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BETTER LEGAL COUNSELING THROUGH EMPIRICAL RESEARCH: IDENTIFYING PSYCHOLEGAL SOFT SPOTS AND STRATEGIES

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A major problem faced by the legal profession is the public perception, unfortunately apparently grounded in reality,¹ that lawyers typically do not practice with an “ethic of care.”² For the most part, lawyers define client problems narrowly—too narrowly for our taste—and often deal with legal matters without paying careful attention to accompanying psychological fallout.

Even lawyers who recognize the importance of the law-related psychological realm have difficulty advising other lawyers just *how* such factors might be identified or taken into account. For instance, in an excellent text on preventive law, the “human element” in legal counseling is briefly recognized, but specific strategies are absent:

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1. See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997).

2. See *id.* at 1401-03.

For an analysis of the human element of legal counseling, see Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98 (1969). Counseling a client about the legal ramifications of a potential conflict requires a broad approach that will identify collateral human issues that may significantly affect the client's decision-making process on a course of action to resolve the conflict in addition to treatment of the core issues. Social and psychological interests of the client or the client's family are examples of such collateral human issues. It is the lawyer's duty to identify and clarify any core or collateral issues that may potentially affect a client's interest.³

And the leading work on legal counseling strongly urges lawyers to anticipate and consider the "nonlegal" consequences—including psychological ones—that invariably accompany legal measures, but notes that "nonlegal consequences are often difficult to predict."⁴

We believe that recent efforts to integrate preventive law with therapeutic jurisprudence can ease the task of predicting psychological consequences, and can give real substance and structure to the area of legal counseling.⁵ The remainder of this essay explores the integration and suggests how we may develop a truly law and psychology based approach to legal counseling.

Therapeutic jurisprudence ("TJ") is concerned with the law's impact on emotional life and psychological well-being,⁶ and is interested not only in law reform, but also in how existing law may be most therapeutically applied.⁷ As such, it offers to preventive law an opportunity of an expanded focus that will embrace explicitly an ethic of care.

Preventive law involves careful client interviewing and counseling, and careful planning and drafting to avoid legal conflicts and disputes. Preven-

3. ROBERT M. HARDAWAY, PREVENTIVE LAW: MATERIALS ON A NON ADVERSARIAL LEGAL PROCESS 75 (1997).

4. DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 12 (1991).

5. The most ambitious effort at integration is Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997) [hereinafter *Integrating Preventive Law*]. See also Dennis P. Stolle, *Professional Responsibility in Elder Law: A Synthesis of Preventive Law and Therapeutic Jurisprudence*, 14 BEHAV. SCI. & L. 257 (1996); Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 29 ARIZ. L. REV. 25 (1997); Dennis P. Stolle & David B. Wexler, *Preventive Law and Therapeutic Jurisprudence: A Symbiotic Relationship*, 16 PREVENTIVE L. REP. 4 (1997); David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REVISTA JURIDICA UPR (forthcoming 1998) [hereinafter *Psycholegal Soft Spots*]; Dennis P. Stolle, *Advance Directives, AIDS, and Mental Health: TJ Preventive Law for the HIV-Positive Client*, 4 PSYCHOL. PUB. POL'Y & L. (forthcoming 1998).

6. The most comprehensive work on therapeutic jurisprudence is LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter LAW IN A THERAPEUTIC KEY].

7. See David B. Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCHOL. 179 (1996) [hereinafter *Applying the Law*], reprinted in LAW IN A THERAPEUTIC KEY, *supra* note 6, at 831.

tive law practice emphasizes the importance of “periodic legal checkups.”⁸ It also seeks to identify “legal soft spots” (potential trouble points) and to come up with strategies to avoid or minimize the anticipated legal trouble.⁹

In anticipating and preventing legal problems, preventive law encourages us to “fast forward” to an imagined future time and trouble, and then to plan to avoid that occurrence. As a pedagogical device—in law school teaching, for example—preventive law proponents also suggest a “rewind” technique.¹⁰ For example, after discussing an appellate decision in contract law, we might “rewind” the situation back to the stage of drafting, and ask what might have been done differently to avoid the legal problem presented by the case.

