applicants, tailor questions concerning mental health and treatment narrowly in order to elicit information about current fitness to practice law, and take steps to ensure that their processes do not discourage those who would benefit from seeking professional assistance with personal problems and issues of mental health from doing so.

*Id.* at 17.

<sup>162</sup> See Mental Health Parity Act of 1996, 29 U.S.C. § 1185(a). The Act does not, however, require a health plan to include mental health benefits. *Id.*, § 1185(a)(b)(1). Furthermore, it does not apply to businesses employing fewer than 50 people. *Id.*, § (c)(1).

politics. Once, the revelation that a candidate for public office had sought counseling or medication for treatment of clinical depression would likely have ended his or her campaign.<sup>163</sup> In recent years, a candidate's history of emotional illness might give voters pause, but perhaps no more so than would a history of physical illness. In any event, it would not constitute a *per se* disqualification from holding office.<sup>164</sup>

---

According to *The Wall Street Journal*, the Act does not prohibit higher deductibles or co-payments for mental health treatment, and allows employers to limit hospital stays or the number of therapy sessions for psychiatric illness. Nancy Ann Jeffrey, *Court Allows Mental-Illness Benefit Caps*, WALL ST. J., Oct. 5, 1997, at B1. According to the *L.A. Times*, this "victory was largely symbolic" as it exempts any employers whose health care costs rise by 1% or more in a year. Don Morian & Julie Marquis, *State Senate OK's Insurance Bill on Mental Health*, L.A. TIMES, June 12, 1998, at A1 (available in 1998 WL 2436461). The Clinton administration is drafting standards to require complete parity in private health insurance plans for federal employees. Robert Pear, *Equal Coverage of Physical and Mental Ills is White House Goal for Federal Employees*, N.Y. TIMES, May 25, 1999, at A22, col. 1.

Many states already provide for greater parity. Maryland, Minnesota, Vermont and Arkansas apply their parity statutes to all mental illnesses. *Perspectives: States Forge Ahead of Feds on Parity*, 51 MED. & HEALTH 48 (December 15, 1997). And, with the exception of Arkansas, these states require parity for substance abuse disorders as well, which the Federal Legislation does not. *Id.* Bills are pending in other states. See Richard Locker, *Equality in Mental Coverage Nearly Law*, COM. APPEAL (Mem. TN), Apr. 24, 1998 at B1 (available in 1998 WL 11202157). In May 1998, Tennessee Governor Sundquist signed into law Tennessee HB 3177/SB 2798, applying to employers of 25 or more employees. See *Consumer Protections Mandated Under Massachusetts Governor's Executive Order*, 6 WASH. HEALTH WK. 20 (June 8, 1998). In California, the State Senate approved mental health parity legislation, 1997 California Assembly Bill No. 1100, on June 11, 1998, which Governor Pete Wilson vetoed. See Julie Marquis & Lisa Richardson, *Wilson Vetoes Mental-Illness Coverage Bill Health*, L.A. TIMES, Sept. 30, 1998, at A3.

<sup>163</sup> Thomas Eagleton was forced off the Democratic ticket as a vice-presidential candidate upon the revelation that he had once been hospitalized for depression. See CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENTS' MEN* 45 (1974); Frank Rich, *The Last Taboo*, N.Y. TIMES, Dec. 23 1997, at A19, col. 1.

<sup>164</sup> Michael Dukakis' ratings went down upon the revelation that he had seen a psychiatrist after his brother died, Rich, *supra* note 163, but he remained a strong presence in the presidential race. Lynn Rivers, congresswoman from Ann Arbor, Michigan, revealed that she suffered from a bipolar mood disorder, and was nonetheless re-elected. *Id.* Governor Lawton Chiles of Florida was twice elected despite his revelation in 1987, during his term as a United States senator, that he had sought medical treatment for depression and had taken antidepressants. "Although questions were raised about Mr. Chiles's mental health during the 1990 campaign for governor, he was elected handily and re-elected in 1994." Richard Grayson, Letter to the Editor, N.Y. TIMES, Dec. 27, 1997, at A10, col. 6. *But see* Francis X. Clines, *Does Clinton Need to Turn to Ministers, or a Psychotherapist, Too?* N.Y. TIMES, Sept. 17, 1998, at A27, col. 1 ("For many veterans of the political wars, the merest hint of any psychological flaw is the ultimate taboo."). For a thoughtful, albeit somewhat whimsical, exploration of whether a psychiatrist should occupy a full-time position in the White House, see David Wallis, *Every First Family is Unhappy in Its Own Way*, N.Y. TIMES, March 14, 1999, sec. 4, at 4, col. 1. Mr. Wallis' essay gives credence to the increasing destigmatization of emotional and mental health issues, while at the same time underscoring how far we as a nation have yet to go.

It is interesting to compare the American experience with that of Norway. See *Norwe-*

Lately, it is not uncommon for reputable journalists to air their family's and their own histories of depression and addiction in the popular media.<sup>165</sup> And in 1997, a major league baseball player went public with his own diagnosis and treatment of clinical depression—a rare and noteworthy event.<sup>166</sup>

If we are able to accept that any one of us is at risk of serious emotional dysfunction,<sup>167</sup> it should not be difficult to accept that some lesser impairments caused by unconscious forces may affect many of us in our ordinary relationships.<sup>168</sup> We must be open to the possibility that emotions we don't understand, and of which we are often oblivious, may affect how we act towards our clients.

## (2) *Law and Humanism Revitalized*

Recent scholarship suggests still another reason for optimism. We can identify both a burgeoning and a convergence of scholarship from several different schools of thought, all revealing an awareness of the importance of psychological sensitivity and knowledge—of emotional intelligence—in the practice of law.<sup>169</sup> Among these are

---

*gian Premier's Illness Prompts Sympathy and Worries*, N.Y. TIMES, Sept. 20, 1998, at A12, col. 1 (describing Norwegians' sympathy with Prime Minister's several weeks of sick leave for depression). "It must be allowed for a politician also to show that people can get sick and react to stress." *Id.* (quoting Norwegian schoolteacher).

<sup>165</sup> See, e.g., Elisabeth Bumiller, *Funny Columnist With a Melancholy Bent*, N.Y. TIMES, Sept. 15 1998, at B2, col. 4 (about columnist Art Buchwald's struggle with depression); Frazier Moore, *Wallace Talks About the Pain of Depression in HBO's Dead Blue*, AP, 1998 WL 3132501 (describing Mike Wallace's HBO special, *Dead Blue: Surviving Depression*, Jan. 6, 1998, and Wallace's own struggle with depression); David Samuels, *Saying Yes to Drugs*, THE NEW YORKER, Mar. 23, 1998, at 48 (about Bill Moyers PBS series on addiction, and Moyers' son's own struggle with addiction). See also WILLIAM STYRON, DARKNESS VISIBLE: A MEMOIR OF MADNESS 1990 (recounting author's struggle with incapacitating depression).

<sup>166</sup> See Frank Rich, *Harnisch's Perfect Pitch*, N.Y. TIMES, May 1, 1997, at A27, col. 5 (about New York Mets pitcher Pete Harnisch). See also Clines, *supra* note 164 (quoting home run king Mark McGuire, who ascribed his success to psychotherapy: "Guys tell me, 'I'll never go to therapy,' . . . Hey, everybody needs therapy.").

<sup>167</sup> See Michael Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 93 n.174 (1991) ("It is probably worth pointing out that, while race and sex are immutable, we all *can* become mentally ill. . .").

<sup>168</sup> See Shaffer, *supra* note 23, at 237:

Lawyers are not analysts and clients are not in the law office for analysis. But people who come to law offices are troubled, and the lawyers who talk to them—whether they admit it or not—are also troubled.

<sup>169</sup> See Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skill, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 602 (1994). Professor Menkel-Meadow cites "[r]ecent scholarship which seeks to explore the emotional, empathic, and human side of law and lawyering" as evidence of increasing interest in what she characterizes as the "art" of lawyering. *Id.* See also Winick, *supra* note 51 (describing several approaches to lawyering that share concern with psychological sensitivity to "emotional climate of the attorney-client relationship").

