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Citation: 44 Buff. L. Rev. 71 1996

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This work was originally published as Alex Hurder, Negotiating the  
Lawyer-Client Relationship: A Search for Equality and  
Collaboration in 44 Buff. L. Rev. 71 1996.

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# Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration

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## I. INTRODUCTION

Two law students under the supervision of a law professor represented M. Dujon Johnson by court appointment on a misdemeanor charge in a Midwestern state's trial court.<sup>1</sup> The lawyers<sup>2</sup> investigated the case thoroughly, interviewed their client, developed a theory of the case, and represented Mr. Johnson aggressively. When the case came to trial the prosecutor asked the judge to dismiss the case, a victory for the defense.<sup>3</sup> The client was furious. He was angry at the court and angry at his lawyers.<sup>4</sup> Taking advantage of their unexpected free time, the law professor, the two law students and their client began a discussion of their relationship.<sup>5</sup> It was a discussion that should have begun when they first met.

The story of M. Dujon Johnson's case is told by Clark Cunningham as a vehicle for examining the lawyer's role as a translator.<sup>6</sup> Reading Cunningham's careful account of the development of the relationship between the lawyers and their client suggests that the cause of Johnson's dissatisfaction was not solely in trans-

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1. The story of M. Dujon Johnson is taken from an insightful article by Clark D. Cunningham, the law professor who represented Johnson. See Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards An Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992). Johnson insisted that Cunningham use Johnson's real name in telling his story. *Id.* at 1383.

2. The term lawyer is used to include law students practicing under the auspices of a law school legal clinic.

3. Cunningham, *supra* note 1, at 1328.

4. *Id.* at 1329.

5. *Id.*

6. *Id.* at 1301 ("[O]ne can understand at least some of the silencing of the client's voice as the lawyer's failure to recognize and implement the art and ethic of the good translator — a translator who shows conscious awareness of shifts in meaning and who collaborates with the speaker in managing these changes.").

lation, but also in prevailing conceptions of what the relationship between a lawyer and client should be.

Johnson's correspondence with Cunningham after the case was closed afforded a unique opportunity to hear the voice of the client and to view the lawyer-client relationship from a client's perspective. In his comments on how his case was handled, Johnson explained that he wanted to participate as an equal<sup>7</sup> in a process of collaboration with his lawyers.<sup>8</sup>

At the initial interview with Johnson, the lawyers learned that he had been arrested by two state troopers when he pulled into a service station at night near Ann Arbor, Michigan.<sup>9</sup> The troopers called out, "Hey, yo," to Johnson, an African American undergraduate at the University of Michigan.<sup>10</sup> They ordered him out of his car and asked him to submit to a pat-down search. When Johnson refused, claiming that a search would violate his constitutional rights, the troopers arrested him for disorderly conduct, searched him, pressed his face on the hood of the car while handcuffing him, and took him to jail.<sup>11</sup> At his arraignment, the judge appointed the lawyers to represent him.<sup>12</sup>

What the lawyers did not ask at the initial interview was as significant as what they did ask. They did not ask Johnson what his goals were. If they had, they would have learned that he wanted more than simply to be cleared of a misdemeanor charge. As he said later, "I would like to have my reputation restored, and my dignity."<sup>13</sup>

The lawyers did not ask Johnson what means should be used to pursue his goals. If they had, they would have learned that he wanted a public trial. They would have learned that, at Johnson's arraignment, the prosecutor had offered to dismiss his case if he would pay court costs of fifty dollars, and he had refused.<sup>14</sup> The trial itself was the relief Johnson sought.<sup>15</sup> Without discussing it with their client, the lawyers filed a motion to suppress evidence that, if successful, would have drastically shortened the trial.<sup>16</sup>

The lawyers did not ask Johnson how to divide the responsi-

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7. *Id.* at 1329-30, 1381 ("[H]e did not feel he was treated as an adult.").

8. *Id.* at 1329 ("Too much of the case had been out of his hands 'from the get-go.'"), 1385-86.

9. *Id.* at 1305, 1311, 1322.

10. *Id.* at 1311, 1322.

11. *Id.* at 1323-24.

12. *Id.* at 1304.

13. *Id.* at 1326.

14. *Id.*

15. *Id.* at 1327.

16. *See id.* at 1312.

bility for conducting his defense. If they had, they would have learned that he was eager to play a significant role in the defense of his case. When his lawyer proposed, shortly before the trial, that Johnson cross examine the trooper who arrested him, Johnson agreed. He was willing to take a heightened risk of conviction in order to have an active role in the case.<sup>17</sup> By then it was too late. Both sides had already testified at the hearing on the suppression motion, and the trial never took place.<sup>18</sup>

Johnson's lawyers did not ask him about the rules of the relationship they were forming. If they had, they would have discovered that he was not content. In a conversation after his case had been dismissed, Johnson said the lawyers had been "patronizing."<sup>19</sup> He said he was always the "secondary person."<sup>20</sup> He felt that they had treated him like a child.<sup>21</sup> Johnson's perception of factors defining his relationship with his lawyers were more detailed than the lawyers expected. He pointed out that on several trips in the car he rode in the back seat while the two law students rode in front.<sup>22</sup> At his final appearance in court, Johnson sat behind the bar with the spectators rather than at the counsel table with his lawyers.<sup>23</sup> Johnson interpreted these physical arrangements as signs that he was in the backseat, not only literally, but in the control of his case as well.<sup>24</sup>

Johnson's case poses the question for clinical legal education of how relationships of equality and collaboration between lawyers and clients can be created and sustained. The texts on legal interviewing and counseling that have been most influential in clinical legal education have not provided a satisfactory answer to the question.<sup>25</sup> Leading texts on professional responsibility also fail to

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17. *Id.* at 1327.

18. *Id.* at 1314, 1328.

19. *Id.* at 1329.

20. *Id.* at 1330.

21. *Id.*

22. *Id.* at 1330 n.52.

23. *Id.* at 1330 n.53.

24. *Id.* at 1329-30.

25. See generally ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING & NEGOTIATING SKILLS FOR EFFECTIVE REPRESENTATION* (1990); GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 966-1080 (1978); DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991); DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (2d ed. 1987); ANDREW S. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELLING PROCESS* (1976); see also Austin W. Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43, 43-44 (1991) ("The relative neglect of lawyer/client interaction in legal education means

answer the question.<sup>26</sup>

The demand for equality and collaboration expressed by M. Dujon Johnson is being raised in every field of law. Changes in the nature of the work lawyers do are forcing changes in the way lawyers relate to clients. The rigid roles of lawyer and client developed in response to the formalities of courtroom litigation do not serve well in the less formal setting of negotiating sessions, mediation conferences or administrative hearings. For instance, representing clients in negotiations requires continuous communication between lawyer and client about goals, strategies and the roles to be played by lawyer and client.<sup>27</sup> The use of mediation to resolve disputes

that lawyers' use of power in their relations with clients is not disciplined by professional training.").

26. Texts on professional responsibility typically discuss the limits of the lawyer-client relationship but do not attempt to provide a model for effective lawyer-client relationships. See generally ROBERT H. ARONSON ET AL, PROBLEMS, CASES AND MATERIALS IN PROFESSIONAL RESPONSIBILITY 147-260 (lawyer-client relationship), 261-313 (confidentiality), 314-96 (conflicts of interest), and 511-665 (lawyer roles and responsibilities) (1985); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 13-70 (defining the lawyer-client relationship), 169-287 (conflicts of interest), 289-492 (special lawyer roles) (3d ed. 1992); MAYNARD E. PIRSIG & KENNETH F. KIRWIN, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 290-425 (counseling and advocacy), 426-516 (the lawyer-client contract) (4th ed. 1984); MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 56-89 (beginning and ending the lawyer-client relationship), 125-50 (lawyer's fees and fiduciary duties), 175-202 (confidential information), 300-16 (conflicts of interest — lawyer v. client), 317-46 (conflicts of interest — conflicts between two clients) (3d. ed. 1992); JOHN F. SUTTON, JR. & JOHN S. DZIENKOWSKI, CASES AND MATERIALS ON THE PROFESSIONAL RESPONSIBILITY OF LAWYERS 246-423 (formation of the lawyer-client relationship), 424-720 (performance of the lawyer-client relationship: representation of the client), 721-38 (termination of the lawyer-client relationship) (1989).

