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## PROBLEM SOLVING FOR FIRST-YEAR LAW STUDENTS

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*The physician must be able to tell the antecedents, know the present, and foretell the future—must mediate these things, and have two special objects in view with regard to disease, namely, to do good or to do no harm.<sup>x</sup>*

~ Hippocrates

Many lawyers remember the first time anyone called them “counselor.” It may have been a professor, a judge, or a professional colleague. New lawyers often feel uncertain; they know they lack the experience needed to make accurate judgments. It may then be startling when someone they respect acts as if they know what they are doing. The honorific suggests not only knowledge of the law and its intricacies but hints at some elusive wisdom. But what wisdom? Lawyers are experts in the law, but law is a service profession. If that is so, how do we serve? What skills do we lawyers need to be wise counselors?

Law schools answer this question first and foremost by teaching students how to read and interpret the law, how to advocate for one’s client in litigation, and how to predict the ways the law will affect clients. At base, lawyers are experts in what the law is or might be. The ability to read and interpret cases, statutes, and regulations obviously plays a central role in the counseling function. For that reason, the core of traditional legal education focuses on the practical art of interpreting the law. Law professors ask students to present cases, tease out rules of law, and determine when rules apply to new fact situations. We ask students to consider the principles of fairness and social wel-

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<sup>x</sup> Hippocrates, 1 OF THE EPIDEMICS §2, ¶ 5 (400 B.C.E.), *available at* <http://classics.mit.edu/Hippocrates/epidemics.1.i.html>.

fare that justify the rules and determine their scope. We teach students to make the best arguments on both sides of contested questions of law, to analyze how each side would present the facts, shape the story, frame the issue, and interpret existing rules.

But lawyers do more than this. We provide a service to clients that goes beyond explaining what the law is. Clients need more than our expertise in the law. If all we did was explain what the law is, we would not be serving our clients to the best of our ability. What else do lawyers need to know, and how can law schools better prepare law students to be wise counselors?

There are many ways to answer this question and many things that might help students on this path. The value of clinical legal education is no longer contested. But we want to present one way Harvard Law School has sought to help students begin to learn how to counsel wisely right from the start. The Problem Solving Workshop is a relatively new course at Harvard Law School, and it is now required of all first-year students. It is taught in our three-week Winter Term in seven sections of about eighty students each. The goal of the workshop is not to teach detailed skills—that is not possible in a three-week period, especially with classes that large. Our goal is to further the “learning to think like a lawyer” process of the first-year program by giving students a practical learning experience that requires them to put themselves in the position of a lawyer giving advice to a client, so as to help the client solve her problem ethically and within the bounds of the law.

In Part I, we explain the philosophy of the Problem Solving Workshop. Part II describes the problem-solving course itself, while Part III outlines the general methodology we ask students to employ to solve problems for clients. Part IV explains how all law professors can write and teach practical problems as part of their own courses, no matter what the subject, thus bringing the problem-solving experience into the core of the law school curriculum.

## I. LAWYERS AS COUNSELORS

### A. *First, Do No Harm*

First, do no harm. This phrase has been associated with the practice of medicine for thousands of years. Although of obscure origin,<sup>1</sup> it

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<sup>1</sup> See *Primum non nocere*, WESLEY'S DOCTOR PLACE (2013), <http://www.eastridges.com/wesley/primum.html>.

is generally attributed in some form to Hippocrates and is associated with the oath that doctors take. It has not been typically associated with lawyers. Indeed, even lawyers joke that a case that will last three weeks if one lawyer is in town can last a good year if there are two lawyers around. Yet it would not be a bad thing if we adopted this principle as a guiding first step in wise counseling.

There are many ways lawyers can make things worse for the client. Instead of solving or lessening a problem, we can turn a small problem into a big one. Instead of figuring out what the client really wants, we can assume we know and proceed to work toward an outcome the client neither wants nor will appreciate. Instead of working toward a successful negotiation, we can adopt a rigid negotiating stance that turns a solvable conflict into World War III. Instead of perpetuating important relationships, we can poison them.

Lawyers may also harm clients by helping clients harm third parties in ways that make the client vulnerable to legal claims. The lawyers who facilitated the subprime mortgage market might have done well to warn their clients about the potential regulatory pitfalls they might face if things went awry. They might have considered what claims might be brought against their clients for marketing subprime mortgages if property values stalled or collapsed. While one can do harm to the client by failing to attend to the client's wants, needs, and interests, one can also do harm to the client by failing to warn the client about the vulnerabilities the client may face if her activities affect others negatively. Conduct that is unproblematic need not trigger these cautions, but conduct that poses a chance of harm to others can also pose an ethical dilemma for lawyers. It may require lawyers to consider whether they should be lending their services to business arrangements that potentially violate regulatory laws or that mislead consumers or investors.