Therapeutic Jurisprudence,<sup>170</sup> especially in its intersection with preventive lawyering,<sup>171</sup> affective lawyering,<sup>172</sup> lawyering with an “ethic of care”<sup>173</sup> and Creative Problem Solving.<sup>174</sup>

Therapeutic Jurisprudence calls for an examination of the therapeutic and anti-therapeutic consequences of laws, legal systems and practices, with the goal of increasing psychological well-being, consistent with protecting legal rights.<sup>175</sup> What preventive lawyering adds to that is counseling and planning to *anticipate* “psycholegal soft spots” in order to eliminate or ameliorate potential problems.<sup>176</sup> An oft-used example is a case that involved an “undue influence” challenge to a will.<sup>177</sup> The decedent had left her modest estate, including her home, to her daughter. The daughter, who lived with her mother during the

---

<sup>170</sup> See *supra* note 79.

<sup>171</sup> See, e.g., Marc W. Patry, David B. Wexler, Dennis P. Stolle & Alan J. Tomkins, *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439 (1998); Dennis P. Stolle, David B. Wexler, Bruce J. Winick & Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997); David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REVISTA JURIDICA U.P.R. 317 (1998); Winick, *supra* note 51.

<sup>172</sup> See, e.g., Menkel-Meadow, *supra* note 169, at 606-07, 619 (comparing Professor Tony Kronman’s prescription for teaching affective skills of lawyering in law school with its absence in MacCrate report); *id.* at 610 (criticizing MacCrate report as advocating instrumental approach to counseling, as opposed to affective approach that “attends to emotional and interpersonal factors that might be affecting the communication,” expresses “caring” for client’s concerns, puts the client at ease, and actively listens “so as to create a relationship, not just to process information”); Mills, *supra* note 23, at 1225 (arguing that clients who are victims of domestic violence are better served by “affective lawyers” who are able to transcend differences and find emotional commonality with clients).

<sup>173</sup> See Daicoff, *supra* note 97, at 1398-1400 (describing studies suggesting gender difference in incidence of “ethic of care” among lawyers, that women law students rated contextual factors such as relationships, care and communication more highly than male law students); Ellmann, *supra* note 9 (examining how lawyer who seeks to practice with ethic of care and connect emotionally with clients and other persons might exercise professional responsibilities under existing norms); Theresa Glannon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992) (discussing strategies utilized by author to integrate ethic of care pedagogy into first-year law school curriculum); Menkel-Meadow, *supra* note 169, at 620. The term “ethic of care” was originally coined by Carol Gilligan in her work on gendered differences in moral reasoning. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 3 (1982).

<sup>174</sup> See, e.g., James M. Cooper, *Towards a New Architecture: Creative Problem Solving and the Evolution of Law*, 34 CAL. W. L. REV. 297 (1998); Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351 (1998).

<sup>175</sup> See Wexler, *Reflections*, *supra* note 79, at 228.

<sup>176</sup> See Wexler, *supra* note 171, at 320; Winick, *supra* note 51, at 4.

<sup>177</sup> See, e.g., Patry *et al.*, *supra* note 171, at 443-45; Marjorie Silver, *TJ: Where the Law Meets the Behavioral Sciences*, L.I. BUSINESS NEWS, Aug 17-23, 1998, at 48 (describing presentation by Judge Peggy Fulton Hora at First International Conference on Therapeutic Jurisprudence in Winchester, England in July, 1998).



latter years of the mother's life, had limited resources and no home of her own. The son, a person of independent means and owner of his own home, challenged the will, claiming undue influence by the daughter. The judge rejected the challenge and, ruling from the bench, said something akin to the following:

From what I can see, your mother wasn't an easy person. In fact she could be a very difficult person, who seldom showed her emotions. I imagine she wasn't someone who told her children she loved them very often. But just because she left her estate to your sister, and not to you, doesn't mean she didn't love you very much.

At that point, according to the judge, the son put his head in his hands and sobbed.<sup>178</sup>

A lawyer helping a client draw up a will should not only explain the legal consequences of implementing the client's wishes but also explore with the client the likely effect of those actions on the client's next of kin. In the above example, a lawyer sensitive to Therapeutic Jurisprudence might have explored with the mother the likely reaction of her son to being excluded from the will. A lawyer sensitive to Therapeutic Jurisprudence hopefully would have helped the son examine his motives for challenging his mother's will. Thus, Therapeutic Jurisprudence could have been brought to bear not only by the judge but also by at least two lawyers significantly earlier in the process. Had that happened, perhaps such a lawsuit—one that inevitably would create (or deepen) rifts between brother and sister—might have been avoided altogether.

Affective lawyering and lawyering with an ethic of care both focus on the importance of the emotional nexus between lawyer and client. As described by Professor Mills in her work on representing victims of domestic violence, affective lawyers are those who are able to transcend differences and find emotional commonality with their clients.<sup>179</sup> Professor Menkel-Meadow, who writes of both affective lawyering and lawyering with an ethic of care,<sup>180</sup> describes the affective approach to counseling as one that “attends to emotional and interpersonal factors that might be affecting the communication” with the client.<sup>181</sup> She notes the importance of caring for the client's concerns, of caring that the client is put at ease, and learning how to listen actively so as to create a relationship and not merely to process information.<sup>182</sup>

---

<sup>178</sup> *Id.*

<sup>179</sup> Mills, *supra* note 23, at 1257-59.

<sup>180</sup> Menkel-Meadow, *supra* note 169, at 619-20.

<sup>181</sup> *Id.* at 610.

<sup>182</sup> *Id.*

Creative Problem-solving, as described by Professor James Cooper, represents a convergence of numerous disciplines including the social sciences and the humanities to address the plethora of problems facing our technological and media-saturated society as we approach the next century.<sup>183</sup> It includes within it other schools of thought, like Therapeutic Jurisprudence and Preventive Lawyering, that “recognize that psychological and sociological perspectives must be addressed” throughout the legal system.<sup>184</sup> According to Professor Cooper, it is broader, however, in that it looks beyond the client’s interests to recognize the impact a client’s decision may have on the profession, community and society in general.<sup>185</sup> As described by Professor Kerper, “[c]reative problem solving assumes that not all problems require legal solutions; and not all legal problems require a lawsuit.”<sup>186</sup>

These schools of thought and method, together with the growing body of other clinical and lawyering scholarship, evidence increasing attention to strategies which may enable lawyers to interact more effectively with clients, other lawyers, and judges.<sup>187</sup> Such strategies call for understanding the psychological processes—such as countertransference and denial<sup>188</sup>—that affect human relationships generally and lawyers’ relationships in particular.

---

<sup>183</sup> See Cooper, *supra* note 174, at 301.

<sup>184</sup> “Creative Problem Solving is the umbrella under which Preventive Law, Therapeutic Jurisprudence, Holistic Lawyering, and Restorative Justice schools of thought rest.” *Id.* at 322.

<sup>185</sup> *Id.* at 320-21. “Creative Problem Solving is . . . about healing society, reconstructing the social contract, and strengthening community bonds, big and small.” *Id.* at 322.

<sup>186</sup> Kerper, *supra* note 174, at 354. This article is a plea to balance the litigious thrust of legal education with non-litigation problem-solving skills.

<sup>187</sup> Another sign of the times was the excellent program co-sponsored by the sections on Law and Mental Health and ADR at the January 1999 AALS Annual Meeting, entitled *Lawyering 2000: Should it Look More “Alternative”?* The program description was as follows:

The legal profession is under attack in the late 20th century. Lawyer dissatisfaction appears to be rampant, and it may be related to a high incidence of psychological distress in the legal profession. Is it possible that “new” or “alternative” approaches to practicing law—that of Therapeutic Jurisprudence/preventive law and the use of mediation to resolve disputes—hold promise as templates for lawyering in the next millennium?

See also GUINIER ET AL., *supra* note 99, at 69-70 (“Another argument for changing legal education is that it currently overemphasizes the adversarial nature of lawyering. Legal education may be inadequate where it focuses on legal issues exclusively or primarily in the context of resolving disputes through litigation. The law school’s definition of lawyering potential—as measured by a single evaluative methodology and one dominant pedagogy—may simply be outmoded in light of contemporary professional developments, which include alternative dispute resolution, emphasis on negotiation rather than litigation, and client counseling.”).

<sup>188</sup> See Winick, *supra* note 51.

