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Professor	Dorosin, Mark
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Text and Material Information	
Assignment Detail	Read material attached ahead of the first class meeting and be prepared to discuss

CHAPTER 4

COUNSELING TRANSACTIONAL CLIENTS

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I. INTRODUCTION

One of your most important responsibilities as a transactional lawyer is serve as a *counselor*: to advise your clients about the law, to help them understand complex documents and deal terms, and to assist them to make important decisions regarding their matters. Indeed, as a transactional lawyer, your counseling responsibilities are perhaps the most central component of your professional role. Compared to your colleagues who are litigators, who must play the role of advocate in dispute resolution contexts as well as serve as counselor, your primary connection to your client is as an advisor.

This chapter introduces you to the role of counselor. It will help you understand the different components of the counseling process, and it will offer you a couple of models—but not recipes—for organizing your counseling meetings with your clients. The chapter will also revisit the fundamental notion of *client-centeredness*, a philosophy we encountered in the Interviewing chapter, and which will influence in some way or another all of your advising interactions with your clients.

II. COUNSELING CONTEXTS

There are many ways in which you will serve as an advisor to your clients, and it should help you to recognize the distinctions among them. Because each type of counseling calls for a distinct interaction with your client, your method for organizing a meeting or a telephone call with a client will differ depending upon the context. Also, as we shall see below, your commitment to the client-centered approach may also vary depending upon which context applies.

A taxonomy of counseling contexts will account for two kinds of variations. First, it obviously matters what your goal is—are you simply explaining something relatively static, like the state of the law or the meaning of a clause in a document, or are you assisting your client to arrive at a decision among several alternatives, such as whether to proceed as a 501(c)(3) or a 501(c)(6) nonprofit organization?[1] Second, the role of the

[1] For a review of how tax-exempt organizations work, see the Introduction to Creating and Operating Nonprofit Organizations chapter.

person or persons with whom you are working affects your approach. Are you counseling an individual about her or his personal stake in a transaction? Or, perhaps more common in transactional matters, are you working with an officer or board member of an organization who possesses a fiduciary responsibility for (and perhaps, but perhaps not, a personal stake in) the outcome? That distinction can be critical in the role you play in arriving at an ultimate course of action.

With those two factors in mind, we might divide the counseling world into the following classifications:

1. *Advice About the Law*: This type of counseling is actually rarer than you might think, when you compare it to what will follow. Sometimes, your goal in a meeting will be simply to communicate to a client what the law *is* or what the law *means*. Usually, if you are doing this, you are in the process of helping a client make a decision, which we encounter as a different category below.

2. *Advice About Business*: You might think that this isn't your role—you're a lawyer, not an MBA (well, for most of you that's true). And you're probably right that it should not be your role, at least some of the time. But you fool yourself if you deny that transactional lawyers can perceive business and practical implications of a client's actions. For present purposes, it is important that you recognize providing business advice as a form of counseling, which you may or may not want to engage in depending on the circumstances.

3. *Assisting an Individual (or Constituent) to Choose Among Discrete Choices*: Note the qualifiers here—they are important. A transactional lawyer will commonly work with an individual to assist him or her to choose among a finite set of alternatives. Imagine a sole proprietor who wishes to create a business organization, and may choose among a Limited Liability Company (LLC), a Subchapter S corporation, or a Subchapter C corporation. You will quickly see that a lawyer has an important role to play in assisting the client with such a decision (but, usually, not suggesting to the client which option to choose). If the person with whom you work is serving as a constituent for an entity client, your counseling role *might* be different as a result of that factor.

4. *Assisting an Individual (or Constituent) to Establish a "Bottom Line" Authority for a Sale or Negotiation*: This category of counseling might not be very self-evident to you, like the preceding three examples will have been. But it makes sense when you think about it. Helping a person choose between Option A and Option B, in a world of finite choices, is a quite different activity from assisting the person to decide how much authority to delegate to a lawyer in a negotiation, or what limit to establish on a payment for a desired object or service. One observer has labeled this kind of counseling as "pre-negotiation

counseling."[2] As above, your participation in this form of counseling may end up different if the person you work with is a constituent and not a direct client.

This chapter will discuss some basic ideas underlying client counseling, and will suggest two working models—again, not recipes—for the latter two types of professional activity. Before we reach the models, though, we must review the basic premise of client-centeredness, because that ethical and strategic stance affects our understanding of your role in any of these contexts.

III. A CLIENT–CENTERED APPROACH TO LAWYERING

A. THE UNDERLYING PREMISES OF CLIENT–CENTEREDNESS

This book adopts a client-centered approach for lawyering work generally. It accepts the insights first developed by David Binder and Susan Price in their pioneering work on legal interviewing and counseling,[3] insights which several critical commentators have refined and reappraised over the years.[4] It is a very elegant and compelling commitment, although when you begin to work with your clients you quickly learn that its elegance can become complicated by the messiness of real world practice.

A client-centered approach to lawyering respects an individual's autonomy, and warns against a lawyer's interference, either willingly or otherwise, with a client's full ownership of her legal matter. Its basic premise is this: A lawyer must aim to assist a client to make choices and to proceed with her legal work in ways which reflect *the client's* preferences, values, goals, and commitments. It is profoundly anti-paternalist in its philosophy. It also makes a good deal of sense. A lawyer is an agent of a client, who is the principal in the relationship. Each lawyer brings to

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[2] Paul R. Tremblay, *Pre–Negotiation Counseling: An Alternative Model*, 13 CLINICAL L. REV 541 (2006).

[3] DAVID BINDER & SUSAN PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH (1977). The authors of this classic text refined their thinking in later variations of the book. *See* DAVID A. BINDER, PAUL BERGMAN & SUSAN PRICE, LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH (1990); DAVID A. BINDER, PAUL BERGMAN, SUSAN PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH (2d ed. 2004); DAVID A. BINDER, PAUL BERGMAN, PAUL R. TREMBLAY & IAN WEINSTEIN, LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH (3d ed. 2012).

[4] *See, e.g.*, THOMAS L. SHAFFER & ROBERT F. COCHRAN, LAWYERS, CLIENTS AND MORAL RESPONSIBILITY (2d ed. 2009); Robert D. Dinerstein, *Client–Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client–Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client–Centered Representation*, 12 CLINICAL L. REV. 369 (2006); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

the interaction her or his own peculiar set of values, fears, likes and dislikes, and it is wrong, as a moral measure, for the lawyer, the professional with power and status, to suggest choices based upon the lawyer's preferences instead of the client's.

A commitment to client-centeredness leads us to craft counseling models imbued with *neutrality*. By "neutrality" we refer to the quality of the lawyer's preferences and values, and not the lawyer's opinion about, say, the likelihood of some strategy working or not. To understand why neutrality is so important (and to appreciate the challenges of this stance), we should consider for a moment the expectation of a client seeking help from a lawyer on a complicated and serious legal matter. Imagine that the client has agreed to pay the lawyer a lot of money for the lawyer's services (which won't be the case in your clinic work, but may be the case after you graduate). The client might expect that for the high prices she charges, the lawyer will offer direct and definitive advice: "My expert, considered opinion is that you should do the following. . . . " The client-centeredness approach suggests that the lawyer will seldom provide that kind of direction to her clients. Why not?

The reason why not is grounded in what lawyers assist clients to do. Suppose that a client wants to know from his lawyer what legal device will accomplish Goal X, and that only one plausible legal maneuver, Device Z, will accomplish Goal X. In that case, the lawyer should and will offer her expert advice: "We'll use Device Z." But few legal matters have such straightforward and definitive solutions. Most legal matters—and virtually all of the legal matters that are interesting and challenging—involve multiple alternative actions, uncertainties about each, assessments of levels of risk, trade-offs in results, and imperfect predictions about what some other people are likely to do in the future, and about how the participants will feel about the choices in the future. A smart and wise lawyer will recognize the relevant alternatives, describe the inherent uncertainties, offer reliable predictions about other participants' likely behaviors and feelings, and assess the risk levels. But then, once the lawyer has performed her role and communicated all of that critical information to her client, only the client can choose among the available alternatives based on factors peculiarly within the client's competence.

Perhaps like you, many clients will want the lawyer to go further, and to make the ultimate choices for them, or at least to recommend a decision. But, while a lawyer is well equipped to perform the role just described, she is ill-equipped to understand *what choice meets the client's preferences most fully*. The lawyer may know her client really well, but the odds are that she does not know the client as well as the client knows himself. Because of the risks and uncertainties involved, the "best" decision is the one which accommodates the client's preferences, values, and position on the risk-taking versus risk-avoiding scale. It is also becoming

more well-accepted that good decision-making is far more dependent on emotion than on reason.[5] A choice will be "right" not because of some reasoned, objective calculus, but because it meets the personal (and often unconscious[6]) needs of the person who will live with the results.

Clients, not surprisingly, often wish it were different—that the lawyer will discern and communicate the important decisions to them.[7] Lawyers are not the only profession facing this kind of angst. Interior designers and financial planners are two professions which quickly come to mind, where customers tend to find the available choices overwhelming and hope—usually in vain—that the expert paid by the customers will make the hard choices for them.

For these reasons, counseling models revolve around processes intended to inhibit a lawyer's tendency to decide issues for clients—or even to imply a favored choice and therefore distort the client's thinking about options. As you will see when you work with your clients, true neutrality is really hard—and maybe even impossible. It is an ideal to seek to attain, even if you never quite reach it. But some factors and settings might call for more direction and less neutrality by the lawyer. Consider the examples in the following section.

