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Jurisprudential Countertransference

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Jurisprudential Countertransference

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JURISPRUDENTIAL COUNTERTRANSFERENCE

*Marla Kahn*¹

INTRODUCTION

The Therapeutic Jurisprudence movement has urged legal professionals to consider how the law influences the mental health of participants. Considered in specific circumstances, such as divorce, competency determination, or adoption, deliberation has occasionally focused on the client's emotional reactions to the legal process. When considering the needs of the disenfranchised, contemplation has usually been in terms of substantive civil rights, rather than what impact judicial decisions have on the client or judicial personnel. Lawyers argue and judges determine the "best interest" of special populations, with little or no input from the subjects of their concern. All too frequently, both with the disenfranchised and the general population of clients, attorneys neglect consideration of how their own feelings impact arguments or decisions on behalf of clients.

Competency hearings, probate hearings, and custody hearings are thought to provide protection for charges of the court and society at large. It is a relatively recent development for the courts to consider the civil rights of populations within their care, much less the psychological impact of the legal process on the subjects of decision. The influence of conflicting role demands when working with special populations, as it affects the emotional health of lawyers, judges, and other legally involved professionals is relatively unstudied and almost nonexistent relative to the typical client.

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When the legal system must address the “best interests” of children or incompetents, or work with populations that generate strong reactions (for example, the poor, those with HIV/AIDS, homosexuals), attorneys and magistrates may not recognize how their own feelings impinge on their work product. Attorneys may experience ambivalence when advocating for client wishes that they do not personally support, or magistrates may be influenced by personal feelings that do not have a place in the context of ethical and fair judgments. Exploration of these conflicts is analogized to the dilemma facing psychologists in the therapeutic context and possible avenues for resolution are suggested by analogues of psychotherapy.

THERAPEUTIC JURISPRUDENCE

Early Therapeutic Jurisprudence (“TJ”) was an outgrowth of traditional mental health law. First generation TJ scholarship struggled with whether mental disability law would be more “therapeutic” or more “jurisprudential.”² Conflict arose from a perception that TJ was too willing to subordinate civil libertarian interests to therapeutic interests. However, others suggested that “‘therapeutic’ civil rights jurisprudence” was not an oxymoron and could invigorate litigation in the field of mental disability law.³ The movement urged development of a policy base from which issues such as the rights of the criminally verses the civilly committed, rights of the incompetent, rights to refuse treatment, and delineation of rights retained or compromised by institutionalization, could be addressed.

TJ generally encourages lawyers to adopt a multidisciplinary approach and practice in a manner that enhances the therapeutic effects of the legal process for clients. “In therapeutic jurisprudence, the client’s perspective should determine the therapeutic worth or impact of a particular course of events.”⁴ Logically, the client’s perspective appreciates the

² Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption*, 1 PSYCH. PUB. POL. & L. 80, 82 (1995).

³ *Id.* at 85.

⁴ *Id.*

preservation of her civil rights. However, questions such as “may mental health patients refuse treatment?” required consideration of both civil rights and patient autonomy. There developed a growing appreciation for the interaction between preservation of patients’ civil rights, the impact of autonomous client decision-making on the treatment process, and societal needs. Attention to the emotional impact of the legal process on clients had begun, but very little has ever been written concerning the personal perceptions and reactions of attorneys to their clients’ increased autonomy. Furthermore, attorneys had no guidance when they personally concluded that the client’s best medical interests were not served by client requests to be free of a proposed pharmacological treatment. Personal intrapsychic conflict and conflicting role requirements inherent in the legal process present the legal professional with unique difficulties that are rarely recognized by the profession as a whole.