### III. LAWYERING AND EMOTIONAL INTELLIGENCE: A PRESCRIPTION FOR THE 21ST CENTURY

#### A. *The Self-Aware Lawyer*

##### (1) *Lawyering with Self-Awareness*

Whatever the reasons for emotional interference in the lawyer/client relationship, it is important that the lawyer strive to insure that the competency of the representation is not compromised. There is no magic bullet for eviscerating emotional responses that interfere with our abilities to function as we would like. In an ideal world, perhaps we would all have the time and money to undergo personal analysis, to explore our hopes, dreams and fantasies with a well-trained guide. Perhaps every lawyer's training for the practice of law should include analysis or extensive psychotherapy.<sup>189</sup> However, as this is neither feasible nor essential for most of us, it is fortunate that less costly and time-consuming alternatives are available.<sup>190</sup>

When countertransference troubles a therapist or an attorney, a range of responses is possible. The efficacy of any response may well depend on the severity of the problem.<sup>191</sup> The first step, of course, is recognition that a problem or potential problem exists. The goal is to make the Unconscious conscious.<sup>192</sup> The mere acknowledgment of uncomfortable feelings may suffice to render such feelings more manageable.<sup>193</sup> In their clinical education materials, Bastress & Harbaugh

---

<sup>189</sup> See WATSON, INTERVIEWING AND COUNSELING, *supra* note 24, at 82:

I have often been queried about whether or not lawyers, judges, and other professionals should be "psychoanalyzed." My response has been that under ideal circumstances, because lawyers are constantly serving as counselors, and since the subjects of their work are always people, they and their profession would profit much by that form of learning and experience.

Elkins, *supra* note 76, at 758-59 ("The essential unresolved questions is whether insight for effective self-scrutiny is possible without the encouragement and guidance of an experienced psychoanalyst or psychotherapist."); Saxe & Kuvin, *supra* note 84, at 216 ("[I]t is respectfully submitted that optimally the prototypical attorney should himself have undergone some formal psychoanalysis or psychotherapy.").

<sup>190</sup> See WATSON, INTERVIEWING AND COUNSELING, *supra* note 24, at 82 ("Needless to say, to require such a learning experience would be totally infeasible.").

<sup>191</sup> See WATSON, PSYCHIATRY FOR LAWYERS, *supra* note 24, at 21; Silverman, *supra* note 59, at 177.

<sup>192</sup> See RACKER, *supra* note 20, at 16; Renik, *supra* note 25, at 558-59; SCHOENFIELD & SCHOENFIELD, *supra* note 77, at 329; Allegretti, *supra* note 154, at 13 (quoting WATSON, PSYCHIATRY FOR LAWYERS, *supra* note 24, at 7); Freud, *Introductory Lectures, Part III*, *supra* note 18, at 435.

<sup>193</sup> See WATSON, PSYCHIATRY FOR LAWYERS, *supra* note 24, at 8:

Since transference is unconscious, the question arises whether one can do anything about it. The answer is something of a paradox. The mere acknowledgment of the possibility of such unconscious reactions permits the participants to look more objectively at relationships and to question causes. The capacity to accept the possibility that one's feelings about another may be due to unconscious and unrealistic coloring

suggest the lawyer start by asking the following series of questions, designed by psychotherapist Lewis Wolberg, to elicit evidence of countertransference:<sup>194</sup>

1. How do I feel about the client?
2. Do I anticipate the client?
3. Do I over-identify with, or feel sorry for, the client?
4. Do I feel any resentment or jealousy toward the client?
5. Do I get extreme pleasure out of seeing the client?
6. Do I feel bored with the client?
7. Am I fearful of the client?
8. Do I want to protect, reject, or punish the client?
9. Am I impressed by the client?

If any of questions two through nine elicit an affirmative response, one must then ask "Why"?<sup>195</sup> We might recognize that the

rather than to the other's reality traits, is a major step toward understanding. Without awareness of transference phenomena, people are over- or under-convinced by their own emotional response and have no opportunity to work out any understanding of them.

<sup>194</sup> BASTRESS & HARBAUGH, *supra* note 79, at 297, *citing* WOLBERG, *supra* note 16; Allegretti, *supra* note 154, at 13 (footnote citing BASTRESS & HARBAUGH and WOLBERG). *See also* Saxe & Kuvin, *supra* note 84, at 212-15 (canvassing variety of reactions that should alert attorney to possible existence of neurotic conflicts affecting representation):

1. Feelings of depression or discomfort (anxiety) during or after time spent with certain clients. . . .
2. Carelessness with regard to keeping appointments with the client or allowing trivial matters that could easily be postponed to interfere with time apportioned to the client.
3. Repeatedly experiencing affectionate feelings toward the client. . . . [T]his affectivity may cause the attorney to prolong the case as a rationalization to maintain the interpersonal relationship and further may eventually lead to seduction.
5. Repeated neglect by the attorney of certain files. . . .
7. A conscious awareness, that the attorney is deriving satisfaction from the client's praise, appreciation and other evidences of affection.
8. Becoming disturbed, consciously, by the client's persistent reproaches and evident dissatisfaction with the merits of the case.
9. Perhaps the most important of all responses to which the attorney should be alert, is a feeling of boredom or drowsiness when either he talks or listens to the client.

SCHOENFIELD & SCHOENFIELD, *supra* note 77, at 329 (list of danger signals to alert attorney to own emotional interference in interviewing); SHAFFER & ELKINS, *supra* note 142, at 58-59 (*citing* Saxe & Kuvin).

In my opinion, the precise list of questions is of far less import than the attorney's acknowledgment that good practice requires attention to one's emotional reactions provoked by the representation.

<sup>195</sup> Wolberg follows his list of questions with the following advice to the therapist, advice that is beneficial to the attorney as well:

Should answers to any of the above point to problems, then ask why such feelings and attitudes exist. Is the patient doing anything to stir up such feelings? Does the patient resemble anybody the therapist knows or has known, and, if so, are any attitudes being transferred to the patient that are related to another person? What other impulses are being mobilized in the therapist that account for the feelings? What role does the therapist want to play with the patient? Mere verbalization to

client reminds us of a close family member and that we are revisiting an emotional pattern played out with a parent or sibling.<sup>196</sup> However, it is altogether possible that we will not have a clue as to why we are experiencing such an intense, troubling reaction to the client. Nonetheless, recognizing that a problem exists in our emotional response to the client may suffice to obtain control over the problem.<sup>197</sup> It may be unnecessary to identify the source; the very act of raising the reaction to a conscious level may make it possible to control the feeling or diffuse its force sufficiently to avoid problems in the representation.

But what if that is not enough? A psychotherapist would likely seek advice from a trusted friend or colleague to help gain perspective.<sup>198</sup> We lawyers, however, are far more likely to seek legal advice than personal advice on such matters. But given that interpersonal skills are as important to effective legal representation as is knowledge of legal strategies and doctrine, lawyers need to overcome that resistance. The process of telling a friend or colleague about one's emotional reactions to a client may enable a lawyer to gain the requisite perspective on and control over countertransference reactions.<sup>199</sup>

A therapist who finds that strong emotional reactions are interfering with the therapy may seek guidance through consultation<sup>200</sup> or reanalysis.<sup>201</sup> If still unable to surmount such difficulties, the therapist may find it necessary to refer the patient to someone else for treatment.<sup>202</sup> Likewise, if a lawyer is unable to gain control over emotional responses to the client, it may be necessary to refer the client elsewhere for representation.<sup>203</sup>

---

himself of answers to these queries, permits of better control of unreasonable feelings. Cognizance of the fact that he feels angry, displeased, disgusted, irritated, provoked, uninterested, unduly attentive, upset or overly attracted, may suffice to bring these emotions under control. In the event untoward attitudes continue, more self-searching is indicated. Of course it may be difficult to act accepting, non-critical and non-judgmental toward a patient who is provocatively hostile and destructive in his attitudes towards people, and who possesses disagreeable traits which the therapist in his everyday life would criticize.

WOLBERG, *supra* note 16, at 491.

<sup>196</sup> *Id.*

<sup>197</sup> *See id.* *See also* Kernberg, *supra* note 25, at 42.

<sup>198</sup> *See* Kernberg, *supra* note 25, at 52; Meier, *supra* note 55, at 1354; Schover, *supra* note 35, at 147; Silverman, *supra* note 59, at 198.