The text by Moliterno and Levy is an exception. See JAMES E. MOLITERNO & JOHN M. LEVY, ETHICS OF THE LAWYER'S WORK (1993). It recommends a "collaborative model" for most lawyer-client relationships. See *id.* at 86 (In the collaborative model the lawyer and client "share responsibility for diagnosis, action and implementation. They divide responsibility along sensible lines accounting for the lawyer's training and experience and the client's concern about the representation matter.").

The text by Hazard and Rhode addresses problems with existing conceptions of the lawyer-client relationship but does not propose a model. See GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 135-376 (professional roles) (1994).

27. Donald G. Gifford argues that the counseling model advocated by David A. Binder and Susan C. Price in their 1977 book *Legal Interviewing and Counseling: A Client-Centered Approach* leads to lawyer domination of decision making in the context of negotiations, unless it is modified to allow continuous communication between lawyer and client about goals and strategies. Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 842-43 (1987); see also Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice and the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990).

requires similar intensity of communication between lawyer and client.<sup>28</sup> This communication takes place primarily in the process of legal interviewing and counseling.

The issues that were not raised in the initial interview with Johnson — his goals, the means he would choose to pursue the goals, the division of responsibility between Johnson and his lawyers, and the rules governing the interaction between Johnson and the lawyers — were all critical terms of the lawyer-client relationship. They are issues that must be decided jointly by the lawyer and client because they determine the actions to be taken by both. The process for making joint decisions is negotiation.<sup>29</sup>

Part II of this article argues that negotiation of the terms of the lawyer-client relationship is an essential function of legal interviewing and counseling. The literature on legal interviewing and counseling devotes extensive attention to the interviewing functions of information gathering, informing and advising the client and building rapport,<sup>30</sup> but the essential function of negotiating the lawyer-client relationship has been largely overlooked.<sup>31</sup> The "client-centered" approach to legal interviewing and counseling followed widely in clinical legal education<sup>32</sup> fails to provide space

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28. See Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177 (1994).

29. See ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN at xvii (1991) (Negotiation "is back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.").

30. See, e.g., BASTRESS & HARBAUGH, *supra* note 25, at 63-65 (on gathering information), 66-67 (on building rapport), 255-57 (on informing and advising); BINDER ET AL., *supra* note 25, at 84-223 (on gathering information), 93 (on building rapport), 258-86 (on informing and advising); SHAFFER & ELKINS, *supra* note 25, at 73-120 (on building trust), 121-54 (on gathering information), 230-43 (on informing and advising).

31. See William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility In Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1449-50 (1992) ("Surprisingly, a review of the empirical literature on the lawyer-client relationship hardly suggests that lawyers and clients negotiate relationships, or that they enact the structure and meaning of professionalism and professional power through negotiation.").

32. The model of client-centered legal interviewing and counseling as advanced by David A. Binder and Susan C. Price in the 1977 text, *Legal Interviewing and Counseling: A Client-Centered Approach*, see *supra* note 25, has probably had the most influence on the way legal interviewing and counseling is understood and taught in clinical legal education. See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 504 (1990) [hereinafter Dinerstein, *Client-Centered Counseling*]; Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 697, 700 (1992) [hereinafter Dinerstein, *Clinical Texts and Contexts*]; Gifford, *supra* note 27, at 815 n.21 (1987) (reporting that 94 law schools used the Binder and Price text in the 1985-86 academic year). The model of legal interviewing and counseling set forth in the 1977 volume was restated with some modifications by David A. Binder, Paul Bergman and Susan C. Price in the 1991 text, *Lawyers As Counselors: A Client-Centered Approach*. See *supra* note 25. Unless otherwise

for lawyer-client negotiation. The client-centered approach maintains that decisions should be made autonomously by the client whenever possible and by the lawyer only when necessary. This approach does not work in practice. Decisions affecting the lawyer-client relationship are negotiated, whether consciously or not. An approach to legal interviewing and counseling that allows principled negotiation of all the terms of the lawyer-client relationship, including the ultimate goals of the relationship, is the best way to create a relationship of equality and effective collaboration.

Part III of this article contends that the organization of the legal interviewing and counseling process must take into account the progression of joint decision making from more general threshold issues to the more specialized decisions that must be made in the course of litigation or negotiations. The progression of joint decision making is cyclical.<sup>33</sup> After joint decisions are made, the lawyer and client must communicate the information necessary to implement them. Implementing joint decisions places the lawyer and client in the role of partners in a joint endeavor, whether it is during the trial of a case or negotiations with an adversary. However, implementation of decisions creates new issues that must be decided jointly, decisions such as whether to file a motion, whether to make a new demand, or whether to hire an expert consultant. Lawyer and client resume the role of negotiators with each other to make these decisions. The legal interviewing and counseling process must allow the lawyer to move freely back and forth from the negotiation and renegotiation of joint decisions to the communication of information and advice necessary to implement joint decisions.

Part IV of this article returns to the Johnson case to illustrate how an approach to legal interviewing and counseling that incorporates negotiation of the issues of the lawyer-client relationship would have changed the content and organization of the conferences between Johnson and his lawyers.

## II. NEGOTIATING THE LAWYER-CLIENT RELATIONSHIP AS AN ASPECT OF INTERVIEWING AND COUNSELING

Negotiation of the terms of the lawyer-client relationship is an essential function of legal interviewing and counseling. Negotiation

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specified, descriptions of the client-centered approach in this article refer to the 1991 text by Binder, Bergman and Price.

33. See Gifford, *supra* note 27, at 830-34 (discussing the cyclical progression of client decision making in the context of negotiations with an adversary).

is the process for making joint decisions.<sup>34</sup> The importance of lawyer-client negotiation as a part of the legal interviewing and counseling process has been overlooked in approaches to lawyering that emphasize the autonomy of either the lawyer or the client in the decision making process.

In the traditional approach to lawyering, the client identifies a problem, and virtually all other decisions remain the professional domain of the lawyer.<sup>35</sup> The client-centered approach developed in reaction to the dominance of the lawyer in traditional models of lawyering.<sup>36</sup> The client-centered approach requires the lawyer to let her client make autonomous decisions about a case to the maximum extent possible. To protect the client's autonomy, the lawyer identifies all decisions that have a significant impact, legal or non-legal, on the client and helps the client make them through the process of counseling.<sup>37</sup> Decisions about the skill and craft of lawyering remain the domain of the lawyer.<sup>38</sup>

Both the traditional approach and the client-centered approach assume that the lawyer and client operate autonomously, with some decisions belonging to the domain of the lawyer and some to the domain of the client. Tensions develop when the inter-

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34. See FISHER ET AL., *supra* note 29, at xvii.

35. For a description of the traditional approach, see DOUGLAS E. ROSENTHAL, *LAWYERS AND CLIENTS: WHO'S IN CHARGE?* 2 (1974); BINDER ET AL., *supra* note 25, at 16-18; see also Dinerstein, *Client-Centered Counseling*, *supra* note 32, at 506.

36. Dinerstein, *Clinical Texts and Contexts*, *supra* note 32, at 700. See Dinerstein, *Client-Centered Counseling*, *supra* note 32, at 518-23 (describing the political and historical origins of client-centered lawyering); Gifford, *supra* note 27, at 817-19; see also Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1318-19 (1995) (tracing the client-centered approach to the judicial emphasis on individual rights and due process of the Warren Court).

37. As stated by the authors of *Lawyers as Counselors*:

You ought to provide a client with an opportunity to make a decision whenever a lawyer using "such skill, prudence, and diligence as other members of the profession commonly possess and exercise," would or should know that a pending decision is likely to have a *substantial legal or nonlegal impact on a client*.

BINDER ET AL., *supra* note 25, at 268.

38. *Id.* at 270. The authors state:

[A] client's decision to hire you is tacit willingness for you to make lawyering skills decisions free from consultation. Thus, such matters as how you cross examine, write briefs, or phrase contingency clauses are generally for you alone to decide, even though they may have a substantial impact. They involve primarily the exercise of the skills and crafts that are the special domain of lawyers.