ROLE CONFLICT FOR THE LEGAL PROFESSIONAL

Most attorneys are familiar with the call to monitor client conflicts of interest that impinge on their practice, usually in the form of overlaps arising between new and former clients. The Model Code offers guidance to assist attorneys in resolving conflicts between clients or between personal legal interests of the attorney and clients’ legal interests.⁵ Issues of divided loyalty and ethical practice clearly arise from duties to clients, former clients and even non-clients, but attorneys must also be aware of how their own biases and intrapsychic dilemmas may intrude on representation of individual clients. This can be one of the most difficult types of conflict to monitor, because the attorney’s own defenses may inhibit acknowledgement of how he is sacrificing a client’s interests for his own.⁶

Two types of role conflict may emerge for the legal professional. “Role-interest conflict” involves the conflict of specific implied tasks attendant to representation of differing client interests, such as when an attorney represents a child in either the

⁵ MODEL CODE OF PROF’L RESPONSIBILITY EC 5-24 (1981).

⁶ Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819 (1996).

role of guardian ad litem or as the child's counsel. Here the child's avowed interests may depart from what counsel personally thinks is in the child's "best interests," such that attorneys must be clear about what role they occupy. The second form emerges when the attorney's personal dynamics (intrapsychic conflict) interact with the specific facts of the client she serves, and I call this "countertransference conflict."

The amount of role-interest conflict within a particular situation is, to some degree, a result of the model of practice chosen. Some attorneys prefer an adversary/advocacy model, while others prefer a "best interests" model. The "adversarial lawyer" generally operates from the assumption that clients wish to retain as much freedom as possible, while the "best interests attorney" is concerned that the client be protected, rehabilitated, or treated.⁷ Both positions require some degree of paternalism and intervention that may not best serve the client. Determination of what is objectively best for a client must be derived from what a client says he wants, what others want, and is then shaded by the attorney's own experiences and needs. Even lawyers who use a mediation approach must recognize that they are not neutral and their experiences, biases, values, and points of view influence how they react to conflict within the mediation process.⁸

Officers of the court are placed in an unusual position when the determination concerns what is in the "best interests" of an individual. Best interests are never objective. It must be determined whether it is the client's, the attorney's, the third party's, or the judge's subjective definition of "best interest" that is most beneficial. Attorneys are required to be sensitive to their client's express wishes, unstated needs, to dynamics of the attorney-client relationship, to their personal biases, to their ethical mandates, and to the conflict engendered by various role assignments. Further, they must be aware that their professional authority combines with the client's vulnerability and creates an inequality of power in the relationship that diminishes the client's ability to be self-determining.

⁷ Janet B. Abisch, *Mediational Lawyering in the Civil Commitment Context: A Therapeutic Jurisprudence Solution to the Counsel Role Dilemma*, 1 PSYCH. PUB. POL. & L. 120, 120 (1995).

⁸ *Id.*

Recognition of how clients' emotional needs and defenses can impact the legal process has been presented in the literature on resistance to the use of advance medical directives in estate planning.⁹ Estate planning attorneys are familiar with the delicacy of guiding clients who are in denial of their own mortality to address difficult emotions, so that they can adequately protect their heirs' future interests. Additionally, sensitivity to the emotional needs of clients has been suggested in models of "relational lawyering"¹⁰ and "affective lawyering,"¹¹ wherein attorneys develop interpersonal skills necessary to deal with their client's emotional responses to the on-going legal process. Careful attention to the concerns of clients, both legal and non-legal, provides greater cooperation between all parties and consequently is associated with outcomes that clients will be more likely to abide by.

The nature of the client-attorney relationship is also a source of affective interaction that may impact the emotional experience and outcome of the legal process for participants. Attorneys must recognize the power they have within the professional relationship, being vested with authority, wisdom, and credibility by their clients.¹² Lawyers design and protect the parameters of society's sense of what is right and equitable. They find ways for their clients to obtain justice and divert harm.¹³ A lawyer's job is to advise clients of what course of action is most advantageous to the client's interests, and she holds considerable power by virtue of her greater knowledge and access to the legal

⁹ Bruce J. Winick, *Legal Counseling About Advance Directive Instruments: Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal With a Psycholegal Soft Spot*, 4 PSYCH. PUB. POL. & L. 901 (1998).

¹⁰ Serena Stier, *Reframing Legal Skills: Relational Lawyering*, 42 J. LEGAL EDUC. 303, 303-23 (1992).

¹¹ Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996).