<sup>199</sup> *See* WATSON, INTERVIEWING AND COUNSELING, *supra* note 24, at 25, 81; WATSON, PSYCHIATRY FOR LAWYERS, *supra* note 24, at 10-11; Elkins, *supra* note 80, at 244.

<sup>200</sup> *See* Loewald, *supra* note 59, at 275.

<sup>201</sup> *See* Schover, *supra* note 35, at 147; Silverman, *supra* note 59, at 177.

<sup>202</sup> *See* WOLBERG (4th ed.), *supra* note 52, at 488; Cooper, *supra* note 50, at 581; Kantrowitz, *supra* note 60 (on analyst/analysand match); Schover, *supra* note 35, at 147.

<sup>203</sup> *See* WATSON, PSYCHIATRY FOR LAWYERS, *supra* note 24, at 21; BINDER, BERGMAN & PRICE, *supra* note 53, at 64 (recommending, where possible, referral to another attorney if lawyer lacks all empathy for client). *Cf.* Dr. Ruth Westheimer's presentation at January

And although therapy or analysis may not be necessary for all lawyers, lawyers who find they repeatedly experience problematic emotional reactions to clients that interfere with their practice may require professional treatment.<sup>204</sup>

## (2) *Different Lawyers, Different Clients*

Our individual psyches affect the intensity of countertransference in our professional lives. Each of us brings to the representation some unresolved—perhaps unconscious—biases in favor of or against persons based on their individual or group characteristics.<sup>205</sup> We may have emotional reactions to a client based on any number of variables: race, gender, sexual orientation, age, physical or mental disability, substance abuse problem or economic status. These reactions—again, often unknowingly—may affect the quality of our representation.

Another variable affecting countertransference is the kind of representation involved. The greater the degree of power imbalance and emotional intensity of the situation, the greater the likelihood that transference and countertransference may interfere with competent representation.<sup>206</sup> Thus countertransference is likely to pose the greatest problems in the contexts of child abuse, domestic violence,<sup>207</sup> criminal defense,<sup>208</sup> immigration, matrimonial practice,<sup>209</sup> and repre-

---

1998 NYSBA Annual Meeting, Panel on Regulation of Sexual Relationships Between Lawyers and Clients. Dr. Ruth, a self-described romantic, thought it was absolutely wonderful for lawyer and client to establish an intimate relationship—as long as the lawyer then terminates the legal representation and refers the client to another lawyer. In fact, Dr. Ruth opined that if the attorney develops strong feelings for a client, the lawyer should own up to them and explain to the client the need for changing counsel.

In certain kinds of representation, however, referral may be less viable. Clients represented by Legal Aid lawyers or Public Defenders may have nowhere else to go, unless they can be transferred to a different staff attorney in the same office. Furthermore, the socioeconomic disparities between lawyers and clients in such cases may exacerbate countertransference problems. For these attorneys, training in handling countertransference may be critical.

<sup>204</sup> See SCHOENFIELD & SCHOENFIELD, *supra* note 77, at 331; WATSON, *PSYCHIATRY FOR LAWYERS*, *supra* note 24, at 11.

<sup>205</sup> See Lawrence, *supra* note 92, at 330.

<sup>206</sup> See *supra* notes 8-13 and accompanying text. See also Gerber, *supra* note 31, at 120 (describing intensity of countertransference in work with sex offenders).

<sup>207</sup> See Meier, *supra* note 55.

<sup>208</sup> See *supra* notes 8-13 and accompanying text. Death penalty representation would be a subset of criminal defense work likely to provoke even more powerful emotional reactions.

<sup>209</sup> See Steven A. Ager, *Do Divorce Lawyers Really Have More Fun?*, 15(6) *FAIR\$HARE* 7 (1995); Elkins, *supra* note 80; Jorgenson & Sutherland, *supra* note 30, at 11; Allwyn J. Levine, *Transference and Countertransference: How it Affects You and Your Client*, 15 *FAM. ADVOC.* 14 (Fall 1992):

In no other field of jurisprudence is one dealing with the most private aspects of people's lives and their most precious possessions—their children. Divorce, in and

sentation of mentally ill persons.<sup>210</sup>

In certain areas of practice, maintaining empathy may be difficult.<sup>211</sup> In connection with this project, I conducted several interviews with clinical colleagues of mine to discuss their own and their students' emotional reactions to clients. Several of them acknowledged the challenges of representing the difficult client.<sup>212</sup> Marianne Artusio, Director of Clinical Programs, spoke of an elder law client for whom the clinic had done an enormous amount of work, including nonlegal work, such as cleaning out and selling the client's home, a home she had not occupied for several years due to hospitalizations. The students were appalled at the client's lack of gratitude. When a client is difficult or demanding, it is hard for the students to maintain their zeal and to know when they have achieved completeness. Although Professor Artusio tries to work with the students on these issues, she is aware that she, too, is affected by a client's difficult personality. Time spent on an ungrateful client or a client whom the lawyer or student regards as "unworthy" takes time away from helping someone else, someone about whom a lawyer can feel good. Sometimes it is obvious how one's emotional reaction to a client affects the representation. Other times, it is less so.<sup>213</sup>

Some clients may act in obnoxious or hostile ways that would cause virtually any attorney to dread their interpersonal encounters. Negative feelings towards such a client might be an entirely reasonable reaction, rather than a manifestation of countertransference. Many clients hold views or have committed acts that most lawyers find abhorrent. The majority of civil liberties lawyers likely detest the racists and neo-nazis whose first amendment rights they attempt to vindi-

---

of itself, is a psychologically draining experience. For all clients, it stirs up feelings of abandonment, separation, dependency, and anxiety—unmatched intensity by any other situation. A matrimonial lawyer is thus thrust into a veritable minefield of psychological traps and pitfalls.

<sup>210</sup> See Michael Perlin, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 L. & CONTEMP. PROBS. 161, 163 (1982) ("[I]ssues raised by investigating ethical standards in civil commitment representation may dredge up unconscious feelings which lead to avoidance—by clients, by lawyers, and by judges—of the underlying problems."). See also Winnicott, *supra* note 18 (discussing negative (hate) countertransference in treatment of psychotic patients):

However much he loves his patients he cannot avoid hating them, and fearing them, and the better he knows this the less hate and fear will be the motive determining what he does to his patients.

*Id.* at 350.

<sup>211</sup> See also FROMM-REICHMAN, *supra* note 58, at 198-99 (on psychiatrist's discomfort working with patients who have attempted suicide).

<sup>212</sup> Author's interviews with Professors Marianne Artusio (July 9, 1997), Bill Brooks (July 3, 1997), Rhonda Shepardson (Sept. 2, 1998) and Lewis Silverman (June 26, 1997).

<sup>213</sup> Artusio interview, *supra* note 212.

cate. Criminal defense attorneys who represent persons charged with committing especially heinous crimes often face the challenge of providing zealous representation to clients they would otherwise despise. This problem is most acute when the lawyers or their loved ones have been the victims of similar crimes.<sup>214</sup> Nonetheless, lawyers must resolve these feelings in order to continue representing the client competently.<sup>215</sup>

---

<sup>214</sup> Randy Bellows writes of how, as a young public defender in Washington D.C., he came to terms with representing accused rapists even after a close family relative was robbed and raped at knife point. Describing the rage he felt towards someone who had hurt a person he loved ("I loathe that person; I want him punished; I want no escape routes to grace his path."), Bellows wrote that if he neither knew nor thought too much about the victim, "then it is possible to do my job," and even develop the empathy necessary to effectively represent his client:

While it is often impossible not to feel sympathy for the victim, this is not an emotion you can afford to nurture or encourage. To put it simply, it is not easy to develop warm feelings [towards your client] when your focus is on the devastation which your client has left in his wake. It makes a difficult job nearly impossible.