*Id.* See also Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, at 511-12 (1994) ("The client-centered literature fails to present even a single example in which a lawyer sits down with a client and walks through alternative case theories and their implications for the case and the client. In this respect, the client-centered approach differs little from the traditional approach, which relegates virtually every decision about case theory to lawyers.").



ests of either side, lawyer or client, make it necessary to influence a decision in the domain of the other.<sup>39</sup>

Both approaches divide decisions into those in which only the client has a legitimate interest and those in which only the lawyer has a legitimate interest.<sup>40</sup> Reflection on actual practice demonstrates that such a division is impossible.<sup>41</sup> Clients often have an intense interest in aspects of a case that are typically considered the domain of the lawyer.<sup>42</sup> For example, the decision to file a motion to suppress evidence, typically considered a matter of professional judgment, conflicted with the client's interest in going to trial in M. Dujon Johnson's case. Lawyers frequently have such strong interest in substantive goals, normally considered the domain of the client, that they will not continue a relationship if mutually acceptable goals cannot be found.<sup>43</sup> For example, in Johnson's case a policy that prevented the lawyers from filing civil cases deterred them from agreeing to goals that could not be accom-

39. Studies of interactions between lawyers and clients have shown that both make overt and covert attempts to influence decisions that impact their interests without regard to whether the issues are designated as the domain of the lawyer or the domain of the client. See Felstiner & Sarat, *supra* note 31, at 1454-72 (reporting the interaction of lawyers and clients in divorce cases); Carl J. Hosticka, *We Don't Care What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 Soc. PROBS. 599 (1979) (describing interaction of lawyers and clients in a poverty law office); see also ROSENTHAL, *supra* note 35, at 63-93 (describing the interaction of lawyers and clients in personal injury cases in New York City).

40. Concerning the traditional approach, see ROSENTHAL, *supra* note 35, at 2 (The traditional model of the professional-client relationship "holds that client welfare and the public interest are best served by the professional's exercise of predominant control over and responsibility for the problem-solving delegated to him rather passively by the client."); concerning the client-centered approach, see BINDER ET AL., *supra* note 25, at 21 (explaining that "a client should make critical choices whenever possible and practical"), 270 (explaining that lawyering skills decisions are ordinarily the domain of the lawyer).

41. Legal literature is increasingly reflecting the dilemma of the lawyer whose client wants to influence or control practices that are normally considered to be lawyering skills. See, e.g., Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619, 643 (1991) (The client insisted on telling her story at the hearing over her lawyer's objections.); Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971, 974-77 (1992) (The client was adamant about going to trial in order to tell a story that was inculpatory.); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (Mrs. G. abandoned her lawyer's strategy for the hearing and told her own story.). Lawyers also frequently have an interest in influencing the client's goals. See, e.g., Felstiner & Sarat, *supra* note 31, at 1494 (The lawyer's desire to help women involved in divorces "learn to stand up for themselves" gave her an interest in the client's goals.).

42. See sources cited *supra* note 41.

43. Legal services lawyers, for example, must give priority to cases with substantive goals that match goals adopted in an annual priority setting process. See 45 C.F.R. § 1620 (1995).

plished in criminal court.<sup>44</sup>

An approach favoring equality and collaboration would require that all decisions about the terms of the lawyer-client relationship be made jointly by the lawyer and client. Such decisions include selecting mutual goals,<sup>45</sup> choosing the means of pursuing mutual goals,<sup>46</sup> dividing responsibility between lawyer and client,<sup>47</sup> and establishing rules governing the relationship between lawyer and client.<sup>48</sup> Such an approach assumes that both lawyer and client might have legitimate interests in any decision about the terms of the relationship.<sup>49</sup> Therefore, neither lawyer nor client has a special

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44. See Cunningham, *supra* note 1, at 1331 n.56 (The lawyers discussed a civil lawsuit at the end of the case and referred Johnson to other attorneys.).

45. Felstiner & Sarat, *supra* note 31, at 1451 (identifying two "important arenas of lawyer-client negotiation: . . . the search for goals [and] the search for control over case progress and division of labor"); see also David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 737 (1988) ("'Client counseling' is simply a shorthand way of describing a complex kind of lawyer-client negotiation . . .").

46. Felstiner and Sarat include choosing the means of pursuing mutual goals in the process of negotiating responsibility. See Felstiner & Sarat, *supra* note 31, at 1466-67.

47. See *id.*

48. Control over the rules of the relationship is one source of lawyer dominance. See Herbert M. Kritzer, *The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study*, 1984 AM. B. FOUND. RES. J. 409, 410 ("The status of the lawyer comes from the ability to structure the relationship."); see also FISHER ET AL., *supra* note 29, at 10 ("The game of negotiation takes place at two levels. At one level, negotiation addresses the substance; at another, it focuses — usually implicitly — on the procedure for dealing with the substance.").

49. The A.B.A. Model Rules of Professional Conduct do not prohibit negotiation of the goals of the lawyer-client relationship. Although Rule 1.2(a) requires an attorney to "abide by a client's decisions concerning the objectives of representation," Rule 1.2(c) invites negotiation of the goals of the relationship by permitting a lawyer to "limit the objectives of the representation if the client consents after consultation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a), 1.2(c) (1983). The process of consultation is defined in the Model Rules as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." MODEL RULES OF PROFESSIONAL CONDUCT Terminology.

Furthermore, nothing in the Model Rules prohibits an attorney from negotiating with a client concerning the means of pursuing mutual goals. On the contrary, Rule 1.2(a) promotes negotiation by requiring an attorney to "consult with the client as to the means by which [the objectives of representation] are to be pursued." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a). The client's power to negotiate is further protected by Rule 1.16(a)(3) which requires the lawyer to withdraw from representation if discharged by the client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a)(3).

The comment to Rule 1.2 illustrates the flexibility inherent in the approach of the Model Rules:

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objec-

domain. It also assumes that the client is capable of making decisions in her own interest if given full access to the relevant information available.<sup>50</sup> Such information includes knowledge of the law, knowledge of facts about the case, and knowledge of interests that could potentially affect the lawyer's participation in the case. The client's interests are protected, not by carving out domains of autonomous decision making, but by providing space within the lawyer-client relationship for open negotiation of every decision that has an impact on the interests of the client or the lawyer.<sup>51</sup>

### A. *Lawyer-Client Negotiation*

Negotiation is a necessary process for joint decision making.<sup>52</sup> A study by William Felstiner and Austin Sarat of lawyer-client interaction in 40 divorce cases suggests that negotiation is an aspect of the lawyer-client relationship whether it is planned or not.<sup>53</sup> The negotiating process was often complex.<sup>54</sup> The negotiations concerned the goals that would be joint objectives of the lawyer and client as well as the division of responsibility within the relation-

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tives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt.

50. See Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L. J. 1545, 1582 (1995) ("Lawyers often need to counsel the client to understand what options the law presents. In this way the sophisticated and unsophisticated are significantly equalized through the assistance of lawyers.").

51. Rosenthal's study of lawyer-client interaction in 60 personal injury cases in New York City came to a similar conclusion:

With a lawyer who tends to adopt a narrowly defined role that excludes "holding the client's hand," the client who actively asserts his concerns and negotiates to have them made central, receives better service both in his subjective terms and in terms of "objective" case outcome. This form of client participation was very significantly related to case outcome.

ROSENTHAL, *supra* note 35, at 43.

52. See FISHER ET AL., *supra* note 29, at xvii ("Negotiation is the basic means of getting what you want from others.").

53. Felstiner & Sarat, *supra* note 31, at 1450. Felstiner and Sarat observed approximately 115 lawyer-client conferences and interviewed the participants. *Id.* at 1450 n.12. For a more detailed description of the study, see Austin W. Sarat & William L. F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93 (1986).