¹² M. PETERSON, AT PERSONAL RISK: BOUNDARY VIOLATIONS IN PROFESSIONAL-CLIENT RELATIONSHIPS (W. W. Norton 1992); see also Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 CLINICAL L. REV. 639 (1995) (arguing that "facilitative" lawyering in a social change context explicates the attorneys role while preserving the client's autonomy).

¹³ PETERSON, *supra* note 12, at 14-15.

system. Attorneys continually determine what and how much information they will give clients and frame, order, or translate it in a manner that influences client choice. It is natural for attorneys to attempt to persuade clients that their advice reflects the wisest course, but ultimately the client must be the final decision-maker.

The assumption of an objective reality belies the fact that client-attorney interactions encompass the psyches of two participants. Therefore, when clients see things differently from their attorneys, it does not imply the operation of client defensiveness or client incompetence.¹⁴ Psychological defenses are protective personality mechanisms that reduce anxiety and allow the individual to maintain self-esteem, a sense of control, and facilitate functioning.¹⁵ However defenses that reduce the anxiety of a perceived threat or unacceptable idea, may also distort reality testing in a manner that prevents optimal and effective functioning.¹⁶ By definition, situations that place a client's destiny in the hands of the court are anxiety producing and potentially threatening. Any participant to an interaction may unconsciously use defenses that result in repression of unpleasant affect, and officers of the court are no exception. I suggest that attorneys must possess more than sensitivity to the perceptions and emotion that inform their client's wishes, but that they must also have awareness of their own perceptions, feelings, and biases, such that their contribution to the legal process is both "psychologically minded" and "ethically clean."

The roles assumed by psychologists in clinical practice are similar to the roles of attorneys in that both hold out the possibility of a path that could better the client's life. They are expected to impart wisdom, provide protection and care, nurture, and heal the helplessness and hopelessness that are the inevitable fallout of society's harms.¹⁷ In both venues, clients relinquish power by virtue of their neediness and the more distressed the client, the more power the professional holds.¹⁸ Both attorneys and

¹⁴ Winick, *supra* note 9, at 907.

¹⁵ SIGMUND FREUD, *THE PROBLEM OF ANXIETY* (W.W. Norton 1936).

¹⁶ See Winick, *supra* note 9, at 904-05; see also I. GREGORY, *FUNDAMENTALS OF PSYCHIATRY* (2d ed., W.B. Saunders 1968).

¹⁷ PETERSON, *supra* note 12, at 16.

¹⁸ *Id.* at 38.

psychotherapists have a significant degree of autonomy to determine what is in their client's best interests, whether it is a decision to treat or represent. Both professions require the trust of clients and vigilance that services are provided to meet the client's need rather than the professional's need. An insightful attorney speaks truth for both professions when he says "I may have wonderful ideas that I think will transform this person's life, but I have to keep asking, 'Is this for me or is this really best for the other person?' Being a professional means not just exercising a skill; rather, there is a responsibility to the person with whom I am dealing."¹⁹ Attorneys, like psychologists, must monitor their self-interests and personal dynamics putting client needs above their own, or they contaminate the relationship.

PSYCHOLOGICAL CONSTRUCTS

Transference is a psychological process by which people impose or project feelings that originated in prior relationships, onto new relationships.²⁰ For example, unresolved feelings about parental authority may be projected onto the psychologist, boss, spouse, attorney, judge, or any current authority figure. Through the defense of "projection," people act out their unresolved inner conflicts. The legal process therefore becomes a fertile ground for issues of good and evil, or justice and injustice, to be played out with the attorney,²¹ the opponent party, or the court itself. Dormant postures of dependency from childhood are also stimulated, the result of client interests being represented by the parent surrogate attorney. Inherent power differentials in the client-attorney relationship require special care and continual monitoring, such that self-determination reasonably retained by clients, is preserved.²²

Countertransference occurs when the object of transference (psychologist, attorney, judge) has a reaction to the projected feelings of the client (the transference), that also are

¹⁹ *Id.* at 29.