B. CLIENT-CENTEREDNESS IN PRACTICE—EXCEPTIONS AND COMPLICATIONS

The neutral, client-centered approach just defended is a perfectly sensible account of the human interaction between the expert lawyer and the client who relies on the lawyer's expertise. It accounts for the reality of lawyering practice by recognizing that legal solutions are not math problems, and that only clients can appreciate in any meaningful way how to respond best to the levels of risk and uncertainty inherent in legal decision-making.

Years of practice have led observers to suggest a more pragmatic view of the client-centeredness agenda, however. In this section we describe a few settings where, notwithstanding the elegance of the justifications described above, you might find yourself diverging from the neutrality principle, and feeling reasonably okay about doing so.

The Legal Technician Exception: This is the most pragmatic and the most easily defended of the exceptions to a neutral stance. You might understand it in its strong and its weak sense. The strong sense is this: Many of your lawyering "decisions" are not for the client to make at all, so

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5 *See* JONAH LEHRER, HOW WE DECIDE (2008).

6 *Id.* at 35–42.

7 One observer has characterized a follower of this approach as a "two handed lawyer, . . . one who can analyze a problem on one hand and on the other hand, but tosses the actual decision back to the client." Jeffrey M. Lipshaw, *On the Two-Handed Lawyer: Thinking Versus Action in Business Lawyering*, at http://ssrn.com/abstract=2095357 (2012).

you will make them without any attempt to counsel your client with a neutral stance. Here's an exaggerated example to make the point: Your "decision" to send to the lawyer representing the seller in a real estate deal a version of the draft purchase and sale agreement by a scanned PDF rather than by a first class letter is not one about which you will seek your client's consent.[8] As many observers have pointed out, though, be careful of reading too much into this otherwise obvious exception. While the Model Rules of Professional Conduct state that "objectives" are for the client to decide and "means" are left to the lawyer's discretion (subject to a "consultation" with the client),[9] most thoughtful commentators reject that distinction as unworkable, and suggest that many "means" choices are as crucial to the client as the "objectives" would be.[10]

The weak version of this exception hearkens back to the simple example above of a legal device which is the right answer to the client's questions.[11] You will see in your transactional practice that some choices will be pretty sensible and pretty inevitable even if they are not the *only* right choice, and even if they have an important effect on your client's business. You may do your client a significant favor by simply suggesting those choices rather than by "counseling" your client in a neutral way about all available options.[12] Especially when a client is paying a handsome hourly fee to your firm for its work, simplifying choices in this way serves the client well.[13]

You should be keenly aware, however, that *this exception is a very seductive one*, and you will be tempted to overuse it. If you accept this pragmatic exception to the client-centeredness stance—as you must, and will—you should exercise exquisite care to limit its use to settings where the choices before you do not implicate the client's personal values and preferences in any meaningful way. Because client-centeredness and neutrality are hard to implement, and because clients also find the stance to be uncomfortable (for the reasons described above), the temptation to jettison neutrality will be great. So try to resist it.

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8 Lest you think of the example in the text as an entirely silly way to make the intended point, note that *sometimes* the PDF-versus-letter question might be an important decision, if either safety of email or timing of transmission is an important strategic consideration in your particular circumstances.

9 MODEL RULES OF PROF'L CONDUCT R.1.2(a) (2012).

10 *See, e.g.*, BINDER, BERGMAN, TREMBLAY & WEINSTEIN, *supra* note 3, at 321–27; Spiegel, *supra* note 4, at 65–67.

11 *See* page 110 *supra*.

12 For example, imagine that your client has approached you about forming a nonprofit organization and obtaining tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. Most lawyers would begin that process by creating for the client a corporation, even though the IRS rules permit an unincorporated association to seek tax exempt status. You need not be *neutral* about the choice to form a corporation, although you may be *agnostic* about a client's choice to proceed as an unincorporated association.

13 *See* BINDER, BERGMAN, TREMBLAY & WEINSTEIN, *supra* note 3, at 379–81.

The "Architecture" Exception: In some settings, and seemingly more often in transactional than in litigation contexts, a lawyer must sacrifice some neutrality in order to be an effective counselor because the choices available are too multifaceted and interdependent to lend themselves to the kind of careful counseling we describe below. Where the choices available to a client represent ensemble-like blends of different elements, the usual client-directed choice models simply may not work. In those instances, a lawyer will suggest, if tentatively, the packages that seem to the lawyer to fit the client's needs best, as the client has communicated those needs to the lawyer.

In the paradigmatic counseling opportunity, your client must make a choice among a finite series of discrete alternatives, none of which is perfect and each of which presents its own combination of costs and benefits. (If one of the choices is indeed "perfect," that happenstance is what we labeled the "technician" exception above.) In this paradigmatic setting, the client-centered ethical commitment urges the lawyer to withhold recommendations or opinions lest her preferences overtake those of the client, perhaps without the lawyer even realizing that she has done so.[14]

In many transactional contexts, though, the alternatives available to a client are not well cabined, are not finite and not discrete, but represent an almost unlimited variation of factors, imagined in countless different packages or ensembles. Imagine, for instance, your counseling the founders of an incipient nonprofit corporation about the bylaw provisions that would work best for the new organization. Each distinct bylaw provision in isolation presents many possible variations. Perhaps you could, with enough time and patience, articulate each possible permutation of each separate provision, and seek the undistorted and unmanipulated clean choice of the founders about that provision, moving then to the next provision, and so forth, until you have successfully "counseled" your client[15] about this matter. Not only would that process take much more time than either you or the founders wish to dedicate to this single element of the nonprofit establishment process, but it would also not be terribly effective in the end. The bylaw provisions are not easily isolated, but affect one another. A change in thinking at Article XIII of the bylaws might require rethinking decisions you elicited about provisions of Article IV.

What your client would expect, and what you would do in practice, is to begin the counseling engagement by exploring the client's preferences, goals, leanings, and history, to understand generally what seems most important to the founders. You then would *propose* a package of provi-

[14] We describe below the operations of cognitive biases within the counseling process. *See* Part IV *infra*.

[15] Note that we use the singular to refer to the "client," while using the plural to refer to the "founders." Would you think that the founders themselves are the clients, in which case the plural would be more apt here? Think of that issue as you work with your own clients and constituents.

sions that *might* fit the needs of the group. In this way you may be less neutral, but equally client-centered. We describe this variation as the "architecture exception," because it seems to mimic the interaction between architects and those who hire them to design living or work space.[16] We return to this idea later in this chapter.[17]

The Entity Constituent Exception: As we have seen, the client-centeredness approach emerges from a respect for the individual autonomy as well as the personal values and preferences of the lawyer's client, and the concomitant recognition that the lawyer has her own preferences and values which the client may not share. When you counsel an individual about *his* business or *his* real estate closing, all of the justifications for a neutral stance outlined above fit nicely, and make good sense. But what if the person you are working with is a constituent of an organization? At a minimum, the justifications for a client-centeredness stance are more complicated in this setting.

Imagine, for instance, that you are advising the executive director (ED) of a small nonprofit about whether to pay for the services of a web designer as an employee or as an independent contractor. The choice before the ED is one with competing considerations, and there is no one correct legal answer.[18] Hiring the web designer as an employee adds costs and responsibilities to the nonprofit,[19] but provides the nonprofit with greater control and oversight of the designer's work.[20] By and large, the lawyer will be neutral about whichever alternative the ED chooses. How-

16 The American Institute of Architecture has established "Best Practices" for architects to honor, some of which emphasize the importance of attending to the client's wishes and goals. *See* American Institute of Architecture, Best Practices: Defining the Architect's Basic Services, available at http://www.aia.org/aiaucmp/groups/ek_members/documents/pdf/aiap026834.pdf (the architect "produces a final schematic design, to which the owner agrees after consultation and discussions with the architect"). The Institute's National Ethics Council has issued ethics opinions addressing Institute members' obligation to respect client wishes. *See, e.g.*, American Institute of Architecture, National Ethics Council, Code of Ethics and Professional Conduct Decision 2006–20 (designing a home that did not meet the client's objectives, and engaging in a conflict of interest); Decision 2002–16 (finding no violation given evidence of regular consultation with client about plans and progress).

17 *See* Part IV *infra*.

18 Whether a person paid for services rendered qualifies as an employee or as an independent contractor is an important one under the Internal Revenue Service rules and state employment laws, although sometimes the dividing line between the two can be fuzzy. *See, e.g.*, Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295 (2001); Susan Schwochau, *Identifying an Independent Contractor for Tax Purposes: Can Clarity and Fairness Be Achieved?*, 84 IOWA L. REV. 163 (1999). A business may choose to pay for services under either arrangement, assuming that the nature of the work performed and the circumstances of its supervision comply ultimately with the option selected.

19 If the worker is an employee, the employer will pay a share of the employee's Social Security and Medicare taxes, and may pay into the state's workers compensation and unemployment insurance programs. *See* 26 U.S.C. § 3101 (employee share of payroll taxes); § 3111 (employer share).

20 If the web designer is an employee, the employer may terminate him at will, and may impose the conditions of the day-to-day work experience. *See* Schwochau, *supra* note 18, at 175–76.

ever, because the ED is not the lawyer's client, but is instead a constituent or representative of the lawyer's client, the rationales developed above for the neutral approach to counseling and for respecting the preferences of the counselee have considerably less weight. Indeed, the ED's *personal* preferences and values should be largely irrelevant, except insofar as the nonprofit has chosen the ED for precisely those qualities.

While you might think that this uncertainty can be resolved by working not with the ED but instead with the nonprofit's board of directors, that answer is unsatisfactory on two counts. First, as a practical matter, the board may not wish to be a party to every such decision made for the organization, and organizational theory would suggest it ought not.[21] Second, even if you were able to move from counseling the ED to counseling the board, the same constituent issues would remain, only they would be multiplied by your having several individual board members to work with, none of whom is "the entity."