Randy Bellows, *Notes of a Public Defender*, in *THE SOCIAL RESPONSIBILITIES OF LAWYERS* 69, 78-79 (Philip B. Heymann & Lance Liebman eds., 1988). Bellows admits that even when the victim is a stranger, developing such empathy is not always possible. "In one case, for example, my client was charged with robbery. I was told in discovery that my client had robbed a pregnant woman, threatening to kick the woman in the stomach if she did not turn over her purse. At the time, my wife was six months pregnant. At the first opportunity, I pulled out of the case." *Id.*

Professor Charles Ogletree describes a painfully similar reaction to learning that while he, too, was a public defender in Washington, D.C., his younger sister, a police officer, was stabbed to death in her apartment:

When it came to my sister's murder, I did not want any procedural safeguards for the criminal. I wanted the state to use all evidence, obtained by any means whatsoever, to convict her attacker. I wanted the satisfaction of knowing that the person responsible for her death would be brought to justice. I wanted retribution.

Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 *HARV. L. REV.* 1239, 1262 (1993). After her murder, Ogletree struggled with the decision of whether to return to the public defenders' office. *Id.* at 1263. Ogletree ultimately transcended his emotional pain and did return, but not without intense conflict. Could he continue to zealously represent a client accused of rape and murder: "Might I subconsciously harbor unacknowledged resentments that would lead me to be underzealous in [my client's] defense?" *Id.* at 1264.

<sup>215</sup> See Winnicott, *supra* note 18, at 351:

If the analyst is going to have crude feelings imputed to him he is best forewarned and so forearmed, for he must tolerate being placed in that position. Above all he must not deny hate that really exists in himself. Hate that is justified in the present setting has to be sorted out and kept in storage and available for eventual interpretation.

Rhonda Shepardson, who runs Touro's housing rights clinic, shared how she steels herself for representing clients who she feels are "using her as a tool to rip off the system" or who are suspected spouse or child abusers. "I just focus on the legal issue, and make it all about winning. I focus on the *fight*." She finds it easier to do when her opponents are also not likable. Shepardson interview, *supra* note 212.



### (3) *Two Stories, Redux*

What if Adam, the fifty-year old criminal defense attorney,<sup>216</sup> had been schooled in the ways of the psyche and understood countertransference? Imagine he had read the following account by psychoanalyst Theodore Jacobs:

During the course of the analysis of a highly attractive young woman, I became aware of the unusual correctness of my posture as I greeted her. I made few spontaneous movements, and both my gait and posture conveyed a certain stiffness. I noticed, too, that the muscles of my arms and trunk were not relaxed as I sat in my chair, and that my tone conveyed a more formal quality than was true with other patients. Some self-analysis of these observations made clear to me what I had sensed in myself but had not sufficiently focused on; that I was responding to the patient's considerable charms by a defense of physical and emotional distance. My anxiety over my own positive feeling for her had led, not only to an exaggerated and rather sterile analytic stance, but to inadequate analysis of the patient's seductiveness both as a character trait and a resistance.<sup>217</sup>

Dr. Jacobs found himself responding to the charms of his patient by distancing himself from her, rather than by being drawn in to her seduction. He observed that he treated her differently from his other patients, to the detriment of the analysis. Recognizing what was going on enabled him to dissipate his anxiety, and work with her effectively. In this instance, it was Dr. Jacobs' observation of his *physical* response to his patient that opened the door to his awareness:

While the analyst seeks, in every case, to become cognizant of feelings in himself that may interfere with his analytic work, these may, as we know, become blocked off from consciousness and remain undetected for lengthy periods of time. Observation of his bodily reactions as they manifest themselves in posture, gesture, and movement enables him to enlarge the scope of his self-awareness and, at times, to gain access to attitudes and conflicts of which he is unaware.<sup>218</sup>

The psychoanalyst Lucia Tower reported that "in [her] experience virtually all physicians, when they gain enough confidence in their analysts, report erotic feelings and impulses toward their patients, but usually do so with a good deal of fear and conflict."<sup>219</sup>

Dr. Gertrude Ticho, an analyst who practiced in three different

---

<sup>216</sup> See text accompanying notes 85-89 *supra*.

<sup>217</sup> Jacobs, *supra* note 61, at 90.

<sup>218</sup> *Id.* at 88.

<sup>219</sup> Tower, *supra* note 25, at 230. Tower concludes that this phenomenon, although widely condemned, is likely ubiquitous. *Id.*

countries and wrote about cultural assumptions and countertransference,<sup>220</sup> shared two personal stories of how her own cultural biases threatened to derail the analytical relationship.<sup>221</sup> In one instance, a young South American man sought treatment from her for severe anxiety reactions, which worsened as his commitment to his fiancée grew stronger.<sup>222</sup> In one session he came to Dr. Ticho's office excitedly describing an accident he had had on his way to his weekly visit to a house of prostitution. This was the first mention of such visits in the eight or nine months of analysis, and Dr. Ticho first assumed that the patient's failure to disclose this information before that time was rife with psychological significance. Only later did she come to understand that these visits to the brothel were culturally bound, that they had been taking place for some ten years since the patient had first been taken to the house of prostitution by an uncle when the patient was seventeen years old, and that they held no relevance to the patient's relationship with his fiancée or his feelings about her.<sup>223</sup>

Dr. Ticho's second story concerned the treatment of a seventeen-year-old patient who was referred due to her promiscuity and suddenly failing grades.<sup>224</sup> The patient (who was black) spoke passionately and politically about white racism and frequently accused Dr. Ticho (who was white) of such racism.<sup>225</sup> Dr. Ticho reported failure in her attempts to encourage the patient to examine her feelings about herself and the therapy.<sup>226</sup> Dr. Ticho believed herself to be free of racial prejudice, until a certain occurrence caught her quite by surprise:

At the end of the tenth session with this patient, the patient was hesitant about leaving the office and suddenly said: "Last year there was a German girl in my class. She was quite all right. I kind of liked her." Whereupon, to my dismay, I made a typical beginner's mistake and said, "I am not a German, but an Austrian."

How can one account for such a slip?

\* \* \*

When the patient finally, for the first time, in the last second of that session, dared to indicate her positive feelings for the therapist, the therapist was caught unawares and heard only, "You are a German who has no regard for human beings, who even made human experiments with people of a 'lower race.'" To this the therapist

---

<sup>220</sup> Ticho, *supra* note 61.

<sup>221</sup> *Id.* at 318-21.

<sup>222</sup> *Id.* at 318. He did, however, report strongly erotic (albeit unconsummated) feelings towards his fiancée.

<sup>223</sup> *Id.* at 318-19.

<sup>224</sup> *Id.* at 320.

<sup>225</sup> *Id.* at 320-21.

<sup>226</sup> *Id.* at 321.

reacted by saying, "No, I am not such a monster"; and, unfortunately, the technical blunder was committed. For a split second, the analyst's sensitivity toward the timid expression of the patient's positive feelings was lost, and so was her ability to identify with the patient.<sup>227</sup>

### *Love Countertransference Understood*

Adam, had he read and understood the implications of Dr. Towers' work on erotic countertransference<sup>228</sup> and Dr. Jacobs' self-critique,<sup>229</sup> might have been conscious that he was drawn to Belle's "considerable charms," although his response was rather different than Dr. Jacobs'. Adam might have noticed that he contemplated their meetings with heightened anticipation. He then might have seen these deviations from his usual responses to clients as warning signs. If so, he likely would have responded differently than he did. He would probably have caught himself abandoning his usual—and usually appropriate—skepticism about his clients' protestations of innocence. Hopefully, he would have investigated the charges against Belle more thoroughly. Were he then to conclude that strong evidence existed of Belle's culpability, he would probably have utilized his excellent powers of persuasion to convince Belle to accept the favorable plea offer.<sup>230</sup>

### *Hate Countertransference Understood*

Acquiring awareness of his attraction to Belle probably would have been less of a stretch for Adam than confronting and understanding his more complicated feelings towards Carl—and their genesis. An understanding of Dr. Ticho's work<sup>231</sup> and an appreciation of the effects of unresolved conflicts or presumptions about differences in gender, race, culture or sexual orientation might have alerted Adam to examine his own conflicted feelings about homosexuality.<sup>232</sup> Individual analysis or therapy might have enabled Adam to understand his impatience with his twelve-year-old son who so easily dissolved in tears. Possibly, Adam might have come to realize that his anger at his son derived from insecurity about his own masculinity.

---

<sup>227</sup> *Id.*

<sup>228</sup> Tower, *supra* note 25.

<sup>229</sup> Jacobs, *supra* note 61.