²⁰ See Winick, *supra* note 9, at 911; see also R. Greenson, *The Working Alliance and Transference Analysis*, 34 PSYCHOANALYTIC Q. 155-81 (1965).

²¹ See PETERSON, *supra* note 12.

²² See Marsico, *supra* note 12.

colored by prior relationships in his or her own experience (countertransference).²³ Countertransference derives from societal expectations about the role of professionals, unconscious reactions to clients' unstated transference, and to dynamics and experiences personal to the professional. Filtering ascribed power through childhood experiences, subjective feelings of self-worth, personal biases, and personal defenses, will determine how the professional responds to the client. Examples of countertransference can be found in the professional's reaction to client dependency or autonomy. It is felt when the professional questions his competence to meet client needs, or alternatively, in self-righteously claiming omnipotence in the ability to represent a client or cause. How professionals feel about themselves, how they see themselves in specifically court-defined roles, and how consciously or unconsciously they react to people or situations, will determine how able they are to separate their personal agenda from the client's interests.

"Countertransference conflict" is often felt by the professional in response to the power differential and dependency needs of clients (many times experienced as pathological dependency) inherent in the relationship. The attorney may feel stressed by how much responsibility she carries, but impotent due to environmental or individual dynamics. Rationalization may permit self-awareness of expert knowledge or skill that gets the job done for clients, but inability to claim the inherent power of results attained, leads to attorneys discounting their personal power.²⁴ Often investment in the role of the "caring professional," or negative images embodied in the role of authority, or the "beginning professional," will restrict one's ability to feel powerful. Attorneys are limited by external factors, such as: inability to control outcomes, unpredictability of participants, attempts to satisfy diverse constituencies, the need for unpopular decisions, reality based limitations, and attempts to meet the professional norm of excellence. These limits increase feelings of self-doubt in the lawyer. When clients have issues with authority and either challenge a professional's power, or alternatively, are

²³ See Winick, *supra* note 9, at 904-05.

²⁴ See PETERSON, *supra* note 12, at 50-53.

overly needy and dependent, they will increase countertransference anxiety in the professional.

To relieve countertransference conflict, attorneys may try to control the meaning of the professional-client relationship or unconsciously distance themselves from anxiety provoking situations. This may be done by objectifying clients (they become cases to act on rather than persons with whom to engage), increasing or decreasing the amount of power attributable to the client, or replacing the “whole real self” with a “role self” (thinking like a lawyer).²⁵ In fact, attorneys are frequently taught to ignore client emotionality and bury their own feeling to attain intellectual victories, just as they are taught to separate hard evidence from subjective intangibles.²⁶ These processes disconnect the attorney from emotional engagement with his or her clients and ultimately from what the client’s true wishes and needs are. Unfortunately, the entire legal system is designed to use affect as a manipulative tool of advocacy, without truly engaging intimately with emotion personally or even interactively with the client. However, the legal profession’s belief that separation of thoughts and feelings will increase objectivity ignores the subconscious process by which emotions seep into representation through countertransference behavior. Unconscious material may affect how cases are assessed, what case law is deemed relevant, may cause differential client interaction, and bias decisions.

While the risks of “role-interest conflict” and “countertransference anxiety” are present in all aspects of the legal process, there are often heightened and therefore easier to track with special populations. For example, attorneys who represent HIV/AIDS clients must be sensitive to the differing needs of subclasses (gay, IV drugs users, women) of the HIV/AIDS community. They must be sensitive to the intersectionality of roles, interests, values, and multifactor discrimination (race, gender, and class). Furthermore, professionals must acknowledge their own attitudes or emotional responses to illness, death, sexuality, classism, racism, sexism, and chemical dependency. To further complicate the interactions, similarities or differences between the client and attorney related to race, gender, sexual

²⁵ *Id.* at 58-60.

²⁶ *Id.* at 178.

orientation, social or economic circumstances, power, and life experience may all impact the dynamics of the professional relationship and degree of both interpersonal and intrapsychic conflict.