This example begins to demonstrate why the usual client-centeredness stance may apply differently in organizational settings. You will likely conclude in your work that most of the same justifications apply in this setting as in the individual setting, and that you will assume the neutral stance rather than a directive stance. You will realize that, imperfections notwithstanding, the constituent still knows the organization better than you do.

The Immoral Choice Exception: When you think about it, client-centeredness is a fancy way of saying "hired gun." By respecting your client's autonomy and his wishes and preferences, you end up serving his will and suppressing your own views and opinions. The entire client-centeredness enterprise is crafted on that premise. As we saw above, that makes good sense. But what if your client isn't such a nice guy? What about your own moral conscience? Does client-centeredness require lawyers to be moral ciphers?

This is a central question that you will confront often in your practice. Many critics have tried to connect the client-centeredness model with the justifications for immoral lawyering activity.[22] The apparent criticism is sound, but only if client-centeredness is understood in a crude sense. In fact, a faithful client-centered lawyer would reject the connection, and resist a pure "hired gun" philosophy. And so, likely, will you. A sophisticated understanding of the client-centered approach respects the lawyer's moral autonomy while it embraces the client's legal autonomy.

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[21] *See* GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS (George W. Overton & Jeannie C. Frey eds., 2d ed. 2002).

[22] *See, e.g.*, SHAFFER & COCHRAN, *supra* note 4; Ellmann, *supra* note 4; Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1742–48 (1993).

Many insightful commentators have written about this tension, and if you are interested you should explore the rich literature.[23] For our present purposes, consider the following basic distinctions: Sometimes your client will consider choices which are lawful and not morally troublesome; in those instances, your role is to assist him to choose the alternatives which best suit his needs, values and preferences, as he understands them. Sometimes, though, your client will consider choices which are simply illegal as you understand the law. Your role in that setting is of course to inform your client about the status of the law, but you will not assist him to pursue one of the unlawful choices. The law of lawyering prohibits you from doing so,[24] as does your moral sensibility (we hope). At other times, though (and here's the hardest iteration, and perhaps the most interesting one), your client will consider choices which are perfectly lawful but morally unconscionable. (You will agree that sometimes an act can be both "legal" and "immoral," right?) In that setting, you will not necessarily be client-centered or neutral in your discussion with your client. You may engage your client in what some have termed a "moral dialogue"[25] with your client, and in that conversation you will not be agnostic about the choices before the client.[26]

This is a complicated topic which warrants a far more extensive discussion than this chapter can offer. You will certainly encounter it in your practice as a lawyer, and you will likely encounter it in your experience as a clinical student. You will struggle with questions about how you distinguish between a serious moral disagreement and a respectful difference of personal opinion. In the end, you will recognize the difference, but you will benefit from a lot of input from your colleagues in arriving at that judgment.

The Disabled Client Exception: The final exception to the client-centered commitment we will consider here concerns clients who suffer from a disability which impairs the client's capacity to exercise autonomy responsibly. The premises of client-centeredness invite this exception. If the purpose of a neutral and non-directive approach to counseling is to respect the autonomy and independence of your client, then it makes lit-

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[23] *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998).

[24] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995). As Stephen Pepper explains, the distinction between explaining the consequences of unlawful conduct ("there is a small penalty, and from my experience you will not get caught") and encouraging the unlawful conduct is a fine one.

[25] *See* Eleanor W. Myers, *"Simple Truths" About Moral Education*, 45 AM. U.L. REV. 823, 853 (1996) ("Engaging in moral dialogue is an essential ingredient of moral growth.").

[26] If you want to know more about how the moral dialogue might work, you could read one of the legal counseling texts which address this issue in more depth than this text. *See, e.g.*, BINDER, BERGMAN, TREMBLAY & WEINSTEIN, *supra* note 3, at 339–41; ROBERT F. COCHRAN, JR., JOHN M.A. DIPIPPA & MARTHA M. PETERS, THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 169–90 (2d ed. 2006).

tle sense to remain faithful to that approach if your client, because of a serious mental illness or disease, cannot make reasoned choices or appreciate the consequences of his actions.

Model Rule 1.14 recognizes that lawyers sometimes must act in a paternalistic fashion with a disabled client; otherwise, the lawyers would find themselves bound to assist in causing harm to clients who never *really* chose to experience that harm. Note the implication of that last sentence. If your client is not disabled, if the client fully appreciates the consequences of his choices (and assume for now that he is not acting as a constituent of an entity, and not acting unconscionably to hurt another), then your role is to assist him in carrying out his lawful choices, even if you believe that the choices are foolish. Even ridiculously foolish. Your clients have every right to make lousy and imprudent choices, and it is not your role to interfere with a knowing decision to do so.[27] (Of course, it is entirely your role to make sure the client *understands* the implications and consequences of his unwise choices. If he does not learn from you about the risks he is facing, you have not done your job as a lawyer.)

You will agree with the distinction just outlined—you must respect the foolish choices your client knowingly makes; but foolish choices made because of some defect in the client's thinking deserve your intervention. You will discover, though, that in practice that theoretical distinction is frustratingly difficult to discern. You might think it is impossible to discern in practice. "Mental illness" does not appear in your office with clear, 16–point font labels. You are not (most likely; though some of you will be) a trained mental health professional, so even the premise of the distinction will be elusive. In those settings where you confidently accept that Rule 1.14 applies, you will find it challenging to know how to proceed, assuming you opt to act in a more directive fashion. May you unilaterally overrule your client and make choices for him? Should you intervene by seeking a lawful surrogate (like a guardian or conservator) who can serve as your substitute client and make decisions for your disabled client? Like the topics above, this subject deserves more attention that this primer can offer. A helpful literature is available if you are interested in understanding this topic better.[28]

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[27] The medical world operates on the same principle. *See, e.g.*, Lane v. Candura, 376 N.E.2d 1232 (Mass. App. 1978) (patient who refuses life-saving amputation procedure not incompetent by virtue of having made that choice, and medical providers must honor her choice even if it hastens her death). For an early discussion of this tension, see Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515.

[28] *See, e.g., Conference on Ethical Issues in Representing Older Clients*, 62 FORDHAM L. REV. 989 (1994); Carol M. Suzuki, *When Something Is Not Quite Right: Considerations for Advising a Client to Seek Mental Health Treatment*, 6 HASTINGS RACE & POVERTY L.J. 209 (2009). At the risk of engaging in dangerous overgeneralization, here is an observation you might appreciate: In the transactional clinic world, the incidence of major mental illness among your clinic's clients will likely be less than in the poverty-focused litigation clinical environment. The prevalence of mental illness in poverty law practice (and therefore in many litigation clinics) is substantial.

IV. HEURISTICS, BIASES, AND COGNITIVE ILLUSIONS

Before you learn about a couple of models (not recipes!) to help guide your meetings with clients, there is an important topic for you to begin to understand—the world of behavioral economics. Nothing has called traditional counseling conceptions into question more than the emerging insights from behavioral economists, and you will have a hard time serving as an effective advisor if you do not have at least a little bit of familiarity with heuristics, biases and cognitive illusions.[29]

Most traditional counseling literature is grounded in classical economic theory, which understands persons first and foremost as maximizers of utility, as rational agents who make decisions based upon a reasoned process of assessing costs and benefits. (We hear the subject of these ideas referred to as *homo economicus.*[30]) The role of a counselor, according to this economic theory, is to assist a client to understand and appreciate, in as organized and careful a way as possible, all of the positive and negative implications of the various alternatives, so that the client may then engage in a careful cost/benefit analysis and arrive at the choice which maximizes utility.

Classical economic theory is not wrong, of course. People, including your clients, do want to make choices in a way that maximizes the good things and minimizes the bad things. A counselor needs to nurture practices that encourage that result, and to incorporate structures to assist in careful deliberation. But classical economic theory is also *not right.* It misunderstands, and at times profoundly so, the way that people think and the way they make decisions. The behavioral economists have shown us many important ways in which we need to rethink our understanding of how people decide, and therefore how professionals help their clients decide. One such economist compares the classical *homo economicus* with

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Poor persons suffer from mental illness at a higher rate than the overall population; you can debate what is cause and what is effect. *See* National Center for Health Statistics, Health, United States 2011: With Special Feature on Socioeconomic Status and Health, 38 (2012), http://www.cdc.gov/nchs/data/hus/hus11.pdf; Carey Goldberg, *Mental illness and poverty: Does one cause the other?*, BOSTON GLOBE, March 8, 2005, http://www.boston.com/yourlife/health/mental/articles/2005/03/08/mental_illness_and_poverty_does_one_cause_the_other. Clients of transactional clinics tend to be less poor, tend to have more education, and tend to be functioning better within the business environment than clients of litigation clinics. As a result, you will likely encounter the Rule 1.14–triggering contexts more rarely than your litigation clinic colleagues.

29 You will recall that we introduced this topic, and covered it briefly, in the chapter on Organizing Your Transactional Work, at Section VI B. We also revisit this topic in the chapter on Transactional Negotiations, at Section IV.

30 *See, e.g.*, Richard H. Thaler, *From Homo Economicus to Homo Sapiens*, 14 J. ECON. PERSPECTIVES 133 (2000).

a more accurate subject he refers to as "Homer economicus," after the character from the television comedy show *The Simpsons*.[31]

Behavioral economics has been around for decades, but it has enjoyed a fascinating popularity in the recent years in the semi-popular literature. Books like *Predictably Irrational*,[32] *Thinking, Fast and Slow*,[33] *How We Decide*,[34] *Nudge*,[35] *Sway*,[36] and *The Drunkard's Walk*[37] each try to explain some of the cognitive illusions which influence how individuals actually make decisions. Since counseling is, at bottom, assisting your clients to make decisions which will be the "best" for them (however one defines that qualifier), you should know a little bit about what factors affect and distort the thinking and decision-making of most of us.