If therapeutic jurisprudence offers preventive law a robust possibility of incorporating an ethic of care, preventive law reciprocates by offering therapeutic jurisprudence a set of practical, law office procedures (including periodic checkups, basic checklists, and planning instruments) whereby lawyers may counsel clients to apply or invoke the law in a therapeutic manner.¹¹ These methods and procedures, in other words, pave the way for therapeutic jurisprudence truly to be “felt by practitioners.”¹²

When integrated with preventive law, therapeutic jurisprudence would suggest that, during legal checkups and client interviewing and counseling sessions, lawyers look not only to “legal soft spots” (areas that can lead to future legal trouble) but also to “*psycholegal* soft spots”¹³ (areas where legal intervention or procedures may not lead to a lawsuit or to legal vulnerability, but may lead to anxiety, distress, depression, hard and hurt feelings, etc.).¹⁴ The lawyer should then raise that issue with the client, and discuss possible strategies for dealing with it. For example, consider the situation of elderly parents with two adult children, one of whom functions marginally because of a history of drug and alcohol problems. If, in drafting a will, the parents leave funds outright to one child, but leave the money in a trust to the one with drug problems, the parents may be creating a situation of hurt and hard

8. See HARDAWAY, *supra* note 3, at 189-92.

9. See *id.* at 92.

10. See *id.* at xlii.

11. As noted in Wexler, *Psycholegal Soft Spots*, *supra* note 5, there are certain instances where the client will be invoking the law personally, and other instances where the lawyer will be applying or invoking the law.

12. Melanie B. Abbott, *Seeking Shelter Under a Deconstructed Roof: Homelessness and Critical Lawyering*, 64 TENN. L. REV. 269, 289 (1997).

13. The concept of “psycholegal soft spots” was introduced in Stolle et al., *Integrating Preventive Law*, *supra* note 5. It is developed more fully in Wexler, *Psycholegal Soft Spots*, *supra* note 5.

14. Preventing anxiety, depression, and other negative psychological consequences has long been viewed as an important goal when dealing with psychologically vulnerable persons. See, e.g., MURRAY LEVINE & DAVID W. PERKINS, *PRINCIPLES OF COMMUNITY PSYCHOLOGY* ch. 7 (2d ed. 1997). Preventing psychosocial problems (or, in this context, law-related psychological problems) can be more cost-effective than handling such problems once they erupt. See *id.* at 251.

feelings—toward them and toward the sibling left funds without strings attached. A lawyer combining the perspectives of therapeutic jurisprudence and preventive law will anticipate this situation, will regard the proposed testamentary disposition as a “psycholegal soft spot” (though not necessarily as a “legal soft spot,” vulnerable to legal attack), and will discuss with the clients possible strategies of dealing with—and minimizing—the law-related psychological distress. For instance, the clients might speak now with the adult children, or they might specify in the will why they are taking the indicated action, and so forth.

Despite our opening remarks about an absence, in the aggregate, of an ethic of care in contemporary lawyering, we of course know that many psychologically-sensitive lawyers already practice, albeit implicitly and unsystematically, what we preach. Moreover, others might be eager to do so if only they had a better handle on how to do so. For this reason, we are hereby launching a research project to mine the experience of practitioners in identifying and dealing with psycholegal soft spots in the various areas of law practice.

So far as we are aware, the approach of problem solving and knowledge-building through the medium of a law review publication is itself a novel technique, but we are hopeful it will be appropriate to our task. For example, we are not in this project seeking a “random sample” of attorney responses. We are not especially interested at this juncture in knowing how the “representative” attorney might handle a given situation; instead, we are interested in learning how psychologically-sensitive attorneys might deal creatively with certain situations.

Accordingly, we close this essay with a prepared form for eliciting relevant information from interested members of the legal profession. The blank form is preceded by three examples intended to serve as models for structuring responses to this invitation to share your experience. They include a Will Contest case, an Americans with Disabilities Act (ADA) case, and a Guardianship-HIV case.¹⁵

We encourage the dissemination of the essay and forms among lawyers in practice settings and at professional meetings, and among law students practicing in supervised clinical programs or in clerking positions. While the principal focus of this essay is on lawyers as legal counselors, we also heartily welcome the participation of the judiciary. In fact, the first example in our forms, a will contest, comes from the trial bench. Judges, of course,