Another example is presented when a judge must determine whether a mentally ill patient has the right to refuse treatment. The judge must balance the patient's civil rights against the rights of the public to be protected from potential violence, or with prevention of clinical deterioration that may result if medication is withdrawn. Internal reactions may reflect attitudes toward mental illness, or conflict regarding the right to autonomy when competence is questioned. The judge's intrapsychic responses of fear or compassion can further cloud determination of what is in the client's best interests.

INTERESTS OF THE LAWYER

Attorneys representing special populations generally have the client's stated interest as their foremost concern. While lawyers are used to considering substantive and procedural rights, they are seldom aware of their client's intrapsychic dynamics, needs for autonomy or dependency, and how these interact with stated wishes. Furthermore, attorneys rarely review their own personal interests, role-interest conflicts, or affective responses to clients or case issues. By definition, it is rare for the attorney in actual practice to be aware of the impact of her own unconscious process as it interferes with client wishes and formation of case strategy.

The ABA Model Code²⁷ indicates that a lawyer's interests must begin with protecting clients' civil rights and stated interests. The Supreme Court's due process analysis of the Fourteenth Amendment provides substantive protection "[where] the State proposes to take drastic action against the individual . . . [requiring] clear and convincing evidence [to] protect the individual's fundamental interest in liberty."²⁸ In

²⁷ MODEL CODE, *supra* note 5.

²⁸ William M. Brooks, *Reevaluating Substantive Due Process as a Source of Protection for Psychiatric Patients to Refuse Drugs*, 31 IND. L. REV. 937, 983 (1998).

addition, the Equal Protection Clause requires that similar individuals (medical and psychiatric patients, biologically or adoptively parented children, those suffering diabetes or AIDS) be treated alike by the state, especially when state action burdens fundamental constitutional rights.²⁹ There is a legal duty and a professional ethical call to separate personal views of what is in a party's best interest from decisions that respect client preferences and civil rights. This duty extends to an awareness of how the psychological processes of all involved may impact the legal decisions of client, attorney, and judge.

Attorneys have a duty to recognize their interests, biases, values, and internal psychological dynamics in their work with all clients. There is latent risk with special populations that a client's civil rights may be compromised if the attorney fears the client's condition or background, feels overly responsible, ignores the power inherent in the client-attorney relationship, or has unconscious barriers adverse to the client's interests. From a therapeutic jurisprudential standpoint, attorneys must ask if they are zealously representing their client's expressed interest, society's best interest, or what they personally believe is in the client's best interest. A lawyer's ethical duty is aligned with the therapeutic jurisprudence view, wherein a lawyer is free to advise his client, but must allow the client's will to prevail.

WHAT CAN PSYCHOLOGISTS TEACH LAWYERS?

Psychologists in clinical practice interact with clients in a fashion similar to attorneys. They must listen carefully to clients' verbal and nonverbal messages to determine what their problems and goals are. They must then determine how best to assist clients' attainment of stated goals in light of the realities of the situation. Psychologists are imbued with the same expert knowledge, authority, and inherent power that attorneys enjoy. Psychologists and attorneys often engender dependency in clients in the very act of providing their skills and services. Like attorneys, psychologists have intrapsychic dynamics that reverberate in their own countertransferential reactions to client interactions, their own

²⁹ *Id.*

view of what is in the client's best interests, and personal biases that are reflected in their work. Psychologists may also react from authoritative agendas or encourage client autonomy. Psychologists, however, intentionally present themselves as targets for client transference, so that clients may become more aware of their inner conflict and work to change the ways it interferes with their goals. Therefore, psychology as a discipline has given more thought to the dynamics in such interactions, and how psychologists have learned to manage these issues within the professional relationship may provide useful tools for attorney practice. The goal is not for attorneys to become psychologists, but simply to benefit from the mindfulness and expertise of professionals who have intentionally explored these dynamics.