In processing information and acting upon it, we all rely upon *heuristics*, and we all are subject to *biases*. Heuristics are shorthand processing devices which allow us to make quick judgments amid uncertainty. Biases are, well, our biases—the unthinking preferences and leanings which we each own as a result of how we have learned things in the past. A few of these heuristics and biases have special relevance to the kinds of decisions your client will make with your help. We will address those few here, as an introduction for you to this intriguing topic. The factors we will identify here are the following three: (1) prospect theory and the framing effect; (2) anchoring; and (3) the self-serving bias.

A. PROSPECT THEORY AND THE FRAMING EFFECT

Prospect theory, developed by the famed cognitive psychologists Daniel Kahneman (who later won a Nobel Prize for his work on this topic) along with Amos Tversky, predicts a subject's risk attitudes based upon whether the event to be evaluated is understood as a gain or as a loss. Here is how one commentator describes the theory:

> The "most distinctive implication of prospect theory," according to Kahneman and Tversky, is that individuals tend to exhibit a "fourfold pattern of risk attitudes" when making risky decisions: (1) risk aversion for moderate-to-high-probability gains, (2) risk seeking for moderate-to-high-probability losses, (3) risk seeking

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[31] Richard H. Thaler, *Economic View: Mortgages Made Simpler*, N.Y. TIMES, Sunday, July 4, 2009, available at http://www.nytimes.com/2009/07/05/business/economy/05view.html.

[32] DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008).

[33] DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

[34] LEHRER, *supra* note 5.

[35] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

[36] ORI BRAFMAN & ROM BRAFMAN, SWAY: THE IRRESISTIBLE PULL OF IRRATIONAL BEHAVIOR (2009).

[37] LEONARD MLODINOW, THE DRUNKARD'S WALK: HOW RANDOMNESS RULES OUR LIVES (2008).

for low-probability gains, and (4) risk aversion for low-probability losses.[38]

Prospect theory correctly predicts that in most civil litigation, plaintiffs (who stand to gain) will exhibit risk-aversive behaviors, while defendants (who face a potential loss) will tend to be risk-takers.[39] In nuisance suits, where the odds of winning are low, the pattern is reversed.[40]

The "framing effect" is a natural corollary of prospect theory. "Framing" refers to the characterization of a situation of uncertainty as representing a risk of gain or a risk of loss. In many conditions of uncertainty, the same consequence may be described as a loss (from a chosen starting point X) or a gain (from a different chosen starting point Y). If the prospect theory holds, a decision maker will behave differently depending upon that choice of reference point.[41] You can quickly see how prospect theory and the framing effect inform the role of a lawyer counseling her client. The lawyer's choice of how to present a collection of alternatives to her client can, inadvertently or otherwise, influence the client's choice among the alternatives.[42] A lawyer may also understand better a client's perspective by listening carefully to the client's framing of the choices.

B. THE ANCHORING BIAS

The cognitive bias known as "anchoring" is yet another insight of the behavioral psychologists Kahneman and Tversky.[43] It is a simple but surprisingly powerful cognitive illusion. In evaluating an uncertain quantity, we will unknowingly (or sometimes knowingly) make our assessments with reference to an anchor point. Sometimes that anchor point is explicit and has some rational basis. If you are counseling your client about the

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38 Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 166–67 (2000) (quoting Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297, 298 (1992)).

39 Chris Guthrie, *Prospect Theory, Risk and the Law*, 97 NW. U. L. REV. 1115, 1117–19 (2003); Jeffrey J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 750–52 (2000).

40 Guthrie, *Framing Frivolous Litigation*, *supra* note 38.

41 In a well-known experiment conducted to test the framing effect in litigation, two sets of auto accident plaintiffs faced identical risks of winning at trial and identical settlement offers. One set of plaintiffs had been reimbursed by insurance for most of their losses, so the settlement represented a gain; the other set of plaintiffs had been reimbursed far less, so the settlement offer represented a loss. While the dollar value of the economic choices available to the two sets of plaintiffs was precisely the same, the plaintiffs facing a loss turned down the settlement offer significantly more often than those realizing a gain. *See* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 131–33 (1994).

42 Dozens of scholarly articles have examined the influence of prospect theory and framing on lawyering practice. Most focus on litigation, perhaps not surprisingly. While none has applied prospect theory to transactional decision-making explicitly, the theory's lessons to transactional counseling are plainly evident.

43 Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 14 (Daniel Kahneman, Paul Slovic & Amos Tversky, eds. 1982).

purchase of a small business, figures showing the assessed value of the real property or the inventory, or the cash flow from the previous quarter, will serve as obvious anchors. But just as often the anchors are not rational and may not even be conscious, but they still can have a powerful effect on decision-making.

Dan Ariely and his colleagues conducted a clever experiment to prove this point.[44] They arranged a number of MIT undergraduates to declare how much they would pay for a number of items, including bottle of fine wine, a cordless trackball, a cordless mouse, and a box of Belgian chocolates. Before the bidding for the items began, they asked each participant to write the last two digits of his or her Social Security number on the page listing the items, and to place that two-digit number next to each item, as a hypothetical price. Then, the participants listed the prices they would pay for each item. The result was exactly as the anchoring effect would have predicted: those participants with low digits at the end of their Social Security number bid significantly smaller amounts than those with high digits. The entirely random, and entirely irrelevant, Social Security number digits had anchored the perceptions of the participants, and influenced directly their decision-making.

Because the anchoring effect is so powerful and so arbitrary, its influence on counseling (and, when you think about it, negotiation[45]) can be profound. Imagine that you are assisting a business owner about a possible lease on some attractive storefront space. You and your client must decide whether to accept an offer suggested by the storefront's landlord, and your role, as her lawyer, is to assist in that process, so that the business owner makes the "right" choice. Once you recognize that her understanding of a fair price may be influenced by certain anchors, some legitimate but some purely irrelevant, you can account for that in your counseling of her. If you are perceptive, you can identify the anchors and their effect, and (if you believe it would assist your client to make a "better" decision) you can introduce a more reliable anchor to offset any irrelevant anchors to which your client might unknowingly be responding. (And, of course, the landlord will be subject to the same anchoring distortions, which your actions might influence.)

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44 ARIELY, *supra* note 32, at 26–31 (describing an experiment conducted by Ariely, Drazen Prelec, a professor at MIT's Sloan School of Management, and George Loewenstein, a professor at Carnegie Mellon University). You will recognize this story from the Organizing Your Transactional Work chapter of this book.

45 In a negotiation, a first offer can serve as an anchor. *See* Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective–Taking and Negotiator Focus*, 81 J. PERSONALITY & SOC. PSYCHOL. 657, 657 (2001) ("[W]hichever party . . . made the first offer obtained a better outcome. In addition, first offers were a strong predictor of final settlement prices."); Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1, 18–19 (1994) (discussing the anchoring effect of the first offer in settlement negotiation). *See also* the chapter on Transactional Negotiations.

C. THE SELF–SERVING BIAS

People tend to believe strongly in themselves, often more strongly than the facts would warrant. The Garrison Keillor line from "A Prairie Home Companion" about all of the Lake Wobegon children being "above average" captures a central truth about how our brains operate.[46] We tend to think of ourselves as better than average on most scales, and we usually perceive justice on our side. This "self-serving" bias affects how we make choices, and its distortions are further influenced by two related cognitive processes—the "representativeness" heuristic and the "availability" heuristic, each of which we will learn about in a moment.

Researchers have demonstrated the self-serving bias in a pithy way with a simple experiment. In two separate negotiation simulations, participants were randomly assigned to represent either the plaintiff or the defendant in a litigated personal injury dispute. Both sides were provided identical information about the victim's losses and injuries. The researchers then asked the participants to estimate a fair trial award to the injured plaintiff. In both experiments, the plaintiffs evaluated the case as worth substantially—and significantly—more money than the defendants, despite the purely random and temporary role assignments.[47] The participants' rational, analytical judgments about the value of certain data was influenced directly by the point of view they were asked to adopt. Their judgments were different based upon their temporarily assigned point of view.

The self-serving bias is well-known to lawyers (who, of course, exhibit it themselves whether they will admit it or not). Lawyers often report their clients' overly rosy predictions about future consequences and likelihood of success. The lawyers wonder whether their role is to overcome those misperceptions. The self-serving bias is augmented by the related heuristics of representativeness and availability. The representativeness heuristic is familiar to us all—it refers to our tendency to magnify the importance of small numbers of examples or anecdotes. As one writer puts it, "a small number of anecdotes might be idiosyncratic and their lessons not broadly generalizable," but we rely on them in a stubborn way.[48] It closely resembles the "availability" bias. "People use the availability

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[46] In his weekly radio program A Prairie Home Companion, Garrison Keillor describes his fictional home town of Lake Wobegon with the following phrase: "Where all the women are strong, all the men are good-looking and all the children are above average." Am. Pub. Media, A Prairie Home Companion with Garrison Keillor, http://prairiehome.publicradio.org/. *See* Nan L. Maxwell & Jane S. Lopus, *The Lake Wobegon Effect in Student Self-Reported Data*, 84 AM. ECON. REV. 201, 201 (1994) (discussing this bias).

[47] Linda Babcock & Greg Pogarsky, *Damage Caps and Settlement: A Behavioral Approach*, 28 J. LEGAL STUD. 341, 352–54 (1999); George Loewenstein, Samuel Issacharoff, Colin Camerer & Linda Babcock, *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 141 (1993).