15. The Will Contest case and the Guardianship-HIV case are adapted from actual cases. See Wexler, *Applying the Law*, *supra* note 7 (discussing the will contest case); MARK S. SENAK, *HIV, AIDS AND THE LAW: A GUIDE TO OUR RIGHTS AND CHALLENGES* 41 (1996) (discussing the guardianship-HIV case). The ADA case was suggested by the writings of a disability advocate. See Rose A. Daly-Rooney, *Designing Reasonable Accommodations Through Co-Worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act*, 8 J.L. & HEALTH 89 (1994), *reprinted in* LAW IN A THERAPEUTIC KEY, *supra* note 6, at 365.

confront psychologically difficult situations each day, and some of them have employed interesting and creative strategies to deal with those situations. They should profit from the collection, analysis, and dissemination of the judicial examples. Moreover, with the preventive law “rewind” technique, judges may be able to provide much advice to attorneys on how, at an earlier time, certain strategies and techniques might have been employed to head-off the very court case described in the form.

As these examples accumulate, we can use them for discussion, debate, dissemination, and education. These cases, describing psycholegal soft spots and strategies, can be collected, categorized, critiqued, compared, and contrasted—much as appellate decisions are now.¹⁶ They may ultimately constitute the corpus of a new form of “case” analysis that will form the stock in trade of legal counselors and TJ preventive lawyers.¹⁷ By sharing and synthesizing our experience, we hope to make the psychological consequences of certain legal courses of action less difficult to anticipate. Thus, we invite you to “brief” some of your own such cases on the provided form. Please note that, as long as appropriate credit is given, the *California Western Law Review* hereby authorizes the reproduction of the essay and the forms.

* * *

IDENTIFICATION OF PSYCHOLEGAL SOFT SPOTS AND STRATEGIES

The enclosed questionnaire is designed as a format for the discussion of legal situations that may have an impact on psychological well-being. Sometimes, when such situations are encountered, the use of certain strategies may lead to reduced negative psychological impact or even to a positive psychological impact. We call these situations “psycholegal soft spots.” Three examples of psycholegal soft spots and strategies are outlined below. These examples are provided to assist you in answering the same questions on a copy of the blank form that follows them.

A judge’s experience inspired our first example:

- 1) Identify the area of law that this problem relates to:

Wills

- 2) Provide a brief description of the legal situation as it was at the time you initially became involved:

There is a will contest between a brother and sister. The sister, who

16. See Wexler, *Psycholegal Soft Spots*, *supra* note 5.

17. See *id.*

cared for the Mother in her dying years, has been left the broken-down family home. Unlike his sister, the brother has a steady income and a home of his own. He seeks to overturn the will.

3) Describe the potential or actual nonlegal motivations or consequences to the parties involved:

This situation seems to have little to do with the money involved, but appears to be related to the brother's hurt feelings. There is potential for the brother to remain bitter about the will and to distance himself from his sister.

4) In your experience, how often does this type of situation occur?

I have only about five will contest cases per year, one or two of which might be motivated by hurt feelings.

5) Provide a description of the action taken and the legal and nonlegal outcomes:

Finding that there was no undue influence, I upheld the will. Because of my perspective on the situation, however, I made some remarks at the close of the hearing. I commented that the differing financial circumstances between the brother and sister made the outcome understandable, and that I didn't think that it meant that the mother loved the brother any less.

6) Explain whether or not you believe this approach resulted in successful legal and nonlegal outcomes and why:

After hearing my comments, the brother broke down in tears. In a legal sense, there is no question that justice was done. The brother simply did not have sufficient reasons or evidence for me to justify overturning the will. More importantly, in a nonlegal sense, I feel that this outcome was completely successful in that the brother would probably not remain resentful about his mother's will or alienated from his sister.

7) Describe alternate approaches that could have been taken and how the legal and nonlegal outcomes may have been more or less successful than the actual outcomes:

Quite simply, I could have called it as I saw it without any additional remarks. I feel that the outcome of such a hearing would not have resolved any negative feelings that the brother had about the will.