Most successful psychotherapists refrain from trying to force clients to do what needs to be done, or cajoling them into doing what they have been unable to do on their own, because the problems that bring people to therapy are usually those that make it difficult for clients to cooperate in their resolution.³⁰ The goal of treatment is change, and the resistance that is often encountered in the therapeutic process represents transference issues that emerge as clients encounter fears, misconceptions, and prior adaptive strategies that no longer work.³¹ Over time psychologists have come to recognize that they are not really blank screens, but are part of the dynamic that occurs in the psychotherapeutic encounter. The new motto is "You're inevitably part of the problem, and taking this fact into account is the only way to be part of the solution."³² Attorneys and other legal professionals must begin by acknowledging their role in the process.

Just as therapists have learned that symptoms are not an indication of what is wrong, but rather a demonstration of how clients are trying to manage vulnerability,³³ lawyers can respect clients stated wishes as expressions of the desire to maintain autonomy in the face of helplessness. Use of defense mechanisms,

³⁰ RESISTANCE: PSYCHODYNAMIC AND BEHAVIORAL APPROACHES xvii (P. Wachtel ed., Plenum Press 1982) [hereinafter RESISTANCE].

³¹ *Id.* at xix.

³² *Id.*

³³ M. Basch, *Dynamic Psychotherapy and Its Frustrations*, in RESISTANCE, *supra* note 30, at 3.

such as resistance, are an indicator that the client is frightened and likely utilizing old ways of managing.³⁴ In therapeutic treatment, the psychologist uses transference and countertransference as guides to determine areas in which a client is ready to reexperience relationships of the past, and in the revisiting of unresolved issues restructure the self along more adaptive lines.³⁵ Psychoanalytic treatments utilize interventions keyed to undoing the developmental arrest suggested by the form and content of the transference.³⁶ Attention to situations that suggest lack of adaptive ability in the face of overstimulation, pain, failure, lack of self-esteem or poor internal cohesion, suggest to the therapist reenactments of past trauma (transference) at specific developmental junctures and possible present day reparative interventions. As clients learn that the intensity and discomfort of change is transient, they become more willing to test new behavior. The ultimate effect is a sense of mastery and extension of awareness that allows willingness and confidence to risk new behaviors again.³⁷ Over time clients become more capable of recognizing their own patterns of defense and became increasingly responsible for managing them.³⁸

Clients often possess the uncanny, unconscious ability to determine sensitivities and unconscious struggles of those they are in relationship with. Such awareness allows unconscious defenses to manipulate the professional into a role the client feels familiar with and that is therefore more manageable. This strategy gives the client a sense of power and ability to manage ambiguity; however, it can leave the professional feeling manipulated, angry or confused. Psychologists develop the ability to break out of the assigned transference position and cultivate a "therapeutic split" within themselves.³⁹ The "therapeutic split" is a method of participation that allows the client to mold the transference, but requires the therapist to keep a part of themselves uninvolved in

³⁴ H. Schlesinger, *Resistance as Process*, in RESISTANCE, *supra* note 30, at 27.

³⁵ See Basch, *supra* note 33, at 5.

³⁶ *Id.* at 16.

³⁷ P. Dewald, *Psychoanalytic Perspectives on Resistance*, in RESISTANCE *supra* note 30, at 57.

³⁸ *Id.*

³⁹ See Schlesinger, *supra* note 34, at 39.

the transference reenactment to observe, evaluate, and develop responsive strategies that allow the client to change within the current relationship.

Therapists must constantly be aware of their personal response (countertransference) to clients in the transference interaction. In actuality, the successful therapist operates at multiple levels simultaneously: overt participant, covert conscious participant observer, and unconscious participant. The overt participant operates at the level of expressed content, while the covert observer's attention is concerned with the dynamic process of interaction. The covert observer must integrate content and process, develop an understanding of the client's total expression, and formulate overt content that will encourage more adaptive process behavior for the client. Countertransference reactions will influence the psychologist's perceptiveness and ability to recognize the existence, manifestation, and meaning of whatever the client presents.⁴⁰ Alternatively, countertransference may signal the therapist's personal reluctance to face conflict, discomfort with the expression of strong painful emotions, difficulty forcing the client to face difficult emotions, or may pull on dynamics historically painful and intolerable to the therapist personally. Just as clinicians expect clients to become increasingly able to identify and be responsible for patterns of defense, the helping professional must recognize and manage personal defensive patterns within themselves.