[48] Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 281 (2006).

heuristic whenever they take action or reach conclusions about the world based on how easily they can recall or imagine instances of what they are thinking about. This heuristic guarantees that events that are more vividly and emotionally implanted in our minds will leap to our consciousness when we face a decision."[49] So, people tend to fear airplane accidents or shark attacks even when, empirically, their statistical likelihood is much more scarce than, say, an auto accident.

The availability and representativeness heuristics contribute to another common if puzzling fallacy, sometimes known as "the myth of the hot hand." Most of us succumb to this cognitive illusion, and, indeed, many of us resist any suggestions that it is a fallacy at all. The illusion is this—we tend to see *streaks* in athletic performances (and elsewhere—notably mutual fund performances) when what we in fact observe is simply the result of random distributions of good and bad results. Professional sports managers make their living by adjusting to the "hot" or "cold" spells of their teams' players, as though some players in fact were in a groove or in a funk. Careful analysis of the actual performances has proven that the streaks most of us believe we see are nothing more than expected, random patterns explainable by chance.[50]

Recognizing the self-serving, representativeness and availability biases will make you a more effective counselor, if by "more effective" we mean better able to assist your clients to make important decisions based upon a reliable and sound factual basis.

V. STRUCTURING YOUR COUNSELING SESSION

Counseling clients effectively is a difficult responsibility, particularly if your goals include non-directive guidance and a commitment to client-centeredness. One way to make the process more manageable is to develop schemas for your counseling meetings.[51] Your organization of your meetings can influence the interactions between you and your client. In this part we suggest three separate schemas for your counseling sessions, each applicable to a different kind of project or activity in which you and your client may be engaged. We start with what we describe as the "conventional" counseling undertaking, that is, assisting a client to make a choice among several discrete options. We then describe a similar but modified schema to account for what we have called the "architecture exception," where the client's alternatives are more ensembles than discrete choices. Finally, we suggest a model for counseling a client about arriving

[49] Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. ON DISP. RESOL. 683, 700 (2005).

[50] *See* LEHRER, *supra* note 5, at 62–67; MLODINOW, *supra* note 37.

[51] Note that a telephone call, or perhaps even an elaborate email correspondence, might serve as a counseling meeting.

at some negotiation authority, the activity we call "pre-negotiation counseling."

The schemas we suggest are orienting templates. We believe that their structure makes sense given the goals of your meetings and some baseline understanding about how people process information and make choices. But of course the templates are intended to be fluid and flexible, as you exercise your reflective judgment about your work with your clients.

A. A PRIMER ON THE STRUCTURE OF A CONVENTIONAL COUNSELING SESSION

This part of this chapter introduces you in a simplified way to a model for organizing what you might think of as a "conventional" counseling meeting—a meeting where your role is to assist a client (or a constituent of a client) to make a sound choice among a finite set of alternatives. We think of this kind of counseling as conventional because it is quite common, and because the rich literature about counseling tends to focus on this kind of meeting.[52]

The model described here emerges primarily from the pioneering work of David Binder and Susan Price, and their later co-authors.[53] Because this is an orienting primer and overview, you may wish to review the latest version of *Lawyers as Counselors* for a much more elaborate discussion of a model similar to the one described here. The model assumes a client who wishes to engage in careful and rational deliberation about alternatives, and proceeds with the goals of clarity, structure, and neutrality on the part of the lawyer, who will not try to influence her client's decision except in an exceptional circumstance.

Let us use the following typical example to introduce the model: Imagine that you are representing Sandy Litmanovich, an entrepreneur who has begun a catering business as a sole proprietor. As her business grows, Sandy wonders whether she ought to establish a more formal business structure, like an S Corp or an LLC. She visits you to serve as her lawyer as she decides whether to proceed with a business entity and, if so, which entity to adopt. Let's assume that she is honestly perplexed about what avenue would serve her interests most effectively, and really does need some smart and compassionate assistance to make this decision. That assumption seems a perfectly fair one, given the clients you will encounter in your clinical work.

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52 The textbooks listed in footnotes 3 and 26, *supra*, and 55 *infra* assume that this kind of counseling is the paradigm of legal advising.

53 *See* note 3, *supra*.

1. A Model Structure

A model for structuring your meeting with Sandy could look something like this, with the following separable stages developing in this order:

1) Welcome and small talk;
2) Review and confirmation of goals and interests, including a preparatory explanation;
3) A *brief* description of the discrete options to be discussed;
4) A choice by Sandy about which order to review the options;
5) A *descriptive* (not normative) review of each option in order;
6) A *normative* comparison of the options, with pros and cons identified;
7) A refinement of the alternatives and a tentative choice; and finally,
8) A choice by Sandy of one option (or a string of options).

Some of these steps are entirely intuitive; some, though, may warrant some further explanation. Let us review the model and defend it using the goals of clarity, structure, and neutrality.

2. An Explanation of the Model's Stages

You will recall that above we recognized than an orienting model is not a recipe, and not a script to be followed rotely. That caveat deserves this reminder here. But there is a wisdom in generally organizing your meeting along the lines just discussed. Let us review some of the insights that led to this model.

Steps 1) and 2): One benefit of this early introductory part of the meeting is to agree upon the meeting's agenda and to discuss with Sandy your intentions for the meeting. Sandy may believe that the question she brings to you is a technical one, to which you can provide an answer for her by the end of the meeting ("You should create a Subchapter C corporation."). Since Sandy would likely be wrong in that assumption, the beginning part of the meeting permits you to help her understand what you can accomplish today (or, by the end of the counseling process, which may take more than this one meeting). You can remind her of your goal of neutrality—to emerge with the solution that *Sandy* prefers.

You can also resist the tendency to assume that you know what your client's goals and interests are, by explicitly reviewing them. This part of the counseling session follows up on your interview, where you would have inquired about the client's goals and aspirations, but obviously does not simply repeat that line of inquiry. Instead, you will check back with

the client to make sure you understood her during the interview, and to learn whether anything has changed since the previous conversation. Your check-in might look something like this:

> Before we start reviewing the choices available to you, Sandy, I want to make sure I understand what is important to you as we consider the options. I recall from our last meeting that your short-term plans are to operate the catering business alone, without any partners or co-owners. But down the road, especially if the business thrives (as we expect it will, right?), you would like to have the flexibility to share the business with a partner or two, and maybe to look for investors if that would help the business grow. I also understand that cash flow is really tight for you right now, and that you are especially concerned about protecting your home and your savings in case something were to go wrong with the business. And finally, I remember you saying that you prefer the least complicated arrangement possible. You told me about your tendency to focus more on the baking and marketing and less on the administrative drudgeries that come with owning a business. Do I have this right?

Steps 3) and 4): These steps represent an effort to avoid any hint of favoritism by you for any of the choices on the table. The model asks that you look to Sandy to decide which option she wants to discuss first, second, and so forth. To permit her to make that choice, you of course have to list the options serially for her, with the briefest of "headline" descriptions, but with little else for now. So, for example, you might explain the choices for discussion to Sandy in this way:

> It makes a lot of sense for you to be thinking about whether you should create some kind of formal business for the good work you've been doing. I don't know whether you should do so or not, of course, but we can review the choices you have and see what you decide in the end. My sense is that you have four realistic options available here. You could continue as a sole proprietor as you've been doing. Or, you could create what's called an "S Corp.," which is a corporation usually intended to stay rather small. You could start what's known as an LLC, which is like an S Corp. but with some important flexibilities built in but also some possible disadvantages. Or you might start a C Corp., which usually gets chosen when there are plans for the business to get large or to seek outside investors. I can and will tell you a lot more about each of these four choices, but that's a basic headline about each. I'll let you decide which we discuss first. I am completely agnostic about the array, so I'll happily talk about them in whatever order you wish.

Sandy might not care about the order and express that sentiment to you, in which case you can easily choose an order. The primary insight here is that you do not come into the meeting having chosen one option above the others to consider first. As you discuss this part of the model in class or with your supervisor, you will consider whether there might be some meetings where your selecting the order makes very good sense, because there might be very good legal reasons to prefer one over the others, or where the necessary sequence of the legal activity determines the order. Again, this model represents a suggestion, and invites your reflective critique.

Steps 5) and 6): These two steps represent the integral philosophy of the model, but they are also the most likely areas where the model will completely fall apart in practice. They capture the model most elegantly because they recognize that before a client can compare options the client needs to understand what the options entail. The structure aims to discourage premature diagnosis by providing description before analysis and comparison.[54] The companion steps also recognize that advantages and disadvantages are inherently *relative* to a compared object; so, if Sandy wants to understand the advantages of a sole proprietorship, she needs to know, "compared to what?"

Therefore, Step 5 proposes a non-comparative, purely descriptive review of each choice before consideration of its attractiveness. You will describe what a sole proprietorship gives Sandy, without evaluating *yet* whether those attributes are good or bad. You do the same for the other three options.

Once Sandy understands the four options, the next task is to compare them, analytically and in a structured, organized way. This seldom happens smoothly in practice, by the way, but it will be your fervent goal. In Sandy's case, you will likely first compare "entity versus no entity," to see whether creating some formal business is where Sandy wants to go. If not, there is little reason to compare the three entity options. If the answer to that question is "yes" (or, if Sandy is not sure of "no" yet), then you proceed to compare the S Corp., the LLC, and the C Corp. Many writers suggest using a chart or some visual aid to help Sandy compare the differences between the options.[55]

The fundamental insight here is this: There are differences among the options, those differences will be advantages or disadvantages depending upon Sandy's needs and interests, and she must in the end decide how to weigh those advantages and disadvantages. Your job is to as-

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[54] *See* BINDER, BERGMAN, TREMBLAY & WEINSTEIN, *supra* note 3, at 350–52.