8) Using the "rewind" technique (e.g., "rewinding" the case to an earlier

point in time), describe how this situation may have been prevented or diminished in severity by other attorneys or other judges at earlier points in time:

This situation could have been resolved long before it entered the courtroom. Looking back to the lawyer's office when the brother was contemplating legal action on the will, the lawyer might have been able to make similar observations to mine, and to a similar effect. Looking even further back to the mother's lawyer at the drafting of the will, the lawyer may have thought about the potential perceptions of the brother and sister and suggested preventive measures against future hard feelings, such as a letter to the brother explaining her reasons for leaving the house to the sister.

9) General comments:

It seems that when this type of situation arises, there may be alternative ways of handling the problem of one sibling feeling that a will is unfair. Since the mother did not, before or after her death, communicate to her children the reasons for the division of assets in her will, my courtroom may have seemed to the brother the logical place to air the family feud. It is quite possible that the brother's attorney attempted to tell him the same thing that I did, but that the brother nonetheless pushed to go to court. In cases like this, I often feel that the authority I have as a judge can result in success where others may have failed. Hearing me tell him that I didn't think the mother's division of assets meant she loved him any less may have had a much stronger impact on the brother than anyone else could have had.

Second is an example adapted from an attorney's experience:

1) Identify the area of law that this problem relates to:

Guardianship and AIDs law

2) Provide a brief description of the legal situation as it was at the time you initially became involved:

A client dying of AIDS didn't feel that her relatives would make good parents. She found someone outside the family who she wanted to raise her seven-year-old daughter.

3) Describe the potential or actual nonlegal motivations or consequences to the parties involved:

The mother wanted to prevent her family from taking custody of her

child. She wanted to leave her child in the custody of another adult that she trusted. The potential difficulties that could have resulted for the child if the family were to take custody are too numerous to list here. The anxiety that this issue caused for the mother was extreme and it would have been very traumatic for this dying woman if her family had taken custody of her daughter.

4) In your experience, how often does this type of situation occur?

I know of several similar instances in my personal legal experience. I imagine that, with the increasing prevalence of AIDS and children with AIDS-infected parents, this type of situation will occur with increasing frequency.

5) Provide a description of the action taken and the legal and nonlegal outcomes:

Fortunately, my jurisdiction allows for the appointment of a "standby guardian," and I made legal arrangements for the new caretaker to have standby guardianship of the child while the formal adoption papers were being processed and suggested that the mother, daughter, and the standby guardian begin immediately to spend time together.

6) Explain whether or not you believe this approach resulted in successful legal and nonlegal outcomes and why:

The standby guardianship arrangement was very successful from both legal and nonlegal perspectives. From a legal perspective, the new guardian had immediate custody over the child, which would have prevented the family from taking custody if the mother had unexpectedly died. From a nonlegal perspective, the standby status allowed the daughter to get to know her new mother before her maternal mother died. The three were able to spend time together and bond before the mother had to be hospitalized. This made things much easier on the daughter than it might otherwise have been. I feel that a very important nonlegal aspect of this standby guardianship arrangement was for the mother. It was an incredible comfort to her to know that her daughter would be properly cared for.

7) Describe alternate approaches that could have been taken and how the legal and nonlegal outcomes may have been more or less successful than the actual outcomes:

We could have simply started the adoption process without arranging for a standby guardianship. This could have created a host of problems for the child if the mother had passed away unexpectedly, especially if the fam-

ily had sought custody. In this way the legal outcome could have been extremely convoluted. The nonlegal consequences of such a complicated situation could have been extremely troublesome to all involved, especially for the young girl.

8) Using the “rewind” technique (e.g., “rewinding” the case to an earlier point in time), describe how this situation may have been prevented or diminished in severity by other attorneys or other judges at earlier points in time:

I am unsure that “rewinding” this scenario shows any earlier times when this situation could have been ameliorated. It is possible, however, with a good “outreach” legal assistance program, that the mother could have consulted with an attorney when she discovered she was infected with HIV. If she did, then the lawyer could have suggested that she begin thinking about making arrangements for her child before her health began to severely decline.

9) General comments:

This seems like it might be a good case to keep in mind for lawyers or judges who encounter individuals with HIV. A simple suggestion from someone that children will need to have legal guardianship arrangements may help to get the client thinking along those lines and eliminate a host of problems at a later point.