<sup>230</sup> See Bellows, *supra* note 214, at 89-90 (on critical importance of persuading client to accept favorable plea deal); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator*, 2 CLIN. L. REV. 73, 97 & n.89, 130-32 (1995) (on obligation of defense counsel to attempt to persuade client to accept favorable plea bargain).

<sup>231</sup> Ticho, *supra* note 61.

<sup>232</sup> See discussion *supra* notes 86-89 and accompanying text.

Understanding countertransference, Adam might have realized that his disgust with Carl was triggered by his perception (conscious or not<sup>233</sup> and accurate or not) that Carl was gay, and derived from similar anxiety. If Adam came to understand these fears, they might have lost their powerful grip on him. Were he able to dispel his annoyance with Carl, he might have been able to hear and process Carl's claim of innocence, and, if warranted upon further investigation, he might have agreed with Carl's decision to proceed to trial.<sup>234</sup>

How is Adam to acquire such skills of self-awareness? Skills such as these evolve over a lifetime of experience. Ideally, one would commence this journey early in one's psychological development. But it is never too late to begin—even in law school or thereafter. Our aim as law school teachers must be to insure that knowledge of psychological processes and the skills needed to recognize and resolve psychological sore spots become basic learning objectives for all law students and lawyers.

### B. Cultivating Emotional Intelligence

#### (1) Teaching Self-Awareness and Interpersonal Skills in Law School

Few would question the need for therapists or analysts to study interpersonal skills as a prerequisite for earning a license to practice their profession.<sup>235</sup> The requirement that analysts themselves submit to analysis before practicing, however, was a radical departure when first introduced.<sup>236</sup> "The idea of making a doctor into a patient before he can practice as a doctor is itself traumatic,"<sup>237</sup> and analysts are the only medical doctors who must submit to such treatment.

With the exception of psychotherapy—which is practiced by some medical doctors as well as other mental health professionals—the medical profession, like the legal profession, has virtually ignored emotional intelligence. Interpersonal skills are only rarely taught in medical school.<sup>238</sup> Most of us have likely experienced the frustration

---

<sup>233</sup> See Lawrence, *supra* note 92.

<sup>234</sup> Dr. Judy Kantrowitz suggests that a good "match" between analyst and patient may enable both parties to use countertransference positively so as to advance the analysis. See Kantrowitz, *supra* note 60, at 303-07. Arguably, a similar match might enhance the lawyer/client relationship. An attorney might find herself working harder on behalf of a client who reminds her of herself or someone close to her.

<sup>235</sup> See *supra* note 62 and accompanying text.

<sup>236</sup> Tower, *supra* note 25, at 229.

<sup>237</sup> *Id.*

<sup>238</sup> See STEIN, *supra* note 25, at 172 ("Countertransference is a topic that should be introduced early in the education of medical students and continued throughout medical education."); Abigail Zuger, *When the Doctor and Patient Need Couple's Therapy*, N.Y. TIMES, Mar 31, 1998, at F4, col. 1 ("The current system of medical education leaves learning how to communicate well with patients entirely up to chance" (quoting Dr. Dennis

of encountering medical professionals who lack any measure of empathy.<sup>239</sup> Virtually all of us desire the assistance of medical professionals who can understand our pain and alleviate our anxiety. Our clients ask no less of us.

Apart from law school clinics—in which only a small proportion of law students participate<sup>240</sup>—law schools traditionally have paid little attention to skills training at all, let alone training in human relations skills.<sup>241</sup> As previously noted, Dean Griswold's 1955 call for human relations training in law school went largely unheeded.<sup>242</sup> Although some clinical materials (such as those of Bastress and Harbaugh<sup>243</sup>) do cover basic psychological principles, few law students are adequately exposed to human relations training.

Thanks in large measure to the impetus of the MacCrate Report,<sup>244</sup> law schools are increasingly integrating into their curriculum more courses on practice skills such as interviewing, counseling and negotiation to “bridge the gap” between school and practice.<sup>245</sup> But there has been little call for instruction on more subtle “practical” skills, such as training in human relations. In its compendium of core skills and values, MacCrate barely touches on the kinds of emotional intelligence needed for effective lawyering.<sup>246</sup> Yet emotional intelli-

---

Novack, professor of medicine at the Medical College of Pennsylvania-Hahnemann School of Medicine in Philadelphia)). *See also* Hulme, *supra* note 35, at 188, 191 (advocating education of seminarians about boundary violations).

<sup>239</sup> *See* LOUISE HARMON, FRAGMENTS ON THE DEATHWATCH 128 (1998).

<sup>240</sup> *See* MACCRATE, *supra* note 110, at 236-41.

<sup>241</sup> At the time Harrop Freeman was writing about lawyer/client transference and countertransference, barely any attention was paid to the lawyering skills of interviewing and counseling, or to clinical education at all. FREEMAN, *supra* note 6, at 233; Diamond, *supra* note 99, at 67 (“The professional practice of law often requires nonlegal answers to human problems whose very existence seems not to be recognized by the legal curriculum.”); Watson, *Teaching Professional Responsibility*, *supra* note 100. *See supra* notes 120-27, 132-34 and accompanying text for attempts at such training by Watson, Sacks and Stone. *See also* Elwork & Benjamin, *supra* note 98, at 583 (citing to others who have recommended law school training in human aspects of legal practice).

<sup>242</sup> *See supra* note 133 and accompanying text.

<sup>243</sup> *See supra* notes 152-53 and accompanying text.

<sup>244</sup> MACCRATE, *supra* note 110.

<sup>245</sup> *See, e.g.*, Mischler, *supra* note 32, at Appendix (listing law schools offering courses in client counseling); Lawrence M. Grosberg, A Report on an Experiment Using “Standardized Clients” in Legal Education (unpublished manuscript, on file with the author).

<sup>246</sup> The only intimations are found in the following two identified Fundamental Lawyering Skills:

Skill #5: Communication:

5.1 *Effectively Assessing the Perspectives of the Recipient of the Communication* (the client, decisionmaker(s), opposing counsel, witnesses, and so forth), and using this assessment to:

- (a) View situation, problems, and issues from the perspective of the recipient of the communication, while taking into account the possibility that one's abil-

gence may be one of the most significant skills a lawyer can possess. In addition to helping the lawyer avoid boundary violations, it informs a myriad of other legal skills including, for example, counseling, mediation and negotiation.<sup>247</sup> Good Lawyers need to appreciate and respect their clients' emotional lives as well as their own.<sup>248</sup>

The law school of the 21st century should endeavor to insure that no graduate receive a law degree without exposure to the *psychology* of law practice. Ideally, all law students should leave law school and

ity to adopt the perspective of another person may be impeded by, *inter alia*

- (i) One's own partisan role and perspective;
- (ii) An insufficient understanding of the other person's culture, personal values, or attitudes.

Skill #6: Counseling:

- 6.2(c)(iii) The extent to which (and the ways in which) the client's perspective, perceptions, or judgment may differ from those of the lawyer because of:
  - (A) Differences in personal values or attitudes;
  - (B) Cultural differences;
  - (C) Differences in emotional reactions to the situation;
  - (D) Interpersonal factors in the relationship between attorney and client . . . .

MACCRATE, *supra* note 110, at 173, 179.

One of the MacCrate Fundamental Values of the Profession may be read to include the need to recognize and resolve unconscious conflicts such as countertransference, but was likely intended to address the more obvious problems of substance abuse and mental depression:

Value # 1: Provision of Competent Representation:

- 1.2(d) Maintaining the conditions of physical and mental alertness necessary for competence, including: . . .
  - (ii) To the extent that the lawyer's ability to provide competent representation is impaired, taking whatever steps are necessary to ensure competent representation of his or her clients, including . . . . [seeking treatment, soliciting assistance, referring client elsewhere].

*Id.* at 208-09.

For a thoughtful critique of the MacCrate report in general, and its failure to address human relational skills in particular, see Menkel-Meadow, *supra* note 169. Professor Menkel-Meadow faults the MacCrate report—and legal education in general—for insufficient attention to “the human arts of lawyering.” *Id.* at 619.