[55] *Id.* at 367–68; STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 276 (4th ed. 2011).

sist her to make a systematic assessment of the options' relative strengths and weaknesses.

Let us observe one small part of your comparative discussion with Sandy Litmanovich. As we join the meeting, you are wrapping up your discussion of the baseline question of whether Sandy would choose not to create any entity at all. If she were to choose that route, the meeting is essentially over. In your meeting, Sandy is not convinced that no entity is preferable to some entity, so the conversation moves ahead:

Lawyer: I hear you, Sandy, that you are not ready to decide yet that you should stay as a sole proprietor. Perhaps you will end up there, but perhaps not. So let's now move to a comparison of the entity choices. If you did decide to create a formal business, let's see which one would make the most sense for you. Once we have some read on that, we can circle back and see whether your preferred entity is better than staying a sole proprietor. Does that make sense?

Sandy: Sure. That's fine. I think I'd prefer the LLC given how you've described it, although I'm still a little confused about how that will protect me compared to the corporations.

Lawyer: That's great that you're seeing some things you like about one of the choices, and that you're leaning toward the LLC. But if it's OK with you, let's not make any choices yet until we have compared the good and the bad, the pros and the cons, about all three choices. Once we've done that, we'll see how things look to you. As you know, I am happy to create whatever structure you wish, but I want to make sure you choose the one that fits your needs best.

Sandy: Makes sense to me.

Lawyer: And why not start with the LLC since you mentioned it. Let's see what advantages you see with the LLC, given how we've discussed it. And as we talk, I'll use this chart here that I've created, and note the pros and cons for each of the three choices. At the end of our discussion we'll look at the chart to see how things compare.

Sandy: Well, one good thing that my friends have told me about and you confirmed is that there's no double taxation for the LLC, like there is with the—was it the C Corp.? But isn't it more expensive to set up an LLC than a C Corp.? And didn't you say some investors prefer the C Corp.?

Lawyer: You have just identified a number of pros and cons for two of the options, so let me both clarify and label them so our

discussion can stay as organized as we can make it. As I mentioned at the beginning, there are a lot of factors to consider here. As I hear you, a pro of the LLC is the pass-through taxation, without your business having to pay income taxes separately. We discussed earlier how that factor might play out for your particular business, so I will jot that down as a pro for the LLC but as a con for the C Corp.

You also noted the start-up cost factor. Money is always an important issue for a beginning business owner. A disadvantage you see with the LLC is that it is more expensive in our state to register an LLC than a corporation, so I will list that as a con for the LLC and a pro for both the C Corp. and the S Corp. But remember that after the initial set-up fees, the LLC actually has a slightly cheaper annual fee than the corporations for each year in the future, so should I list that as a plus for the LLC and a con for the others?

Sandy: Thanks for reminding me of that. So can we note the short-term cost as a very slight disadvantage of the LLC? Cash flow is very tight right now.

Lawyer: Got it. Now, what else do you like about the LLC?

Sandy: You mentioned its flexibility, and that sounded good. But isn't that also a problem? I find I need structure in my business life, as I get so busy and distracted running the operations.

Lawyer: You like flexibility but you want structure. Let's spend a little more time comparing the three choices based on those factors to flesh out how they might work for you, or not work for you. First, with the LLC . . . .

In this segment, you have already described for Sandy what her business would get with the S Corp., the C Corp., and the LLC. Your goal now is to help Sandy compare them, and none of the choices is unambiguously better in all respects than the others. This dialogue shows you first gently nudging Sandy not to decide too soon. It may surprise you to see the client-centered model, with its commitment to antipaternalism, urging you to act in this decidedly directive way, but it makes good sense.[56] Your goal as Sandy's advisor is to assist her to make the most appropriate choice, and your meeting structure should encourage a fair deliberation among all options.

[56] This seeming tautological aspect of the client-centered approach has not escaped commentary. *See, e.g.,* Ellmann, *supra* note 4.

You then attend explicitly to identify each of Sandy's reactions and observations as an advantage or a disadvantage of a given option. You try to maintain some organized consideration of the choices, lest the process become a jumbled maze of factors. (Do you think you did well enough to organize her consideration of the choices?) And you use the chart to serve as a visual aid which can capture her preferences and dislikes in a retrievable way.

Steps 7) and 8): At some point Sandy will decide whether to create an entity or not. (If she remains completely unable to make any choice, she will have decided just the same—to opt for the sole proprietorship, for the status quo, the default option.) In these final two steps you will listen to her reactions to the evaluative processes you've just engaged in, and help her make sense of the conflicting considerations. Some choices will, in the end, be easy—and your role will be pretty minimal. Often, though, the choice will be very difficult, and she will want the most help from you. Conceptually, what you do at this stage of your interaction is to reflect back to Sandy what you are hearing and learning from her, to help her match her inclinations and needs with the substance of the available choices. You will work with her to assemble, analyze, and grapple with the information you have provided to her.

This is the most important place for you to think hard about the limits of your neutral stance. Recall our discussion earlier about client-centeredness. Whether Sandy chooses to start an S Corp. or an LLC *can-not* be based on your preferences—you will not run her business, and, to boot, you might have all sorts of conflicts of interest about that choice. That fundamental reality does not mean, however, that you cannot express your opinions about the choices at this end of the process. Having heard Sandy's concerns and understood her goals and opportunities, and having listened to her struggles with how to choose, you certainly may—and perhaps must—suggest ways that the options can meet, or not meet, her particular needs.

It is very common for a client to ask you what option she should choose at this stage, and you might think you have to resist answering her question, even if she pleads for your advice. It is a good thing if you sense that resistance, because the best instinct is to avoid taking control, rather than the more common lawyer reaction of stepping in and serving as the authority. But done well, and with ample respect for Sandy's circumstances, you can suggest, tentatively, an option that seems to meet what she has told you are her concerns. Consider this:

> You're right, Sandy. This is a really hard choice to make. I hear you enticed by the traditional recognition that the S Corp. receives, but worried about some of its limitations. Meanwhile, the LLC attracts you because of its flexibility, but it is more expensive to establish and cash flow is a short-term worry. As you

know, I'm happy to draft either one, and it makes no difference to my life as a lawyer which one you choose. I do sense, though, that the LLC might serve your purposes better given what you've said this afternoon. You are attracted to the LLC's options of having flexible ownership arrangements, compared to the S Corp.'s one class of stock rule. Also, as I hear you, you like the fact that the LLC permits the option, at least, of having a member which is not an individual person, unlike the S Corp. All of those seem to favor the LLC.

You worry about the greater cost of establishing the LLC, and that's a serious consideration. But down the road, the LLC's annual costs may actually be slightly less in our state than the annual filings due from an S Corp. I raise this to help you compare some short-term costs with some long-term savings.

So, let's think some more about what worries you would have if we opted for the LLC. . . .

That dialogue shows a lawyer who is offering an opinion, but not based on the lawyer's preferences, values, or interests. (Or, at least, that's how the dialogue is intended. One never knows whether one's principled considerations are really masking some underlying self-interest or bias. But this is the best one can do.) If you were working with Sandy on this problem, you could use this kind of reflective expertise to test one of the options, while—and this is critical—always welcoming her to disagree with you.

3. What If Sandy Were a Constituent of an Entity?

Our last consideration for this conventional counseling model is to address briefly what, if anything, would look different in this meeting if Sandy were not a sole proprietor operating the catering business, but one of four partners running the same business. It is perhaps unusual, but certainly not unheard of, to find four individuals participating in a business without any formal structure, especially, for instance, in a family business. As a matter of substantive law, the unincorporated business would be a general partnership, but without any limited liability or similar protections.[57] Imagine that Sandy visited you as the lawyer for the partnership, intending to use your legal services to help her and her partners decide whether to change the form of the business. Essentially, it is exactly the same situation as that we have just explored. The eight stages and their respective justifications would apply to this meeting just as they did to Sandy as a solo owner of the business.

There is one potentially critical difference, though. In assisting Sandy to make the hard choices—especially the interactions at Steps 7

[57] *See* SCOTT B. EHRLICH & DOUGLAS C. MICHAEL, BUSINESS PLANNING 42–43 (2009).

and 8—you may find yourself *less deferential* to Sandy when she is a constituent compared to when she owned the business outright. As a partner, Sandy is *not the client*. (This true statement would have far more obvious meaning if the business were a formal corporation instead of an unincorporated partnership, but it still remains a true statement of professional ethics and substantive law.[58]) If the fundamental premise of client-centeredness is the lawyer's fidelity to the preferences, values, and predilections of her client, you must avoid conflating Sandy's preferences, values, and predilections for those of the partnership. It would make sense that you would treat Sandy's voice as *presumptively* reflecting that of the partnership. Absent some information that you know from your work with the four partners in the past, you are in no better position than Sandy to speak for this entity, and likely are in a far worse position.

But that assertion is rebuttable. As a result, your interplay with a constituent might be—and ethically, may be—less neutral and less deferential than in the solo context. This is a topic which deserves much more careful consideration; with hope, you will encounter it in your clinical work and can explore it more with your supervisor and your classmates.

B. MODIFYING THE CONVENTIONAL PRIMER FOR "ARCHITECTURE" SETTINGS

In the conventional counseling schema, we saw how you strived for as much neutrality as possible, even in the lower-level decision about which option to discuss first. Your aim was not to communicate, even implicitly, to your client that you favored one of the choices over the other. The structure aimed to discern your client's undistorted preferences, to the extent that is possible.