Many psychologists advocate that professionals pursue their own therapy or participate in on-going peer consultation groups, so that they can continually identify, monitor and work through their personal countertransference issues. It should be noted that the psychologist's theoretical model will suggest very different interpretations and uses of countertransference. Traditionally, countertransference was seen as a sign that the clinician was overly involved with the client and should not be disclosed during treatment. A modern approach suggests that the professional's subjective emotional life can be actively used as a tool to assist clients in treatment.⁴¹ In the client's attempt to turn

⁴⁰ See Dewald, *supra* note 37, at 52.

⁴¹ L. HEDGES, INTERPRETING THE COUNTERTRANSFERENCE 4 (Jason Aronson, Inc. 1987).

passive childhood experience into active adult mastery, the client unconsciously invites the professional to experience what they felt as a child.⁴² Therefore, countertransference feelings often convey to the psychologist what the client felt like as a child and may actually be a part of the client's personality projected onto the professional. The clinician's reactions become listening tools that guide them to a greater understanding of the client's experience.⁴³ Change occurs by discussing both the current level of relatedness and the fantasy transference/countertransference level.⁴⁴

RECOMMENDATIONS

Although lawyers are not psychologists, they must be psychologically minded and aware when working with clients. Sensitivity to the needs, emotions, and dynamics of clients, to the dynamics of the legal process, and to subjective factors can increase their effectiveness and ethicality.

First, lawyers must be cognizant of the environment of the legal situation. They must acknowledge power dynamics inherent in the client-professional relationship, and recognize client transference and personal countertransference issues for what they are. Skills that allow actively listening to client concerns and goals facilitate dialogue and should be preferred to paternalist decision-making for the client. Attorneys are trained to gather facts and listen for the inevitable holes in the evidence. Lawyers must also be cognizant of the demeanor and presentation of a potential witness in evaluating the value of "the case." However, considerable additional information is available by listening to a client's affective tone, noting the energy or depletion they have in telling their story, and considering the client's degree of flexibility and resilience.

Attorneys must know and understand the client's reality because denying it does not make it disappear and its effect on the process is inevitable. Nonjudgmental attention to the client's expressed feelings and fears, as well as observation of motivation, energy, and nonverbal behavior can provide information regarding

⁴² *Id.* at 22.

⁴³ *Id.* at 46-47.

⁴⁴ *Id.* at 24.

the underlying dynamics and nonlegal concerns of the client within the legal crisis.

An appreciation for the psychology of conformity, obedience to authority, power dynamics and dependency issues that are inherent to legal representation will also inform the issues that emerge within the professional relationship. It must be noted that self-determination and autonomy are important aspects of psychological health, and can be creatively integrated into even involuntary situations. When the client's wishes are heard and treated with dignity, respect, and sensitivity by authority figures, compliance with legally mandated decisions are often more easily obtained. Lawyers may meet these needs by educating clients regarding strategy, listening to non-legal goals, and respecting the client's ultimate decisions.⁴⁵

Attorneys must further recognize that they are part of the situation, not just observers. It is incumbent on them to resolve their own internal conflicts regarding the central and derivative issues of the case, watching for biases, value judgments and parallels to their own history or issues. Attorneys must realistically assess their own needs, limitations, skills, and dynamics. Often professionals are drawn to work with specific areas of the law that have some personal meaning. Attention to those interests may provide a starting point for consideration of personal dynamics and agendas that may impinge on their work.

The professional should be alert to signals of countertransference that may present as feelings of boredom, anger, sexual reactions, over involvement, grief, or any other emotion that seems incongruous or in greater proportion than the situation would seem to dictate. These affective responses are clues that other unconscious factors are impinging on the process. Countertransference can be used as a signal to the professional that attention should be directed to both content and process of the interaction. Intense or incongruous feelings indicate the need for further assessment of possible unconscious motivations, of either the client or the professional, that may be directing what overtly transpires. It is the professional's responsibility to make note of

⁴⁵ See Marsico, *supra* note 12.

these clues and utilize them to facilitate a productive working relationship.