<sup>247</sup> See Sacks, *supra* note 120, at 317-18; Interview with Stephen Reich, Ph.D., J.D. (July 7, 1997). Dr. Stephen Reich, a clinical psychologist who also holds a J.D. degree, graciously agreed to speak with me about my project. Dr. Reich shared his belief that the first interview with a client is essentially a psychotherapy session. A lawyer must listen carefully to the client to understand what it is that the client needs and wants. At each subsequent meeting with a client, a lawyer similarly should allow the client to have a psychotherapeutic experience in the course of the lawyer's acquiring necessary information from the client. For a discussion of the differences between the lawyer's role as counselor and that of a psychologist, see Meier, *supra* note 55, at 1360-61.

<sup>248</sup> See Menkel-Meadow, *supra* note 169, at 620 (“the good lawyer needs to understand, from a human point of view, what the other wants to happen in the world”); Mischler, *supra* note 32, at 263 (“Both thinking and feeling must be engendered in the legal profession, as well as thinking *about* feelings.”) (emphasis in original).

enter practice with an understanding of the techniques necessary to examine their own psychic tendencies, and an appreciation of the potential effects of the unconscious on the lawyer-client relationship.<sup>249</sup>

I do not wish to minimize the difficulty of such an accomplishment.<sup>250</sup> For one, there is the barrier of the overburdened curriculum. Although ideally a law student would arrive at law school already equipped with a grounding in psychology and psychological skills through prior education and life experience, most law students have no such preparation.<sup>251</sup> Were basic undergraduate education to include human relations training, legal education could then focus on relating such knowledge and skills to the practice of law. However, as only a small percentage of entering law students have this kind of background, inevitably law schools would have to compensate. Moreover, successful education will require strategies for breaking down the *resistance* to crediting psychic life, which most law students bring with them to law school.<sup>252</sup> These are formidable obstacles.

As to the first concern, the curriculum is already overburdened. Many law professors are preoccupied with coverage and likely always will be. But as Dean Griswold recognized in 1955,<sup>253</sup> as Tony Amsterdam wrote in 1984,<sup>254</sup> and as Dean Feinman said in 1998,<sup>255</sup> no law school can or should hope to cover all the substantive knowledge that the law contains. Focusing on skill development, including the skills necessary to teach oneself, is far more essential.<sup>256</sup> And knowing how

---

<sup>249</sup> See WATSON, *INTERVIEWING AND COUNSELING*, *supra* note 24, at 82; Elkins, *supra* note 114, at 494; Watson, *Lawyers and Professionalism*, *supra* note 32, at 269, 275; Winick, *supra* note 51, at 13 ("These are skills that can and should be taught in law school and in continuing legal education."). Such skills would greatly assist lawyers in their dealings with judges, colleagues, bosses and adversaries as well. See, e.g., Nelken, *supra* note 85 (importance of understanding unconscious processes in order to negotiate effectively with opponent).

<sup>250</sup> See, e.g., Sacks, *supra* note 120, at 320 n.10 ("In addition to data on the effectiveness of training, it will be necessary to consider such questions as the availability of faculty for this specialized type of course; the problem of already bulging law school curricula; the relative efficiency of training in law school as compared with post admission training, etc.").

<sup>251</sup> See Watson, *supra* note 95, at 98 (vast majority of law students have had no experience with behavioral sciences).

<sup>252</sup> See, e.g., Meier, *supra* note 55, at 1355 (discussing resistance of domestic violence clinic students to education about countertransference and other psychological processes in lawyer/client relationships); Stone, *Legal Education on the Couch*, *supra* note 132, at 438 ("[T]here is the considerable resistance of some faculty and students to what they consider to be either an amorphous learning experience or pseudotherapy.").

<sup>253</sup> Griswold, *supra* note 117, at 207.

<sup>254</sup> Anthony G. Amsterdam, *Clinical Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 618 (1984).

<sup>255</sup> Jay M. Feinman, *The Future History of Legal Education*, 29 RUTGERS L.J. 475, 479 (1998).

<sup>256</sup> See MACCRATE, *supra* note 110, at 211 (Commentary to Value #1):

to bring emotional intelligence to bear on client problems is critically important. The prevailing skepticism regarding this assertion brings me to the second concern, and the greater challenge: overcoming resistance to crediting the importance of the psyche.

My colleague, Marianne Artusio, shared with me the difficulty of exploring psychological principles with the students in her clinics.<sup>257</sup> Professor Artusio uses the Bastress & Harbaugh materials,<sup>258</sup> but finds that students are enormously resistant to talking about, thinking about, or accepting the significance of transference and countertransference in the lawyer/client relationship. She introduces these issues at the beginning of the term and again at the end. By then, she finds the students a little more receptive, but not much more so.

I have suggested earlier that such resistance is breaking down in society generally, and in the legal profession in particular.<sup>259</sup> But this process is inevitably a slow one. It can be hastened by those of us who have the power to frame the discourse, especially those of us who teach in the first-year standard curriculum. As long as only a minority of law professors explores the relationship among emotions, the psyche, and the practice of law, students will reject such exploration as marginal and “soft,” if not outright ridiculous. If students who self-select to take clinics are intolerant of psychological insights, it will surely be even harder to win over the many students who choose not to avail themselves of clinical opportunities.<sup>260</sup>

At least where I teach, however, even students who do not opt for clinics usually are eager nonetheless to learn lawyering skills. Most exhibit little if any resistance to learning “hard-core” skills like trial practice, negotiation and drafting, when offered as stand-alone electives or when introduced into traditional courses.<sup>261</sup> Students

---

As Judge Judith S. Kaye [now Chief Judge] of the New York Court of Appeals has observed, “[t]he increasing codification and complexity of the law, the expansion of the law into wholly new societal areas, the heightened expectation of clients that their lawyers will know even arcane points of law of other jurisdictions in specialized areas, the new technology—all these serve to dramatize the eternal truth that ours is a profession that by its nature demands constant study in order to maintain even the barest level of competence.” Kaye, *The Lawyer’s Responsibility to Enhance Competence and Ethics*, in American Law Institute-American Bar Association Committee on Continuing Professional Education, CLE and the Lawyer’s Responsibilities in an Evolving Profession: The Report on the Arden House III Conference 55, 56 (1988).

<sup>257</sup> Artusio interview, *supra* note 212.

<sup>258</sup> See *supra* notes 152-53 and accompanying text.

<sup>259</sup> See *supra* notes 159-168 and accompanying text.

<sup>260</sup> This of course is a generalization. The reason at least some students do not avail themselves of clinical offerings is economics: many need to work at part-time jobs and lack the time for the all-consuming demands of clinical work.

<sup>261</sup> For example, I teach Civil Procedure during the first year, and use the Lucy Lockett materials, created by Professor Phil Schrag of Georgetown University Law Center. PHILIP



need to realize that interpersonal skills and the psychology that informs them are as “hard core” as these other skills. We, who teach them, must believe so, too.

We must teach these skills pervasively, throughout the curriculum. Students need to know from the first day of law school that understanding basic psychological principles and processes is as important to the practice of law as understanding legal principles and processes.<sup>262</sup>

Ideally, a law school faculty should include a professional such as a psychiatrist, psychotherapist or social worker.<sup>263</sup> These professionals might be used in numerous ways. For example, they might teach stand-alone courses on human relations or interpersonal skills. They might co-teach clinics or skills courses.<sup>264</sup> They could consult with other faculty and help develop course materials and simulation components for the standard curriculum that will expose law students to psychological insights and processes necessary to the practice of law.

As with other skills training, the use of “hands on” instructional techniques will convey the desired lessons in the most effective and enduring manner. Simulations, the use of videotapes, videotaping and subsequent critiques of videotaped performances,<sup>265</sup> and other meth-

---

G. SCHRAG, *CIVIL PROCEDURE: A SIMULATION SUPPLEMENT* (1990). These materials consist of twelve discrete simulation exercises designed to teach procedure through the use of a simulated client. The exercises include interviewing the client, case planning, drafting a complaint, arguing a motion to dismiss, replying to a counterclaim, conducting discovery and negotiating a settlement. Students typically are very enthusiastic about the simulation.

<sup>262</sup> As with other skills and values—be they professional ethics, principles of justice, issues of diversity, or good writing—the failure to mainstream the lessons early and pervasively throughout the curriculum, creates a great risk of marginalizing their importance such that students consequently view them as “fluffy” and not “real law.” See, e.g., Margaret M. Russell, *Beginner’s Resolve: An Essay on Collaboration, Clinical Innovation, and the First-Year Core Curriculum*, 1 CLIN. L. REV. 135 (1994) (discussing collaborative experiment integrating traditional doctrinal courses, clinical skills and issues of diversity in the first year curriculum); Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 737-38 (1998) (advocating pervasive teaching of legal ethics). See also DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* (2d ed. 1998).