A lawyer can also cause harm by interfering with a viable and mutually beneficial deal by raising unimportant, trivial, or peripheral concerns. Clients want lawyers who help them achieve business goals; they do not want lawyers who make transactions unnecessarily complicated or who foster fights over issues that are unlikely to matter. While some disputes are zero-sum games and the lawyer is trying to maximize the client's share of the goodies, others can be resolved in ways that promote the interests of all concerned parties. Seeing other parties as potential allies rather than implacable enemies may not only improve

the client's position but avoid destructive negotiations that prevent future collaboration and scuttle beneficial deals.

### B. *Do Good*

Second, do good for your client. What does this mean? When a client comes to the lawyer, she expects the lawyer to help her address some problem or to achieve some goal within the bounds of the law. That requires the lawyer to go beyond a sophisticated interpretation of what the rules are. It requires the lawyer to advise the client on what the legally available options are that might solve her problem. This in turn requires lawyers to focus on the client's goals and values and to figure out paths that the law allows. Lawyers may be interpreters of law, but from the client's perspective, lawyers are first and foremost problem solvers.

The role of the lawyer as a problem solver has not traditionally been the focus of legal education. Most law school classes—especially first-year classes—focus on case law interpretation, effectively looking at a case at its end when facts have been determined, legal issues have been narrowed, and a decision on the applicable rule of law has been announced. The Harvard Law School Problem Solving Workshop focuses on cases at the very beginning, before the facts are all known, before the client's goals are set, before it is clear what rules of law are applicable, and before a course of action has been established to deal with the client's problem. Our goal is to help students feel comfortable with the ambiguities that are present in this situation and to have a sense of what is needed to help guide the client through the steps needed to deal with the client's issues in a manner consistent with the legally available options.

Students tend to view the law as establishing reality. When a rule of law tells us that someone has a particular legal right and a particular legal remedy, they assume that this is what happens. Sometimes this is the case. An owner who sues to enjoin a nuisance may obtain an injunction ordering the neighbor to reduce the noise produced by her tavern on the weekend evenings and the neighbor may well comply with that order. But this scenario assumes that the problem has been clearly identified and that the law solves it in a particular way. In the real world, at the beginning of a case, things are not so clear. The client may have conflicting goals or even be unsure what she wants out of a situation, the facts may not be known or may be ambiguous, and various laws may be relevant to the situation. In this setting, before the

lawyer can advise the client on what the law is and how it applies to the client's situation, the lawyer has to figure out what laws are relevant. To do that, the lawyer has to figure out what goals the client might have, what facts to find out, what facts to create by the client's future actions, and which of the various laws that may be relevant to the situation are most important to focus on.

At that point, there may be various options to solve the client's problem. Litigation is only one of the available options and often it is the least attractive one; in many ways, litigation represents a failure to solve the problem in some other way. Thinking about the various ways to solve the client's problem within the bounds of the law requires thinking about the law as a tool for problem solving rather than as a mechanism that imposes a particular result. After all, the fact that one has a legal right does not mean that one is obligated to exercise it. Often one cannot solve the client's problem without also solving the problems faced by those with whom the client is embroiled in conflict or with whom the client is negotiating for a desired end. The law helps create the bargaining power of the parties; it is not the endpoint, but a basis for negotiation, action, planning, and resolution of difficulties. Students need to learn these things.

## II. A PROBLEM-SOLVING COURSE

In designing the Problem Solving Workshop, we very much wanted it to be a first-year course—a course that students would take while they were still forming their fundamental conceptions of what lawyers do and how lawyers think. In our context, this meant operating within several substantial constraints—it required, if you like, pedagogical problem solving, as well. First, the course could take up only so much student time: room still had to be made for traditional first-year subjects even if their credit hours were somewhat reduced. Second, it had to be taught in the same faculty-student ratio as other first-year courses, which, at our school, is a 1 to 80 ratio: resources for one-on-one mentoring were to be saved for the clinical program. Third, practice had to be simulated practice: live clinical experience for first-year students would run up against legal limitations in Massachusetts, and in any case, at this faculty-student ratio, would be an invitation to malpractice. Finally, we could expect the other first-year courses to continue to emphasize the products of litigation, or perhaps of regulation: we had to do enough in this one course to accomplish our purposes.