The third example also reflects the perspective of an attorney; it is adapted from a law journal article:

1) Identify the area of law that this problem relates to:

Americans with Disabilities Act

2) Provide a brief description of the legal situation as it was at the time you initially became involved:

A client with a disability came to me requesting facilitation of special working conditions. Because she is paraplegic, she wanted to have a special desk constructed for her so that she could easily reach her computer keyboard, telephone, and working surface at her new job in a telemarketing firm. Her supervisor had told her that the company expected employees to make the best of the existing equipment and furniture.

3) Describe the potential or actual nonlegal motivations or consequences to the parties involved:

This case is a clear-cut example of a person with a disability requesting necessary working conditions through the ADA. The nonlegal ramifications are much more far-reaching, however. In many similar cases, the worker with a disability experiences social isolation in the workplace because other workers feel that there is some sort of "special treatment" being given to the employee with a disability. This type of scenario can create a host of undesirable consequences for the disabled person, sometimes resulting in leaving the job.

4) In your experience, how often does this type of situation occur?

This type of situation is common in cases where ADA reasonable accommodations are being sought. Rarely, however, do clients approach me with requests to facilitate adequate working conditions. Usually, employers are extremely responsive to the needs of employees with disabilities. I have handled only two similar complaints in my career.

5) Provide a description of the action taken and the legal and nonlegal outcomes:

I drafted a letter to the employer on behalf of my client. I suggested to my client that she consider asking her employer to have an informal meeting with supervisors and co-workers so that she could explain her situation and her need for special work space. The employer agreed to provide the special workstation and held the requested meeting. Supervisors and co-workers were very responsive and remain helpful and friendly toward my client and her needs.

6) Explain whether or not you believe this approach resulted in successful legal and nonlegal outcomes and why:

I believe both the legal and nonlegal consequences of this situation to be quite successful. My client was able to get the working conditions she was legally entitled to under the ADA. In addition, her meeting with supervisors and co-workers helped to familiarize others with her disability. It is my belief that my client's openness about her disability resulted in much more positive working relationships with peers and supervisors than other courses of action may have caused.

7) Describe alternate approaches that could have been taken and how the legal and nonlegal outcomes may have been more or less successful than the actual outcomes:

I could have simply informed my client of her rights and drafted the

letter citing the ADA, asking for the workstation as a reasonable accommodation under the Act. This may have been a less successful course of action in the nonlegal sense in that it may have created tension with supervisors and co-workers if my client had not personally discussed her disability and workplace needs.

8) Using the “rewind” technique (e.g., “rewinding” the case to an earlier point in time), describe how this situation may have been prevented or diminished in severity by other attorneys or other judges at earlier points in time:

In cases such as this, it is usually ignorance on the part of the employer which results in clients coming to me and requesting what is legally theirs. Once employers become aware of their duty under the ADA, they usually comply without further hesitation. If the company were fully aware of ADA requirements, it could integrate disability requirements into its hiring and training policies. This would eliminate the problem of employees with disabilities needing to come for legal assistance to get the working conditions they need and are entitled to. This sort of preventive approach on the part of the employer might also reduce supervisor and co-worker hostility towards people with disabilities, if training could include awareness of disabilities and related workplace issues.

9) General comments:

Please proceed to the blank form, which begins on the following page.

* * *

IDENTIFICATION OF PSYCHOLEGAL SOFT SPOTS AND STRATEGIES

This project has been approved by the University of Nebraska Institutional Review Board, IRB # 98-04-328EP. Confidentiality of responses will be protected by the investigators. For questions, contact the UNL IRB at (402) 472-6965.

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No _____ Yes _____

Please remember to protect the identity of individuals involved in the cases you discuss.

1) Identify the area of law that this problem relates to:

2) Provide a brief description of the legal situation as it was at the time you initially became involved:

3) Describe the potential or actual nonlegal motivations or consequences to the parties involved:

4) In your experience, how often does this type of situation occur?

5) Provide a description of the action taken and the legal and nonlegal outcomes:

6) Explain whether or not you believe this approach resulted in successful legal and nonlegal outcomes and why:

7) Describe alternate approaches that could have been taken and how the legal and nonlegal outcomes may have been more or less successful than the actual outcomes:

8) Using the “rewind” technique (e.g., “rewinding” the case to an earlier point in time), describe how this situation may have been prevented or diminished in severity by other attorneys or other judges at earlier points in time:

9) General comments:

Please photocopy, complete, and return the completed form to:

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