54. Felstiner & Sarat, *supra* note 31, at 1450 ("These cases indicate that the services provided by lawyers to clients are contested and negotiated in the stream of interactions that constitute the professional relationship, and that the content and contours of the interaction vary considerably from case to case, and from moment to moment within the case.").

ship for accomplishing different tasks.<sup>55</sup>

The negotiating tactics employed by clients included withholding information and excluding the lawyer from entire fields of inquiry.<sup>56</sup> Felstiner and Sarat found that both lawyers and clients exercise "various levels of procrastination, vacillation, disapproval, withdrawal, repression, and [manipulation of information] that delayed, distorted and jeopardized what [the lawyer or client] was trying to accomplish."<sup>57</sup> They interpreted these actions as "covert enactments of power" used to gain advantage in ongoing negotiations within the lawyer-client relationship.<sup>58</sup>

Negotiation produces better results for both sides if not done covertly. In their influential book, *Getting To Yes*, Roger Fisher and William Ury introduced a strategy for negotiating decisions by focusing on the interests of each side, searching for options that permit mutual gain and resolving conflicting interests by looking for objective criteria independent of either side.<sup>59</sup> If incorporated into the process of legal interviewing and counseling, the Fisher and Ury strategy of principled negotiation would enable lawyers and clients to make joint decisions about mutual goals and the scope of their relationship in a way that would preserve and strengthen, rather than weaken, the lawyer-client relationship.<sup>60</sup> Negotiating the lawyer-client relationship is typical of many transactional negotiations in which maintaining the ongoing relationship ranks among the highest interests of both parties to the negotiation.<sup>61</sup>

The possibility of lawyer dominance of negotiated decision making is a valid concern.<sup>62</sup> Generally, the lawyer has more experi-

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55. *Id.* at 1458-72.

56. *Id.* at 1466.

57. *Id.* at 1467. Felstiner and Sarat observed, however, that clients and lawyers sometimes have sound reasons for procrastination and vacillation. *Id.* at 1470-71.

58. *Id.* at 1468.

59. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* at xii (Bruce Patton ed., 1981). The 1991 edition of *Getting to Yes* reprinted the original edition with minor changes and added an additional chapter. See FISHER ET AL., *supra* note 29, at ix.

60. See FISHER ET AL., *supra* note 29, at 20 ("Most negotiations take place in the context of an ongoing relationship where it is important to carry on each negotiation in a way that will help rather than hinder future relations and future negotiations.").

61. See *id.* ("[W]ith many long-term clients, business partners, family members, fellow professionals, government officials, or foreign nations, the ongoing relationship is far more important than the outcome of any particular negotiation.").

62. Naomi R. Cahn, *Theoretics of Practice: The Integration of Progressive Thought and Action: Styles of Lawyering*, 43 HASTINGS L.J. 1039, 1067 (1992) ("[E]xploitation can occur because of the structures of dominance and subordination in the attorney-client relationship; the possibility of exploitation is inherent in such a relationship." (footnote

ence negotiating and more knowledge of the law.<sup>63</sup> However, clients also have power in lawyer-client negotiations. Being a voluntary relationship, the client has the power to withdraw from the relationship if her interests are not satisfied.<sup>64</sup> The client's ability to withdraw from the relationship is the client's most fundamental power,<sup>65</sup> but withdrawal is an ultimate act and may lead to unwanted consequences for the client as well as the lawyer. The client has other sources of bargaining power. They include control over the payment of fees, the use of grievance procedures,<sup>66</sup> the disciplinary procedures of bar associations, the client's ability to influence other clients or potential clients of the lawyer,<sup>67</sup> and the client's ability to withhold information or action needed for the case.<sup>68</sup>

Negotiating does not imply acquiescence by the lawyer to the impossible or the unlawful. At times the lawyer may have to meet the client's proposals by explaining that rules of civil procedure or rules of professional responsibility prevent the lawyer from agreeing to the client's proposed course of action. For instance, rules of civil procedure limit the number of interrogatories a party may use.<sup>69</sup> If a client wants to use extensive written interrogatories without good cause the lawyer must explain that the procedure is unavailable. Rules of professional responsibility prohibit the lawyer's complicity in giving false information to the court.<sup>70</sup> A client who proposes giving false testimony to a court must be told that the proposal is unacceptable. If a client insists on an unlawful

omitted)).

63. ROSENTHAL, *supra* note 35, at 172; Gifford, *supra* note 27, at 841.

64. See MOLITERNO & LEVY, *supra* note 26, at 97 ("The client may terminate the relationship for any or no reason.").

65. Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233, 1254 (1992) ("Perhaps exit, in its many rhetorical guises, is the only true power of clients."); Felstiner & Sarat, *supra* note 31, at 1464 ("Where dissatisfaction is great, the usual client response is exit rather than voice."). For an example of a client who chose to represent himself, see Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law As Language*, 87 MICH. L. REV. 2459 (1989).

66. For example, law firms funded by the national Legal Services Corporation are required by federal regulations to have grievance procedures available to clients. See 45 C.F.R. § 1621(3) (1994).

67. See, e.g., Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 698-704 (1988) (advocating lawyer-client and client-client dialogue as a safeguard against hierarchical lawyer-client relationships).

68. See, e.g., Felstiner & Sarat, *supra* note 31, at 1470-71.

69. See, e.g., FED. R. CIV. P. 33 ("Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts . . .").

70. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1994).

course of action, the lawyer might have to end the relationship.<sup>71</sup> However, just as a lawyer would not reject a potential cause of action without researching possible arguments, a lawyer should not reject proposed goals, procedures or divisions of responsibility without exploring their legal and practical feasibility.

At times a client might express an interest in taking a non-traditional but lawful role (e.g., conducting the cross-examination of a witness) or following an ill-advised but permissible procedure (e.g., refusing to negotiate with an adversary before the trial of a case). The client's interest might be equaled by the lawyer's interest in following a different course of action,<sup>72</sup> such as an interest in pleasing the court by following local customs. The process of negotiation allows the lawyer to disclose significant interests to the client and to search for options that satisfy the interests of both lawyer and client.<sup>73</sup> An attempt by the lawyer to appear neutral would possibly foreclose opportunities to discover a mutually acceptable course of action.

Recognition of the role of negotiation in lawyer-client interaction also does not mean that every decision would require detailed negotiations. Ordinarily, lawyers and clients can agree to follow standard procedures and customary divisions of responsibility without discussing every possible option. Differing interests are not likely to manifest themselves in every aspect of the relationship. However, when differing interests do arise, resolution of the differences through negotiation should not be hindered by restrictions arising out of unjustifiable assumptions about the role of the lawyer or the client. If the client's interests require extensive negotiation to arrive at joint decisions, the possibility of developing a relationship unique to the needs of the case should not be foreclosed by preconceptions of the lawyer's or the client's role.<sup>74</sup>

An approach to lawyering that emphasizes the importance of

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71. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1994) ("[A] lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law . . .").

72. See, e.g., Dinerstein, *supra* note 41, at 978 ("[The judge's] comment made me feel ambivalent. I was pleased the judge recognized that we were not just 'kids' playing at having a trial in the face of the client's contrary interest in a plea bargain.").

73. For a discussion of negotiating tactics that allow a search for common interests, see FISHER ET AL., *supra* note 29, at 40-55.

74. See, e.g., Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLINICAL L. REV. 65 (1994) (describing the unique relationship developed by the author and her client who had been convicted of a capital crime and sentenced to death); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988) (describing the relationship developed by a South African lawyer and a community that was resisting forced relocation under South Africa's apartheid laws).

negotiating the terms of the lawyer-client relationship could move lawyer-client negotiating from the covert, self-defeating activity documented by Felstiner and Sarat, to planned and organized discussion. To insure that issues are addressed openly and honestly, negotiation of the terms of the lawyer-client relationship should be an integral element of the legal interviewing and counseling process.

### B. *The Client-Centered Approach and Lawyer-Client Negotiation*

The client-centered process of legal interviewing and counseling not only does not provide space for lawyer-client negotiation to occur, but it fosters an inequality in the lawyer-client relationship that hinders negotiation. The source of inequality is the lawyer's greater access to relevant information. Binder, Bergman and Price stress equally the need for the client to disclose all relevant information<sup>75</sup> and for the lawyer to conceal information that would reveal the lawyer's preferences.<sup>76</sup>

The lawyer's access to client-held information is considered so fundamental to the client-centered approach that questioning techniques intended to manipulate the client into making a full disclosure are regarded as central to the legal interviewing and counseling process.<sup>77</sup> Clients who resist client-centered questioning

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75. BINDER ET AL., *supra* note 25, at 19-22, 32.

In a client-centered counseling approach you serve clients best by encouraging clients to be active participants in the description and resolution of their problems. Left to themselves, however, clients may not participate as fully as they might. Hence, it behooves you to understand what factors tend to obstruct active client participation, and how you might overcome them.

*Id.* at 32.

76. *Id.* at 288 ("Effective counseling usually requires the appearance of neutrality; that is, the appearance that you have no favorites among available alternatives.").