As we suggested above, in transactional work the notion of finite, discrete choices is less common than it might be in litigation settings. In counseling your clients about deals, about business arrangements, or about corporate governance, your clients surely will make decisions, but in less isolated fashion. Instead of your asking a client, "Would you prefer X or Z?," you will find yourself asking the client something like, "Does package W or package Y better meet your needs, or some combination of the two?" Or, perhaps more commonly, you will say something like this: "Here's a package of terms that I believe might potentially meet your needs. Let's review the proposal and see if it works. If it doesn't, we'll see if we can adjust the provisions that do not seem right."

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58 While a lawyer for a general partnership owes her professional allegiance to the partnership which is her client, she might, in some jurisdictions and under some fact scenarios, owe some fiduciary duties to each partner. This is a complicated subject beyond the scope of this chapter or, indeed, this book. *See, e.g.*, Pucci v. Santi, 711 F. Supp. 916, 927 (N.D. Ill. 1989) (noting that a lawyer for partnership represented all the partners, general and limited); James M. Fischer, *Representing Partnerships: Who Is/Are the Client(s)?*, 26 PAC. L.J. 961 (1995).

This kind of interaction calls for a different schema. Unlike the conventional counseling meeting above, or the pre-negotiation meeting we will discuss below, this kind of collaborative work typically will not be accomplished in one meeting. If we were to suggest an adjustment to the model above, that altered model would look like this:

First Meeting

1) Welcome and small talk;
2) A preparatory explanation; and
3) A review of the goals, preferences, and values which the lawyer's work will honor, with specific reference to the lawyering task at hand.

Second Meeting

4) Welcome and small talk;
5) Presentation of a proposed package/ensemble that the lawyer believes could work for the client;
6) A collaborative review of the critical aspects of the package;
7) Discussion of alternatives for each place where Sandy might prefer a different term; and
8) A final package that Sandy accepts.

This schema varies the first model in a few important ways. To see these differences in some practical context, imagine the following development in Sandy Litmanovich's business planning: After some conventional counseling as we described above, Sandy has decided to create a Subchapter S corporation. Your next step is to develop her basic corporate documents—the articles, the bylaws, and the stock share arrangements. As you likely know, those documents will not be entirely lock-step and boilerplate. Sandy has choices about how the S Corp. will get structured and how its governance procedures will look. In order to create the kind of corporate operation that meets Sandy's needs, you will have to work with her to decide which provisions she will prefer—in other words, you will *counsel* her. You could treat each separable choice within the documents as a conventional counseling task, and follow the model described above, but doing so would be time-consuming, patience-draining, and not terribly effective. Instead, you will work with Sandy on this project similar to the way an architect would treat her client. What you will do is first to explore Sandy's goals, leanings, preferences, and uncertainties about the future. You will then craft a proposal that seems to address those considerations as best you can, and present the proposal to Sandy. Those two interactions will typically not occur in one meeting, for apparent reasons.

The First Meeting: Before you can make a presentation to Sandy, you need to know how she hopes to operate her business. If the articles, bylaws and stock arrangements for any given S Corp. are subject to some

variations, you will need to learn from Sandy what plans she has for the business's operations, what preferences she has for managing and financing the company, and who will join her in the future. You also need to learn from Sandy about her areas of deep uncertainty—where she needs to maintain greatest flexibility for possible future changes in direction.

Your counseling of Sandy about what kind of company structure she will have requires that you explore these factors, and it makes much more sense that you do so before you begin to craft a package for her. Note that you may have accomplished everything you need by the process of your conventional counseling regarding whether she wants an entity at all, and if so what entity she prefers. The important insight is that you need to know a lot about this entrepreneur's plans and preferences before you make your own provisional choices for her.

The Second Meeting: Here is where we encounter the most noticeable adjustment of the conventional counseling model. For the reasons we described above, your counseling of this client about how to organize this business will not consist of separable, isolated choices for which you will profess your neutrality and about which you will discern Sandy's undistorted preferences, item by item. Instead, based on what you have learned in your previous work with her, you will come to the second meeting with a proposal which you have concluded will likely work for Sandy, and which respects the implications triggered by the substantive law as you have researched it.[59] You will explain to Sandy the assumptions you have relied upon in crafting your proposal. Your aim in the second meeting is to remain just as client-centered as you were in your conventional counseling meeting about the choice of entity. There is no reason here why you should have any greater influence about what Sandy chooses than you permitted yourself in the previous setting. Your structure of this second meeting will seek to ensure as much neutrality and deference as possible, even though you will have offered a proposal as the subject of the discussion.

In order to achieve as much deference to Sandy as possible notwithstanding your having staked out a position among the various choices, your preparatory explanation for the second meeting is critical. Sandy must understand that she will decide whether these terms work, and her values and preferences will control. Even though you wrote the proposal, you do not recommend it in any strong fashion, if at all. Here is how you might introduce this second meeting:

> Sandy, in today's meeting we will review the package I have put together as a first take on how you might operate your S Corp. I sent you the documents a few days ago, and today we can discuss

[59] In practice, you will more likely have provided Sandy with your proposal before the meeting for her review. You would most likely spend some time at the beginning of this meeting asking Sandy whether she had had an opportunity to review the materials.

them and see whether they work for you. There are many different ways that one might organize a business like yours, and this is obviously just one variation, so feel free to let me know if you want to change or adjust anything here.

Let me stress that last point, because it is especially important. I created this package by considering the things we've spoken about in our earlier meetings, knowing what your current plans are and where you would like to retain some flexibility in the future. While I created it, I am not at all committed to it, and I will happily revise, add or remove provisions given our discussion today, in light of what you wish and given the requirements of the law. I will show you as we go along where I made some choices that I *think* fit with what you've told me, but all of those choices are just my tentative judgments.

Does that make sense? Do you have any questions about how we'll proceed today?

This preparatory explanation should minimize the risk that your client will read into your proposal an inference that this is "the answer" to the puzzles she is facing, or that it is the answer that you recommend as the best one available.

In an effective second meeting, your client will question whether some of your proposed terms work to meet the business's needs. It would be either a serendipitous happenstance, or a flaw in the process, if the client agreed with everything you have included in your package. For any given item where your client is uncertain about whether that term will work effectively, and for which there happens to be one or more alternative provisions available, you will then counsel the client about the alternatives, essentially in the same fashion as we described in the conventional counseling schema.

Let us suggest an example of this last point. Imagine that your draft bylaws for Sandy's S Corp. includes a provision permitting the board of directors to oust a member of the board "with or without cause," upon a proper quorum of the board at a properly called meeting and a sufficient number of board members voting to oust the member. If Sandy wonders whether she might be better off with a "for cause" provision instead of the version you proposed (and assuming that such an alternative is lawful), you and she must decide which of the two alternatives to include. You should include one or the other, and you cannot include both.[60] You now

[60] For the sake of the counseling point we hope to make here, assume that these two options are the only two plausible alternatives. In fact, a creative drafter might insert a provision where some factual circumstances would permit a "cause" ouster while other settings would permit a "not for cause" removal. Or, perhaps a drafter could omit any mention of removal of existing board members, but that option may trigger some state law remedies. We ignore those complexities in our simple example.

encounter precisely the type of counseling opportunity we labeled above as "conventional," where you and your client face a discrete choice with finite alternatives, one of which will have to occur. Your role would then be to counsel Sandy about the choices in such a way that she may choose, without distortion from you, the alternative that best meets her goals, just as she did when choosing her form of entity.[61]

C. A PRIMER ON THE STRUCTURE OF A "PRE–NEGOTIATION" COUNSELING SESSION

As we saw above, not all counseling consists of aiding a client to choose among a finite set of discrete options, even though most counseling textbooks address only that kind of interaction. Another common alternative version of counseling addresses the activity a lawyer engages in when preparing a client to make a purchase or sale offer, or to develop some bottom line authority for the lawyer to rely upon when negotiating the terms of some transaction. If we consider any such purchase or sale as a form of negotiation, we can refer to this kind of counseling as "pre-negotiation" counseling.[62]

Pre-negotiation counseling differs from conventional counseling in a couple of important ways. To highlight those differences, let us start with an example.

Imagine that you are representing Alan Minuskin, the owner and chef of an innovative little café in Center City. Alan has had great success with his café since he opened it two years ago, so much so that he now seriously considers moving to a better and larger location. He has located a storefront which would be quite fitting for his restaurant, considering the location, the kinds of people who walk by, and the size and layout of the space. The storefront is occupied, but by a business which seems like it is not thriving, and Alan believes that the owner might be willing to rent the space to a new business like his. Alan retains your legal clinic to represent him in the possible negotiation of a lease with the owner of the space, a woman named Kerianne Byrne. Before you approach Ms. Byrne to begin discussions, you invite Alan in for a meeting in order to counsel him about what authority he will give you for a monthly rent for the premises, and what his bottom line would be on that price item. (Assume, for simplicity's sake, that you will try to negotiate a flat monthly rent for the space, rather than the more likely complicated multi-term price structure of a commercial lease.)

Notice how your meeting with Alan in this case is quite different in its goal from your conventional counseling meeting with Sandy. Sandy's meeting was actually more elegant and straightforward—she needed to

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61 *See* Section V.A *supra*.

62 As one of us has in an earlier publication. *See* note 2 *supra*.

choose between options A, B, C, or D, and in the end she could choose but one of them. If the owner of the desired space, Ms. Byrne, had offered to you a take-it-or-leave-it price of $2500/month, your meeting with Alan would parallel your meeting with Sandy, except that Alan would have only two options—take the deal, or leave the deal. But you haven't met yet with Byrne, and Alan has no finite, discrete choices to make yet. Your purpose in this meeting is to *test* Alan for how high he would go before he walks away from the deal (or you do so as his agent). To discern that authority from Alan calls for a counseling meeting, but it is a fundamentally different kind of counseling meeting. This is what we mean by pre-negotiation counseling.