When the professional is aware that role-interest conflict or personal issues are involved, there are a variety of possible solutions suggested by the experience of psychologists. First, the professional must listen carefully to his client and to himself. The legal process can be humanized by tuning into affect rather than immediate intellectual problem-solving. The act of listening at different levels does not mean compartmentalizing intellect and affect. Listening with both the mind and the heart increases interpersonal rapport and facilitates a more productive collaboration. The heart hears emotion and responds affectively, the intellect may then be used to determine the best possible response. Sometimes clients need to vent their concerns (nonlegal and legal), or need to integrate their emotions with the specifics of their legal situation. When attorneys adequately listen to their own affective response, they will know whether it is appropriate to simply hold a grieving or fearful client's hand, to build client autonomy, to address covert agendas, or to address their own intrapsychic dynamics. Attention to the complexities of relating can help clients to feel understood, trust the professional's judgment and will more satisfactorily address a greater range of the client's concerns. The attorney will benefit from a fuller understanding of the client and herself in relation to the client both personally and professionally. Clients who feel understood and professionals who understand are more prepared to cooperate in the litigation process and experience greater overall satisfaction with the process and outcome.

The professional should be open to discussion and support from peers. Often "debriefing" with other professionals the interactions that have emotionally pulled on the attorney will be sufficient to highlight areas needing special care. Peer support can assist the attorney in consideration of blind spots and alternatives for effective resolution of the issues. When the issues suggest more personal history or conflict, the legal professional may be advised to consider psychotherapy or additional education to facilitate management of the issues in a way that prevents unwanted interference with clients' best interests. Finally, all professionals must be cognizant of areas, issues, or types of people

that they just do not work well with. Because attorneys are taught to argue both sides of a case and at times must represent repugnant clients, they may not believe that they have a right to refuse clients. However, when personal values or conflicts interfere with the best representation possible, attorneys must be able to refer their client to someone who can manage the issues more effectively.

CONCLUSION

The legal system has long concerned itself with the protection of the general public. Most obviously, the criminal system protects by incarceration of those who would harm others. However, the civil system also considers the “best interests” of those dependent on the *parens patriae* power of the state to determine the care of children, the mentally ill, and other incompetents. Finally, the ABA Code considers the best interests of clients and how the legal profession can avoid conflicts that may impinge on their work for the public. The area of TJ has gone a step further in its concern with the emotional impact on clients of the legal process itself, however it is in its infancy of consideration. I propose that legal professionals have an ethical mandate that is encompassed by the ABA Code, although not concretely spelled out, that requires us to consider role-interest conflicts, relational dynamics, and intrapsychic dynamics that influence the legal process and thus the emotional outcome for clients.

Attorneys are not alone in concern for how their personal values, biases, psychological dynamics, and countertransference reactions impact their work. Psychologists have long encountered similar concerns in their clinical work, and can teach the legal profession to hone awareness, sensitivity, and strategy to decrease potential damage or resist irrelevant agendas. First, attorneys must recognize that they are part of the dynamic interaction and attend to both the power dynamics of the client-professional relationship, as well as how they impact the process. Unconscious dynamics on the part of the client or within oneself may be played out in the professional relationship, and awareness of this possibility is necessary to prevent being sidetracked into irrelevant or even harmful territory. Attorneys can be alert to behavioral

manifestations on the part of clients, unusual or magnified emotional reactions within themselves, or review and clarify personal values and biases that are related to the subject matter of the case for clues to ulterior motives or agendas. Self-exploration and evaluation of one's personal history, psychological struggles, and individual blind spots can assist the legal professional to be aware of his or her own biases and keep the process "cleaner" for clients. Emotionally sensitive, healthy attorneys and judges can thereby facilitate care of the legal process. Legal professionals can work to keep law about the law, while acknowledging the affective components of the legal experience for their clients and themselves. Attention to emotion can create jurisprudence that is truly therapeutic and prevent contamination by internal processes that could circumvent the true best interests of those the law serves.

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