77. The technique of empathic understanding advocated by Binder, Bergman, and Price encourages lawyers to mask their true feelings in order to communicate empathy and nonjudgmental acceptance of their clients' choices. BINDER ET AL., *supra* note 25, at 41 ("[I]n the presence of someone who exhibits non-judgmental understanding — a listener who provides empathic responses — most people are strongly motivated to continue communicating."). The technique of offering "extrinsic reward" encourages lawyers to indicate to clients who are reluctant to divulge information that providing the information is in the client's best interest. *Id.* at 44. Professor Ellmann has argued that giving a client incomplete information in order to overcome a client's reluctance to reveal information can be manipulative because, at times, remaining silent is in the client's best interest. Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 741 (1987).

Binder, Bergman and Price rejected the criticism.

Professor Ellmann's point that clients are encouraged to divulge information without understanding possible adverse reactions is correct. However, we believe the

techniques and continue to withhold information are considered "atypical" and "difficult."<sup>78</sup> The lawyer's need for full knowledge, not only of the facts of the client's case, but also of the client's values and beliefs, outweighs any interests that may cause a client to resist disclosure of information.<sup>79</sup>

Binder, Bergman and Price assume that the most significant barriers to a client's full disclosure of information, values and beliefs to a lawyer are psychological factors.<sup>80</sup> Because the most significant barriers to full communication are deemed to be psychological, techniques taken from psychology and therapeutic counseling are relied upon to question clients effectively.<sup>81</sup> The school of psychotherapy pioneered by the psychologist Carl R. Rogers is the primary source of the psychological techniques used in client-centered counseling.<sup>82</sup>

Binder, Bergman and Price particularly stress the importance of the practice of "empathic understanding."<sup>83</sup> Empathic understanding is the technique of communicating empathy and nonjudgmental acceptance of a client's choices.<sup>84</sup> To communicate empathy and nonjudgmental acceptance, it is necessary for lawyers to project an appearance of neutrality about the alternatives available to a client.<sup>85</sup> Binder, Bergman and Price stress that the appearance of neutrality is necessary to enable clients to participate actively in

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practice of encouraging clients to reveal information so that you can help them is a time honored one which you should continue. First, until the information is revealed there is no meaningful way to assess whether a revelation is helpful or harmful.

BINDER ET AL., *supra* note 25, at 239 n.4.

78. BINDER ET AL., *supra* note 25, at 237.

79. *See id.* at 279 ("[T]hough you may ultimately provide a client who asks for it with your opinion, you should do so only after you have counseled a client thoroughly enough that you can base your opinion on the client's subjective values, not on your own.").

80. *Id.* at 34 ("If you want clients to participate actively in describing and resolving their problems, you must be skilled both at minimizing the factors that tend to inhibit clients, and at maximizing the factors that tend to motivate them.").

81. *Id.* at 34-44 (classifying the psychological factors in lawyer-client dialogue as "inhibiting" factors, such as ego threat, role expectations and trauma, and "facilitating" factors, such as empathic understanding, fulfilling expectations and extrinsic reward).

82. Rogers coined the term "client-centered" in the early 1940s to describe a new method of psychotherapeutic counseling in which the therapist is nondirective and nonjudgmental. *See* CARL R. ROGERS, *COUNSELING AND PSYCHOTHERAPY* 126-28, 246 (1942). For a brief history of the influence of Rogerian theory on client-centered legal counseling, see Dinerstein, *Client-Centered Counseling*, *supra* note 32, at 538-42 (1990); *see also* William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 *STAN. L. REV.* 487, 511-20 (1980) (taking a critical view of the use of Rogerian techniques by lawyers).

83. BINDER ET AL., *supra* note 25, at 40-42.

84. *See id.*

85. *Id.* at 60-61.



the resolution of their problems, as well as to encourage clients to reveal information they might withhold if they knew the interests and preferences of the lawyer.<sup>86</sup>

Maintaining the appearance of neutrality inevitably requires pretense. The lawyer is seldom disinterested.<sup>87</sup> In a study of lawyers representing clients in personal injury cases in New York City, Douglas E. Rosenthal identified the lawyer's financial interest in a quick settlement of the case as the most likely source of conflict with the client's interest.<sup>88</sup> Other sources of conflict may lie in the lawyer's personal interests or in the policies of the law firm or institution employing the lawyer. The lawyer's interests might be financial,<sup>89</sup> ideological,<sup>90</sup> institutional,<sup>91</sup> or personal. Because lawyering ordinarily involves not just communication with the client about potential solutions to a problem, but collaboration with the client on activities to solve the problem, every decision about a case has a potential impact on the lawyer.

In Carl Rogers' concept of client-centered therapy, the ability of the therapist to remain nonjudgmental is at the core of the therapeutic approach.<sup>92</sup> In order to remain nonjudgmental the therapist must be a person with no significant emotional investment in the decisions made by the client.<sup>93</sup> Rogers advised spouses not to counsel spouses and advised friends not to counsel friends because of their emotional stake in the other person's decisions.<sup>94</sup> Like a

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86. See *id.* at 288 ("Similarly, the appearance of neutrality encourages clients to disclose all relevant information, especially when you counsel clients who by nature defer to experts and authority figures.").

87. See ROSENTHAL, *supra* note 35, at 95.

88. *Id.* at 96.

89. See, e.g., *id.* at 98-99 (the lawyer's financial interest in quick settlement of a case).

90. See, e.g., Felstiner & Sarat, *supra* note 31, at 1494 (an interest in helping other women "learn to stand up for themselves").

91. In M. Dujon Johnson's case a policy of the law school clinic limiting the lawyers to criminal defense cases gave them an interest in focusing on goals that could be satisfied in the criminal court. See Cunningham, *supra* note 1, at 1331 n.56. Many public interest law firms have goals or priorities set by their boards of directors. For instance, Legal Services organizations are required by federal regulation to set priorities annually. 45 C.F.R. § 1620.5 (1995).

92. See ROGERS, *supra* note 82, at 126-28, 248. Until his death in 1987, Rogers emphasized the centrality to his concept of psychotherapy of the therapist remaining nonjudgmental, a quality he also referred to as "unconditional positive regard." See, e.g., Nathaniel J. Raskin & Carl R. Rogers, *Person-Centered Therapy*, in CURRENT PSYCHOTHERAPIES 155, 170 (Raymond J. Corsini & Danny Wedding eds., 4th ed. 1989) ("The basic theory of person-centered therapy is that if the therapist is successful in conveying genuineness, unconditional positive regard, and empathy, then the client will respond with constructive changes in personality organization.").

93. See ROGERS, *supra* note 82, at 248.

94. See *id.*

spouse or a friend, a lawyer cannot be emotionally neutral about decisions made by a client. The lawyer's role as a partner in a joint endeavor makes it inevitable that the lawyer will have interests in the goals of the endeavor as well as in how the goals are carried out.

The practice of disguising the lawyer's true interests while manipulating the client to make full disclosure creates an unequal relationship between the lawyer and client. The client becomes dependent on the lawyer in a way that is characteristic of professional-client relationships in medicine and psychiatry, but is not appropriate for the lawyer-client relationship. In medicine and psychological counseling a relationship of dependency with the professional might be necessary to accomplish the purpose of the service. In law it is not.<sup>95</sup>

The purposes of the *human services* delivered by physicians and psychologists are fundamentally different than the purposes of a lawyer's services.<sup>96</sup> Health services have the purpose of inducing, maintaining or restoring the "biological integrity of the individual."<sup>97</sup> Rogerian psychotherapy has the purpose of helping an individual change his or her attitudes and behavior.<sup>98</sup>

Each of the human services is identified with a specialized body of knowledge and specialized personnel.<sup>99</sup> When the consumer of the service enters a relationship with the provider it implies a decision to rely on the specialized knowledge and training of the provider in order to improve (or prevent the loss of) an essential human function. By entering the professional-client relationship, the client implicitly accepts the broad goals inherent in the definitions of health or normal social functioning developed by the respective human service discipline.

In contrast, entering a lawyer-client relationship does not manifest acceptance of any implied goal or objective. It does not

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95. See Dinerstein, *Client-Centered Counseling*, *supra* note 32, at 543 n.195 ("Given the different purposes of the legal and psychological counseling sessions, is it legitimate for the lawyer to use the technique of showing empathy without really feeling it?").