Because your goals are different in this setting, and because your discussions will vary in important ways from the conventional kind of decision-making you assist your clients with, the schema for a pre-negotiation counseling session will look different as well.

1. A Model Structure

A model for structuring your meeting with Alan could look something like this, with the following discrete stages developing in this order:

1) Welcome and small talk;
2) Review and confirmation of his goals and interests, including a preparatory explanation;
3) A description of the status quo, "default" scenarios, assuming no deal is made;
4) Identification of some hypothetical rental price for discussion's sake;
5) Full consideration of that price when compared to the status quo;
6) If the hypothetical price is not acceptable, explore successively lower alternatives until an acceptable price emerges;
7) If the hypothetical price is acceptable, explore a higher price, and continue until finding a limit;
8) Determine the highest price Alan would pay; and
9) Discuss a plausible opening offer in light of the identified "bottom line."

Compared to the conventional counseling session described above, few of these steps are intuitive, so this process as a whole warrants some further explanation. As we did above, let us review the model and defend it using the same goals of clarity, structure, and neutrality on which we have relied in the previous schemas.

2. An Explanation of the Model's Stages

Let us review the model's successive steps, so we can best understand some of the complexities and challenges in this kind of client meeting.

Steps 1) and 2): This introductory and preparatory part of the meeting needs little discussion, except for the following caveat: We will see in a few moments that a meeting like this can leave a client believing that you are in favor of his paying a higher price, a result of your testing to see whether your client would in fact pay a higher price. This will become more evident as we progress, but for now accept this reminder that you might use the preparatory explanation in Step 2 to ensure Alan that you have no interest in his paying any particular price, and that you will be happy with whatever authority he ends up providing to you after the counseling is finished.

Step 3): This step deserves some explanation, because it is not self-evident in its purpose but it is critical to the success of your meeting with Alan. When you begin to discuss hypothetical rent figures with Alan, you and he need a *benchmark* in order to evaluate whether Alan should agree to rent the new space for that price, or should decline to do so. His decision on that score will *always* refer, implicitly or explicitly, to the only alternative—*not* renting at that price. Therefore, you and Alan need to explore and understand the status quo, which could include alternative sites which Alan could rent if he cannot obtain a fair lease on this new space.

Note how this part of your meeting with Alan is different from the early stages of the conventional counseling model. In the prior model, you asked Sandy to choose what topic to discuss in depth first, lest you inadvertently skew the later evaluation by seeming to favor one choice over others. Here, you cannot offer Alan any such choice. Indeed, no such array of alternatives exists. You may act in a directive fashion here, and recommend to Alan that you start with a discussion of the status quo.

Step 4): In order to determine, in the end, what Alan's authority is, you must start somewhere. It doesn't matter where you start, as we shall see, but you have to begin your work with your client by imagining some hypothetical rent. The next two stages represent the interesting part of this meeting, where you test for better or worse deals. For now, you have to arrive at some number to start with.

Conceptually, it might be better for Alan to choose a beginning rent figure for discussion, to minimize the implication that you believe that a rent figure you choose is reasonable and that Alan should agree to it. But it does not matter that much, because you will press Alan regardless of how he responds to the first number. Conceptually it also makes some sense that you start with a "reasonable" figure, to save time, but again it does not make a difference to your process.

Let's imagine that Alan is paying $2000 per month at his current location. And let's imagine further that, in this step of your meeting, where you ask Alan what rent would make him willing to move to the new space, he says, "If Byrne would rent the space to me for $1500 a month, I'd be there in a flash." You would have thus accomplished your purpose for Step 4.

Steps 5), 6) and 7): Here's where the fun begins. Your first responsibility as Alan's counselor is to make sure he has chosen the first figure wisely. In this part of the counseling meeting, you are pretending that Alan had before him two binary choices—status quo, or move to the new space at $1500/month. Before you irrevocably accept Alan's decision about that choice, you need to replicate the conventional counseling process above, and compare the two to make sure he is happy with the selection he has made. In our example, it is easy to perform this step, because Alan has chosen a seemingly very favorable rent figure. If Alan really could obtain better and larger space at less money, it would be a simple decision for him and for you. You now have authority to accept that deal from Kerianne Byrne were she to offer it.

But you know that Byrne is really unlikely to rent the bigger and better space to Alan for less than his current rent. And even if you had no idea whether that were the case or not, you still have a responsibility as Alan's lawyer and counselor to determine *whether you should reject* a proposal from Byrne that demands a higher figure. You therefore have to press Alan about a higher rent. That development looks something like this:

> I understand, Alan, that if Byrne will rent you the space for $1500 a month, I have your blessings to accept a deal on those terms. That's helpful—and why I wanted to meet with you today. What I need to know next, though, is whether you would accept a deal from her with a higher rent figure than that. For instance, what if she offered to rent it to you for, say, $2100 per month, slightly higher than your current rent? Would $2100 be acceptable to you?

You *have to know* the answer to this question. If you ended your meeting after hearing Alan's target of $1500/month, proceeded to negotiate with Byrne, and then rejected an offer for a lease at $2100/month (thinking that $1500/month was the limit of your authority), you could have committed malpractice.[63]

[63] Readers with any passing familiarity with negotiation will be quick to point out that your meeting with Byrne is not necessarily the final opportunity to close a deal. You could try for $1500, get turned down, and return later with authority for $2100 if Alan would indeed accept such a lease. That objection is true, but it misses the point. Your meeting today with Alan ought to elicit, as best as you can, Alan's "price" for the space. You have much to gain and little to lose by learning his final price in your meeting. For a more elaborate discussion of this point (including some further arguments supporting the objection just described), see Tremblay, *supra* note 2.

You can see how the meeting progresses. Alan may well agree, after careful review with you, that $2100/month is a fair price for the new space. If he does so, you need to inquire further, for the very same reasons that you pursued the $2100 question:

> So, I now understand your thinking about the $2100 rent figure—if that's the best I can do, I will accept it rather than walking away. But I'm afraid that I can't leave you alone yet. In order for me to know what I need to know before I meet with Byrne, I have to ask you this: What if she insists on, say, $2500/month? Should I say no? Or say yes? And before we discuss that rent price, let me remind you—if you end up thinking that $2500 is acceptable, that does not mean that I will tell that to Byrne, or make that offer to her unless I am against the wall, and it's the best I could do. I also need to remind you of what I said at the beginning about my role here. It matters not at all to me whether you give me authority for $2500, or $1500, or $4500. It simply doesn't matter. My job will be the same. I just need to make sure I don't walk away from a deal that you would, in fact, prefer to have.
>
> So, my question: What if Byrne insisted on $2500? Do I agree? Or do I walk?

This is the part of pre-negotiation counseling where your client might feel like you are wearing him down. (Indeed, the interaction above could be repeated several times if Alan's true "price" is much higher than $2500.) You can minimize the client's feelings through the explicit discussion included in the dialogue above. You could also minimize that reaction by engaging in a different tactic from the one shown here. That tactic would look like this: After Alan has suggested, and then accepted, a figure of $1500, you could reframe the discussion by moving him to the far end of the spectrum. You could suggest a figure of, say, $4500, just to test his spending limits. If Alan says no to $4500, you know that his "price" is somewhere between $1500 and $4500. You can test for numbers in between those endpoints to learn what the ultimate authority actually is. (It could be $1500; or it could be $4450.)

One last note about this process, which is very rich in its implications and deserves much critique and discussion in your seminar and supervision meetings. The model described here implies that Alan somehow "has" a price, and that your job is to find it through the inquiries and comparisons described here. Of course, Alan's "price" is likely not known to him, and will be influenced by your discussions. The best you could expect to do is to discern a ballpark figure which seems like the limits of Alan's authority, and then, if you cannot negotiate a lease with Byrne within those limits, you will return to Alan for further counseling (in-

formed by what you have learned from Byrne) before breaking off negotiations for good.

Steps 8) and 9): At some point, you will end your counseling with a sense that Alan would pay, say, $3000/month but not more for the new space. As you have promised Alan, your having learned this authority does not mean that your first offer to Byrne would be for a lease at $3000/month. You would be a quite inept negotiator if you led with your authority limit. Indeed, you might even walk away from your talks with Byrne at $2700, if you sensed that such a tactic could influence Byrne to accept that figure. All you know from your counseling meeting is that Alan, all things considered, would prefer a $3000/month lease over no lease and the status quo. That is critical information for you, but it does not tell you how to use it.

All of this invites the question, then, of what you would suggest as your opening offer. Many wise lawyers believe that this tactic deserves some input from your client. An offer of $1000 would seemingly insult Byrne, and might irrevocably affect your credibility for the rest of the interactions with her. A proposal of $2850 seems to be far too generous given your authority. However you choose to exercise your judgment as a skilled negotiator, you can benefit a lot by including your client in that thinking. For this reason, the final step of this process covers your having a careful, thoughtful discussion with Alan about your upcoming strategy in the negotiation.

To understand better how you might craft such a strategy, please refer to Chapter 5 of this text, covering transactional negotiation.

VI. CONCLUDING THOUGHTS

You will find the counseling process to be very interesting and quite challenging in practice. Your clients will need your advice and guidance, sometimes desperately so, and they will rely on what you tell them. You will find yourself exercising complex judgments about how effectively you can answer the questions they pose to you, especially if you hope to respect the client-centered commitment we describe here. The models we suggest here should help, but even more important will be your reflective approach to the inevitable tensions that arise in this part of the lawyering experience.