<sup>263</sup> See Diamond, *supra* note 99, at 75 (“Some of the top law schools now appoint psychiatrists and psychoanalysts to their faculties.”); Watson, *The Law and Behavioral Science Project*, *supra* note 123, at 77-79 (“[A]n extremely important part of the plan was to place a psychiatrist on the faculty on a half-time basis. In the writer’s estimation, this is a vital element in any undertaking where the integration of materials from two or more disciplines is to be attempted.”); Watson, *supra* note 32, at 270 (“[I]t must be recognized that, at least for the present, most law schools will need outside, non-lawyer assistance to carry out this technique with skill and effectiveness.”). Such professionals might also hold joint appointments at the law school and other schools within the same university, or, especially in the case of freestanding law schools, joint appointments at other institutions.

<sup>264</sup> See Meier, *supra* note 55, at 1322-27 (discussing co-teaching domestic violence advocacy project with clinical psychologist).

<sup>265</sup> See WATSON, *INTERVIEWING AND COUNSELING*, *supra* note 24, at 24 (suggesting

ods of problem-based learning<sup>266</sup> will be far more successful in integrating the necessary psychological skills than would more traditional pedagogical techniques. For example, simulated or “standardized” clients could be used to reveal manifestations of transference and countertransference, and strategies for their successful resolution.<sup>267</sup>

## (2) *Continuing Education and Other Points on the Continuum*

If students are pervasively exposed to psychological inputs before and during law school, inevitably that will affect how they think and act as practicing lawyers. However, the process of acquiring interpersonal skills should not end with law school. As with all other skills, acquisition and refinement must continue throughout the lawyer’s career.<sup>268</sup> Bar associations and individual law firms can play an important role in facilitating this process.

Continuing legal education (CLE) is a place to begin. Today, more than three quarters of the states require lawyers to take CLE courses every year or two.<sup>269</sup> Most of the jurisdictions with mandatory CLE require a certain number of credits in a particular subject matter, most often ethics.<sup>270</sup> Some states also require courses on substance

---

videotape of interview interpreted by skilled professional); *id.* at 77-79 (relating specific examples of use of videotape in clinic).

<sup>266</sup> For descriptions of problem-based learning in medical school education, see HOWARD S. BARROWS & ROBYN M. TAMBLYN, *PROBLEM-BASED LEARNING: AN APPROACH TO MEDICAL EDUCATION* (1980); STEVEN JONAS, *MEDICAL MYSTERY: THE TRAINING OF DOCTORS IN THE UNITED STATES* 352-56 (1978).

<sup>267</sup> See Grosberg, *supra* note 245. Professor Lawrence Grosberg has been using standardized clients—based on standardized patients used in medical school clinical education—to offer quality skills practice and feedback to students. Currently, he is exploring cost-effective methods for using standardized clients for skills education of large numbers of students.

<sup>268</sup> See also LÓPEZ, *supra* note 10, at 80-81:

You don’t master lawyering . . . any more than you master living; it’s not some knowable game about which you proclaim once and for all, “I got it.” You plug along at it and try to improve the quality of your collaboration as you figure out new ways to change the world fundamentally. Even (or perhaps especially) when you’ve admirably re-inspired familiar and not-so-familiar practices with the aim to educate, you grow ever more aware of the need to stay alert and responsive to what you learn about yourself, about people and institutions, about how power operates in both large and small projects. In short, you understand just how integral education is to your conception of lawyering and living.

<sup>269</sup> See Jonathan Lippman, *CLE: New York Bar has Reason to be Proud*, N.Y.L. J., Jan 27, 1998, at S1, col. 1.

<sup>270</sup> AMERICAN LAW INSTITUTE, *MCLE: A COORDINATED APPROACH: REPORT AND RECOMMENDATIONS*, Table 5, Special Content Requirements 36-37 (1997). For example, New York State implemented mandatory CLE in 1997 for newly-admitted lawyers, who are required to take thirty-two hours in their first two years, including three hours of ethics and professionalism, six hours of skills (including writing, research and negotiation) and seven hours of practice management and other areas of professional practice. Part 1500, Mandatory Continuing Legal Education Program for Attorneys in the State of New York,

abuse and malpractice prevention.<sup>271</sup> Lawyers could be required or encouraged to take courses in human relations, or interpersonal skills, as well.<sup>272</sup>

In addition to their role as providers of CLE, bar associations might help in other ways. Bar associations could keep psychiatrists or psychologists on staff or on retainer and available for consultation by lawyers when psychological problems and questions arise in their practice.<sup>273</sup> Law firms, too, might retain professionals to consult with firm attorneys about emotional problems of their own or their clients that threaten to interfere with the professional relationship.<sup>274</sup>

### CONCLUSION

Most lawyers have long resisted crediting the psychic forces in their lives, especially in their relationships with clients. Whether we acknowledge such forces or not, they exert a powerful influence on the quality of legal representation. Unconscious conflicts, inade-

---

§ 1500.12 (minimum requirements for newly admitted attorneys). Effective December 31, 1998, all attorneys in New York are required to complete a minimum of twenty-four hours of CLE biennially. *Id.*, § 1500.22

<sup>271</sup> Arizona, New Hampshire, Ohio and Pennsylvania require substance abuse training as part of, in addition to, or as an alternative to ethics training. Arizona, Kansas, Missouri, and New Hampshire require malpractice prevention training as part of, in addition to, or as an alternative to ethics training. *Id.*

<sup>272</sup> See Elwork & Benjamin, *supra* note 98, at 583 ([“B]ar associations should consider approving continuing legal education credits for courses that focus on increasing interpersonal and psychological skills . . . .”); Sanford M. Portnoy, *Responding To a Divorcing Client’s Emotions*, MASS. LAW. WKLY., May 25, 1992, at 11, col. 4 (column and workshop offering advice regarding handling transference, recognizing and resolving countertransference by clinical psychologist). See also Watson, *supra* note 74, at 17 (discussing work with lawyers helping them analyze emotional interference in counseling relationships). Perhaps psychotherapy focused on professional relationship issues should also count for CLE credit.

<sup>273</sup> See Pilpel, *supra* note 81, at 71 (describing New York City programs involving lawyers and psychotherapists). A psychologist serves on the Florida Bar’s Professional Stress Committee. Jeff Schweers, *The Small Majority*, 68 JAN FLA. B.J. 14 (1994).

<sup>274</sup> Some law firms currently have psychiatrists or psychologists on retainer for consultation and referrals for lawyers experiencing excessive stress. See Ellen I. Carni, *Stress and Productivity: For Better or Worse*, N.Y.L.J., Nov. 26, 1996, at 5, col. 1. see also WATSON, PSYCHIATRY FOR LAWYERS, *supra* note 24, at 17 n.5:

Information has come to the attention of the author about a law firm engaged in corporation practice, which worked out an arrangement with psychiatrists whereby they may call them into consultation in appropriate cases. When a situation arises where the lawyers believe that an emotional problem is the cause of the legal difficulty, it is suggested to the client that a psychiatric colleague be called into consultation. It is reported that results have been excellent in terms of salvaging clients’ business relationships, and that all participants in the arrangement have regarded this procedure most favorably.

Divorce Lawyer Ronni Burrows employs “legal therapist counselors” to attend to the emotional needs of her clients while she concentrates on legal matters. See David E. Rovella, “Therapizing” Divorce, NAT’L L.J., Sept. 22, 1997, at 1.

quately resolved, threaten the competency of the lawyer/client relationship. These obstacles may be overcome by breaking down lawyers' resistance to acknowledging these problems and their root causes. Lawyers need to learn about the effects of the psyche on the practice of law. Among other things, lawyers need to understand how countertransference can interfere with their relationships with clients. Law schools have an obligation to provide this education. There is already a substantial body of literature available to inform this endeavor; hopefully more will be forthcoming. The challenge lies in developing successful methods for training in emotional skills. The organized bar should support the academy in this project and provide opportunities for lawyers to continue to cultivate their emotional intelligence beyond law school.