96. In an article analyzing the delivery systems of health, education and social services, W.P. Hurder, John H. Lewko and Alex J. Hurder defined human service as "a formal social endeavor in which specialized knowledge and specialized personnel are developed and utilized for purposes of inducing, maintaining, and restoring essential human functions." W.P. Hurder et al., *Improving the Evaluation of Human Services by Separating the Delivery of Service from Service*, 14 COMMUNITY MENTAL HEALTH J. 279, 280 (1978).

97. See *id.* at 282.

98. See ROGERS, *supra* note 82, at 3 (defining psychotherapy as "a series of direct contacts with the individual which aims to offer him assistance in changing his attitudes and behavior").

99. See *id.* at 283-84.

imply a desire for help in changing how the client functions as an individual.<sup>100</sup> The purpose of a lawyer's services is to work in union with a client to solve a problem external to the client, whether the solution requires resolving a dispute, drafting a document, or planning a transaction.<sup>101</sup> The goals of the lawyer-client relationship must be developed and agreed upon in the course of the relationship between the lawyer and client. By focusing on the lawyer's role as a helper, rather than on the lawyer's dual role as a negotiator and a collaborator, the client-centered approach to lawyering does not equip a lawyer to deal with the complexity of the lawyer-client relationship. It does not recognize the client's role as an equal participant in the creation of the relationship and in the implementation of joint decisions.

### III. ORGANIZATION OF THE INTERVIEWING AND COUNSELING PROCESS

An approach that integrates the negotiation and renegotiation of joint decisions with the other essential functions of legal interviewing and counseling can provide lawyers with objective criteria for planning and organizing interactions with clients, for making judgments about how to communicate with clients, and for evaluating the lawyer's role in lawyer-client communication.

Like the other functions of legal interviewing and counseling (information gathering, informing and advising the client, and building rapport), negotiating and renegotiating joint decisions occurs at every stage of the lawyer-client relationship, from the initial interview to the final lawyer-client conference. Many decisions cannot be made in the early stages of the relationship, and many joint decisions must be renegotiated as new information is learned and new options develop.<sup>102</sup> The legal interviewing and counseling process must allow the lawyer to move back and forth freely from the negotiation and renegotiation of joint decisions to the commu-

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100. See Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991, 1010-15 (1992) (comparing the lawyer's role as helper to the therapist's role as helper).

101. See Dinerstein, *Client-Centered Counseling*, *supra* note 32, at 540 ("The pressures of this external reality necessarily lead the lawyer to adopt a different attitude from that of the client-centered therapist. The lawyer becomes the mediator between the client and the external world."); see also Gifford, *supra* note 27, at 842 ("[N]egotiation counseling is inherently different from the therapeutic counseling sessions conducted by psychologists, counselors, or other therapists. In those counseling contexts, it is the patient who, after leaving the counseling session, actively implements the strategy for facing his own problems." (footnote omitted)).

102. See, e.g., Gifford, *supra* note 27, at 830-31 (describing the interplay of counseling and negotiation at different stages of a case).

nication of information and advice necessary to implement joint decisions. The process is cyclical.

The legal interviewing and counseling process enables lawyers and clients to work in harmony to solve legal problems. It also creates the lawyer-client relationship. Before examining the progression of activities and decisions that create and define the lawyer-client relationship, it is helpful to consider the forms that the joint decisions of lawyers and clients can take. Joint decisions can take a variety of forms ranging from formal written contracts to informal mutual expectations.

### A. *Forms of Joint Decisions*

The lawyer-client relationship is the product of a series of joint decisions made by the lawyer and her client. A joint decision might take the form of a formal written contract (e.g., a retainer agreement). It might take the form of an oral understanding (e.g., a promise to appear in court). It might also take the form of informal mutual expectations (e.g., both sides will be courteous, or both sides will be straightforward). The lawyer-client relationship is both contractual and social. It is contractual in that the lawyer and client exchange express or implied promises to behave and perform in certain ways.<sup>103</sup> The lawyer-client relationship is a social relationship in that the lawyer and client also develop patterns of behavior and expectations in the course of their relationship that are not based on an exchange of promises.<sup>104</sup>

The express contractual agreement between lawyer and client might be extremely detailed or very brief. It might include the legal problem to be addressed, how fees will be calculated, and actions to be taken by the lawyer or client.<sup>105</sup> Implied agreements

103. The contractual relationship between a lawyer and client is modified by principles of professional responsibility and fiduciary relationship law. See MOLTERNO & LEVY, *supra* note 26, at 96.

104. See Felstiner & Sarat, *supra* note 31, at 1448 ("Social structure is no more than patterns of behavior generated and re-generated through negotiations in people's daily lives.").

105. The following form retainer agreement, developed by Legal Aid Society of Middle Tennessee, Inc., illustrates some of the issues that might be covered in a written contract. It reflects the intention of the lawyers to express the agreement in highly readable language.

RETAINER AGREEMENT

By signing this paper, I am asking \_\_\_\_\_ and other Legal Services workers to represent me or give me advice. Here is the legal problem I want help with:

I understand that:

1. I will not have to pay for my lawyer or paralegal.
2. Some cases may involve court costs and other expenses. Legal Services may ask me to pay these costs if I have approved them.

between the lawyer and client are also a part of the contractual relationship. They might include the lawyer's implied promise to file a pleading before the statute of limitations expires or the client's implied promise to pay the expenses of an expert witness. Both the express and implied contractual agreements between the lawyer and client are negotiated and renegotiated throughout the lawyer-client relationship.<sup>106</sup>

Issues such as the frequency and nature of communication between the lawyer and client can be made the subjects of contractual agreement, but ordinarily they remain a part of the social relationship that the lawyer and client develop. The patterns of behavior that make up the fabric of the social relationship between the lawyer and client are no less important to the accomplishment of their joint objectives than the contractual agreements. The behaviors might include such expectations as how much authority is delegated to the lawyer to make decisions, what types of information the lawyer will share with the client, and, also, what information the client will share with the lawyer.

Many aspects of the social relationship between the lawyer and client acquire significance because of the age, race, class, gender, sexual orientation, ethnicity, disability or social background of the lawyer or client.<sup>107</sup> For instance, the lawyer's decision to call a

3. If I win money in my case, I must pay Legal Services back the money they spent on my case for things like court fees, deposition fees, and expert witness fees. But, I will not have to pay the money back if what I win is a government check like Social Security, SSI, AFDC or Unemployment.

4. Sometimes Legal Services can try to get the other side of the case to pay for my lawyer. If that happens, I agree to let Legal Services ask for and keep this payment.

5. My case will not be settled without my okay.

6. My lawyer or paralegal has not promised to handle later appeals which I may want. They have not promised to go back to court to enforce a court order they get for me.

7. My lawyer or paralegal may ask other lawyers to help with my case.

8. I must tell Legal Services right away about changes in my address, phone number or income, and any other changes that might affect my case.

9. This agreement is not in effect unless it is signed by me and by my lawyer or paralegal.

Date: \_\_\_\_\_ Client's signature \_\_\_\_\_

This is what Legal Services will do for you: \_\_\_\_\_

Date: \_\_\_\_\_ Attorney/Paralegal's signature \_\_\_\_\_

Legal Aid Society of Middle Tennessee, Inc., Retainer Agreement (on file with Legal Aid Society of Middle Tennessee, Inc., in Nashville, Tennessee).

106. See Felstiner & Sarat, *supra* note 31, at 1450.

107. See Bill O. Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age In Lawyering Courses*, 45 STAN. L. REV. 1807, 1809-10 (1993) (discussing why an effective community lawyer should be conscious of and sensitive to the personal identification differences of the players in the legal environment).

client by first name instead of by a courtesy title might communicate a sense of equality in some relationships but might communicate a lack of respect in others.

The terminology used by a lawyer might be an issue in the lawyer-client relationship. For example, widespread objection by persons with disabilities to use of the term "handicapped" led to amendment of the Individuals with Disabilities Education Act<sup>108</sup> in 1990 to eliminate use of the term handicapped throughout the statute.<sup>109</sup> A lawyer can adapt to changes in terminology by listening to how clients describe themselves or matters in which they have an interest and by initiating discussion, if necessary, of what terminology should be used.

A lawyer or client who desires a change in the character of a lawyer-client relationship must renegotiate the social as well as the contractual terms of the relationship in order to bring about the change.<sup>110</sup>

## B. *Four Essential Functions*

Recognition of the importance of incorporating lawyer-client negotiation into the legal interviewing and counseling process influences the way that a lawyer plans and organizes interaction with a client. The organization of communication between a lawyer and client must provide for four essential functions of legal interviewing and counseling: (1) gathering information; (2) informing and advising the client; (3) building rapport; and (4) negotiating and renegotiating the terms of the lawyer-client relationship. The organization of lawyer-client conferences should take into account the progression of decision making from more general threshold issues to more specialized decisions that must be made in the course of negotiations or litigation. Furthermore, at each stage of the relationship the organization of the legal interviewing and counseling process should balance the four essential functions so that they complement and reinforce each other as much as possible.

1. *A Progression of Joint Decisions.* An approach that incorporates the negotiation of joint decisions requires that information-sharing and decision-making proceed cyclically. The Binder,

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108. 20 U.S.C. §§ 1400-1491 (1994).

109. The Education of the Handicapped Act Amendments of 1990 changed the terminology used in federal statutes from "handicapped individuals" and "handicapped children" to "individuals with disabilities" and "children with disabilities." Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400-1491 (1994)).

110. See Felstiner & Sarat, *supra* note 31, at 1449.

Bergman and Price model for information gathering can be an effective method of organizing the lawyer's search for information. The progression from broad inquiry with open-ended questions<sup>111</sup> to theory verification through more focused questioning advocated by Binder, Bergman and Price<sup>112</sup> gives the lawyer an opportunity to identify the facts and concerns of greatest interest to the client. However, the path from information gathering to decision making is not always a straight line. Information gathering might have to be interrupted to permit negotiation of issues that affect the scope of the lawyer's questioning, or even to negotiate the types of information that the client will make available.

The agenda of the lawyer-client conference might itself be a subject of negotiation as the client might have interests in how the conference is conducted. The lawyer should be prepared to modify a proposed process for information gathering, especially if cultural or experiential differences give a client an interest in pursuing a different process.<sup>113</sup> Research by John M. Conley and William M. O'Barr suggests that telling a story in chronological narrative form is difficult for some people and could lead to the omission of important information.<sup>114</sup> Some clients might prefer to organize the story around individuals and their relationship to the critical event rather than chronologically.<sup>115</sup> The lawyer should be prepared to negotiate a suitable format for information gathering if the interests of the client require it.

Preliminary issues that might need to be negotiated or renegotiated should be raised early in each lawyer-client conference. The lawyer should begin a conference with a client by proposing an agenda for the meeting. The proposal can be informal, such as, "I would like to ask you some questions, and then we can talk about what needs to be done. Is that all right?" The lawyer's initial inquiry should be not only, "What kind of problem are you having?" but, "How would you like to approach it?" or "What do you want to do?"

Threshold issues in the development of the lawyer-client relationship must be decided before information gathering, informing

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111. *Id.* at 94-97.

112. *Id.* at 112-14.

113. See, e.g., Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 at 1681 n.348 (1991) (criticizing the use of a chronological overview for organizing facts when the speaker may be inclined to a different storytelling logic). For a discussion of alternative storytelling logics, see JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* 58-81 (1990).

114. See CONLEY & O'BARR, *supra* note 113, at 58-81.

115. See *id.*

and advising can be narrowed. Such threshold issues might include the degree of confidentiality of lawyer-client communication, whether or not the client wants a role in planning the organization of the conference, and whether the client's problem, broadly defined (e.g., whether it is a criminal matter, a civil matter, or a regulatory matter) is a matter the lawyer can undertake.

As the exchange of information and advice progresses, the negotiation of the terms of the lawyer-client relationship requires decisions about the boundaries of the relationship, such as the scope of the lawyer's authority to act for the client, limitations on the lawyer's responsibility, and the division of responsibility between the lawyer and client. At later conferences between the lawyer and client the issues that must be negotiated and decided become more specific and might deal with how the client's case should be presented, how to frame the story of the case, what forum should be selected, and what specific roles the lawyer and client will have.

The roles of the lawyer and client in the investigation of a case or in negotiations with an adversary cannot be fully negotiated until both lawyer and client have substantial information about facts and alternatives available to them.<sup>116</sup> As the lawyer and client learn more about a case, and each other, negotiations between lawyer and client will encompass a growing range of issues. For instance, the lawyer might believe that taking a deposition would increase the chance of prevailing and the client might not want to bear the expense. Issues agreed upon at the beginning of a case might have to be renegotiated as the client becomes more sophisticated and the lawyer learns more about the client and the case. A decision made early in the case to rely on alternative dispute resolution procedures might have to be renegotiated if it appears that the adversary is not participating in good faith.

Although it is important to plan the organization of legal interviewing and counseling, the organization must be flexible. If difficulty arises in gathering information it might signal that the organization of an interviewing and counseling conference needs to be renegotiated.<sup>117</sup> The lawyer must exercise judgment in deciding whether it is possible to take action in union with the client or whether it is necessary to resume the negotiation or renegotiation

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116. See Gifford, *supra* note 27, at 830 ("Uncertainty characterizes the initial counseling encounter between the lawyer and the client prior to the first negotiation session. At this early stage, it usually is not possible to identify all the alternative courses of action available to the client and to assess the costs and benefits of each." (footnotes omitted)).

117. See FISHER ET AL., *supra* note 29, at 10 ("[W]hether consciously or not, you are negotiating procedural rules with every move you make, even if those moves appear exclusively concerned with substance.").



of mutual goals or strategies.

2. *Balancing the Essential Functions of Legal Interviewing and Counseling.* The organization of lawyer-client interaction should balance the essential functions of legal interviewing and counseling so that they complement and reinforce each other as much as possible. The functions of information gathering, informing and advising the client, building rapport, and negotiating and renegotiating joint decisions might reinforce each other, but often they are in conflict, and the pursuit of one might jeopardize accomplishment of the others. When the functions are in conflict, it is particularly important for the lawyer to be sensitive to the organization of the lawyer-client interaction.

For example, at the initial conference between lawyer and client it might be a mistake for the lawyer to begin gathering information without first negotiating guidelines for the lawyer-client relationship. A common problem at an initial interview is the failure to negotiate a mutual understanding about the protection of client confidences. The client's reluctance to divulge information does not stem from a failure to understand rules of professional responsibility. The client is justified in wanting to negotiate an explicit understanding of how the lawyer will use information revealed by the client. In the absence of an understanding that the client's confidences will be protected, the client might be unwilling to reveal important data to the lawyer.<sup>118</sup> The degree of confidentiality of the lawyer-client relationship is a matter for negotiation. Although professional ethics require a lawyer to preserve the confidences of clients,<sup>119</sup> the client makes an express or implied waiver of confidentiality in many cases. If the client asks the lawyer to initiate negotiations with an adversary, the request implies authorization to reveal some information that would otherwise be confidential. If the facts of the case are sensitive, the client might be willing to reveal some facts but not others to the adversary and might withhold facts from the lawyer in the absence of an explicit understanding that the lawyer will reveal only what the client authorizes. The lawyer should make it clear that information will be used in

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118. See, e.g., Miller, *supra* note 38, at 575 ("[T]here was potentially a very high cost to discussing sexual orientation issues with a client who wants to keep his sexual orientation secret. Simply raising the issue with the client might be devastating if he believes that by remaining silent he can control who has access to this information.").

119. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1994) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out representation . . .").

the negotiations only with the specific agreement of the client. Thus, negotiating guidelines for the confidentiality of the relationship early in the lawyer-client interaction reinforces the other function of gathering information. The client is likely to provide more information after a full discussion with the lawyer of how it will be used.

The use of confidential information is only one of many issues that might require negotiation before the other functions of interviewing and counseling can unfold. Negotiations about the structure of the lawyer-client relationship can also facilitate the functions of gathering information and building rapport. For example, if the client needs an order for protection from domestic violence, local statutes might require the petitioner to supply detailed information to the court. Some of it might be embarrassing to the client, and both lawyer and client might prefer to have a more developed relationship and better rapport before discussing sensitive topics. If the lawyer and client discuss the problem and agree to postpone usual steps in developing the relationship between them in order to respond to the emergency, loss of rapport can be avoided and the client might be more willing to communicate sensitive information. At a later encounter, the lawyer can ask about the client's ultimate goals and gather detailed information about the case.

Negotiating some issues in the lawyer-client relationship might conflict with the other functions of legal interviewing and counseling. For instance, it is important for the lawyer to negotiate a fee arrangement at an early stage. Disclosing the lawyer's conditions of employment and seeking the consent of the client is essential to the integrity of the relationship. However, presenting the client with a retainer agreement specifying the steps the lawyer will take to collect unpaid fees risks a loss of rapport. The organization of lawyer-client conferences could provide for such potential conflicts by deciding on joint objectives and means of pursuing them before discussing the proposed agreement on fees.

Often building rapport and gathering information are in conflict. For some clients building rapport might require that the lawyer take time to tell about herself and her experience (or lack of experience) before any other communication takes place. The time the lawyer spends telling about herself might delay the collection of important facts. However, the confidence and trust that results from full rapport between lawyer and client can justify the time spent.

Recognition that legal interviewing and counseling is a cyclical process of sharing information and negotiating joint decisions enables a lawyer to plan and propose agendas for lawyer-client con-

ferences that meet the needs of both lawyer and client.

#### IV. INTERVIEWING AND COUNSELING MR. JOHNSON

The case of M. Dujon Johnson illustrates how identifying the four essential functions of legal interviewing and counseling can facilitate lawyer-client communication. Problems that arise in communication between lawyer and client, or in the coordination of their activities, might indicate that one or more of the essential functions has not been accomplished sufficiently to allow the lawyer to act in union with the client. Such problems were evident in Johnson's case.

After viewing a videotape of the initial interview with Johnson, one of the lawyers observed, "[I]t seemed that our client was managing the impressions he created in the interview."<sup>120</sup> Based on this observation, the lawyer could have asked: Were each of the four functions of legal interviewing and counseling accomplished, and if not, what else should be done?

There were indications that information gathering, informing and advising the client, building rapport and negotiating mutual goals and strategies needed additional attention. Johnson's initial interview began with a request by the lawyers for the client to sign a written consent to videotape the interview,<sup>121</sup> a procedure that is invaluable to the teaching process, but one that might jeopardize all four essential functions of the interview. In agreeing to have the interview videotaped, the client understands that the information provided by the client will be shared with a number of unknown persons. Despite assurances, the client's trust in the lawyer to hold information in confidence might not extend to the other unseen observers. Thus, the lawyer should be aware that the information gathered in the videotaped interview might be incomplete or inaccurate.

The client might also question whether the information and advice given by the lawyers is influenced by a desire to impress the unseen observers. Thus, the lawyer should consider that the function of informing and advising the client might be incomplete.

Videotaping might also have a subtle influence on the development of the lawyer-client relationship. The rapport built up between the lawyers and the client meeting face to face might not extend to the viewers of the videotape. The client might be conscious of the influence on the lawyers of having unseen observers with interests different from the individuals who are present.

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120. Cunningham, *supra* note 1, at 1311.

121. See *id.* at 1310.

The lawyers should also consider that the client's apparent attempt to *manage the impressions* created at the interview might be a *covert* attempt to negotiate with the lawyers using a tool within the client's control: knowledge of the facts of the case. To determine whether the client is signaling a desire to negotiate, the lawyers should initiate discussion of issues that the client might want to negotiate or to renegotiate. An attempt to manage the impressions given to the lawyer suggests a desire to set mutual goals for their relationship. The lawyers might ask, "What result do you want from this case?"

As Johnson's was a criminal case, the lawyers assumed that the client's goal was dismissal of the case, or acquittal if the case went to trial. When Johnson and his lawyers met again, it became apparent that his goals were broader than obtaining a dismissal of his case. Near the end of the case, he told one of the lawyers that his goal was to have his reputation and his dignity restored.<sup>122</sup>

Negotiation of the mutual goals of the lawyer and client would have required a discussion of how multiple goals, such as acquittal, restoration of the client's reputation and dignity, and public exposure of the police officers' misconduct, could be pursued simultaneously. It might have been necessary to rank the goals in order of priority. The process would have required gathering different types of information from the client as well as giving appropriate information and advice to the client. The discussion would also have required disclosure by the attorneys that certain methods of representation were unavailable because of self-imposed limitations of the legal clinic — most notably, the students did not have the option of pursuing a civil lawsuit.<sup>123</sup> The lawyers needed to decide whether they were willing to agree to pursue goals that might have increased the chance that their client would be convicted of a crime.

The lawyers should also have directly confronted their own interest in the joint goals of the relationship. A lawyer's interest in making a good impression on the court might conflict with the client's interest in the goals or the strategy of the case. Particularly in a criminal case, the choice of goals or strategies that increase the risk that the client will be convicted might not be understood by the court or the bar.<sup>124</sup> The lawyer's professional reputation benefits from "winning" the case, but not from appearing to have made "wrong" decisions.

Furthermore, if the client proposes goals or strategies that

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122. *Id.* at 1326.

123. *See id.* at 1331 n.56.

124. *See, e.g.,* Dinerstein, *supra* note 41, at 972-81.

heighten the risk of a conviction, the lawyer might assume that the client, who allows personal principles to interfere with pursuit of an acquittal, does not understand the significance of a criminal conviction and the profound impact it might have on the client's life. The solution for the lawyer is to engage in a thorough dialogue with the client until a joint decision can be made.

Johnson's actions as his case unfolded continued to suggest that one or more of the essential functions of legal interviewing and counseling had not been fulfilled. After reviewing the case, the lawyers decided to file a motion to suppress evidence as part of an aggressive defense plan.<sup>125</sup> Johnson testified at the hearing on the motion, but the hearing was adjourned and continued to another day for the arresting officers to testify.<sup>126</sup> When the suppression hearing resumed, Johnson did not appear.<sup>127</sup> His lawyers had "strongly encouraged" him to come, and his absence was unexpected.<sup>128</sup> Mr. Johnson's unexpected failure to appear was a signal that the lawyer-client relationship was not succeeding and that communication between lawyer and client was incomplete. The lawyers needed to meet with their client to determine whether his absence was due to faulty communication of information or advice or whether it signaled his desire to renegotiate terms of their relationship.

Negotiation aimed at dividing responsibilities for the case was called for. When the issue was raised late in the case, Johnson responded positively. While preparing for the trial on the criminal charge, one of the lawyers suggested to Johnson that he could attain a voice in the courtroom by participating in the cross-examination of the prosecution's witness.<sup>129</sup> Johnson replied that he had been thinking about asking to participate in the cross-examination.<sup>130</sup> Johnson expressed the opinion later, however, that when the idea came up it was already too late in the legal process for him to prepare to take part in the trial of the case.<sup>131</sup> To make the client's participation in the trial realistic and effective, the client's role should be negotiated early in the relationship. Just as the lawyer is preparing for the trial at every pre-trial conference or hearing, a client who is going to take on responsibilities at a trial

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125. See Cunningham, *supra* note 1, at 1312.

126. *Id.* at 1314.

127. *Id.* at 1314 n.31.

128. *Id.* at 1314.

129. *Id.* at 1327 n.48.

130. *Id.*

131. Johnson wrote to Clark Cunningham later that he "would have, and could have prepared to cross-examine" the witness, but that the lawyers "waited too far into the legal process" to ask him to become involved. *Id.* at 1384.

should have every possible opportunity to prepare.

Participation in the trial of the case is but one area of responsibility that lawyers and clients can divide. The client can take part in the investigation of a case, interviewing witnesses, researching on legal issues, framing the story of the case, and any other task that the client is prepared to learn to do.

At each stage of the relationship between M. Dujon Johnson and his lawyers there were signs that the interviewing and counseling process was not producing satisfactory results. Johnson wanted collaboration with his lawyers, and he wanted to participate as an equal. Clearly, Johnson's lawyers were willing to engage in innovative approaches to the case. Johnson was intensely interested in every aspect of his case, but he began to withdraw his participation. After the case was concluded he made it known that he felt that he had been left in the backseat. An approach to legal interviewing and counseling that incorporated negotiation of the terms of the lawyer-client relationship would have allowed Johnson and his lawyers to create a relationship that met his demand for equality and collaboration.