These design criteria would probably apply at most schools. One additional feature of our situation was perhaps unique: at Harvard Law School, we have a three-week Winter Term between our fall and spring semesters that allows a single course to be taught intensively. By occupying Winter Term, we were able to schedule classroom exercises for the morning while giving the students time to work in teams in the afternoon to do research, write memos, propose options, and negotiate solutions. It also allowed us to introduce students to a variety of problems back-to-back. But while we found Winter Term to our advantage, our materials could be, and have been, used by others in a less-intensive format.

Our materials consist of a series of specially written problems, each of which, broadly speaking, combines a narrative, a legal framework, and a task to be accomplished. Often, they consist of several parts: the narrative is told at least partly through documents, and the legal frame depends on students' research. Where possible, we try to end each problem with a simulated activity: interviewing the client, reporting advice to a supervising attorney, or negotiating a new term of an agreement. Most of these problems have been made available for use by any law professor on the Harvard Law School website.<sup>2</sup>

Over the last several years, we have started the course with several problems that focus on serving the client by figuring out what the client's goals are, what the facts are, and what immediate actions the client might take to prevent things from getting worse. We usually deal with some crisis or problem that occurred with which the client needs immediate help. The client could be a multinational corporation whose products were made in another country and coated with lead paint or it could be a residential landlord who owns one building and who needs to handle a dispute that has arisen between the tenants in two of the apartments.

This first section of the course has generally culminated in a simulated initial client interview. The idea is to get students thinking about what preparation is needed to find out effectively what the problem is and what the client hopes to achieve. That interview can be done in a number of ways. The entire class can ask questions of someone who "plays" the client. Individual students can be asked to come to the front of the class to begin the interview, giving several students turns,

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<sup>2</sup> See *Problem Solving Workshop*, HARVARD LAW SCHOOL (2014), <http://casestudies.law.harvard.edu/problem-solving-workshop-1/>.

and asking other students to make suggestions from time to time. The class can be broken up into two or four parts so that more students have an opportunity to conduct the interview or the class can be broken into teams of four or five people where each team designates one person to serve as the client who is then interviewed by the others. The goal of this exercise is to give the students the sense that interviewing is both important and hard and that they need to learn how to create a trusting relationship with the client, find out the client's goals, determine the facts, figure out what facts need to be discovered, and learn enough to decide which laws impinge on the problem. A large class exercise cannot, of course, teach client interviewing in depth; clinical programs that can give one-on-one attention are the best way to give detailed instruction in how to interview clients successfully. The class exercise is quite useful, however, especially for first-year students, because it reinforces the importance of learning the facts, the context of the problem, and what the client is really worried about or hopes to achieve. It teaches that lawyers do not research the law in the abstract; they use it to help the client get through the situation as best they can.

The middle section of the course has often focused on representing the public either by asking students to assume the role of a prosecutor deciding whether a crime was committed, and, if so, what crime, or to assume the role of a lawyer advising a state agency on drafting regulations or on granting or denying a permit. "The public" as a client is very different from a private party, and correspondingly, the role of "the lawyer" has to change, too. This section of the course has usually ended with the teams presenting a plan of action to the head of the agency or office and defending it. We have ordinarily arranged to have practicing lawyers conduct these meetings in the evening with each team of students and then asked those teams to report back the next day on what they learned.

In the final section of the course, we have focused on planning for the future or negotiating a transaction. We may have two companies deciding whether to develop a business relationship who need to figure out how to structure it. We may have contracting parties that have hit a snag in their relationship; one party may have breached the contract, or there may be a dispute about whether there was a breach. We may have two sovereigns negotiating a cross-deputization agreement so police from one jurisdiction can follow drunk drivers into the other. We may have an employee who was fired and is asked to sign a non-competition agreement in exchange for a monetary settlement and

wants to know whether she should sign or bargain for better terms. In such cases, we ask students to imagine the topics the agreement should cover, the interests of both sides, the type of relationship being constructed, and the procedures for reaching an agreement and ensuring the arrangement works over time. We may engage the students in conducting a negotiation exercise, or we may ask them to draft new contract terms that could have avoided the problems that arose in the relationship.

We have typically ended this section of the course, like the second section, by asking students to present a plan of action to their supervising attorney. This might be a short memo, a PowerPoint presentation, or a draft letter to the client with an explanatory memo to the supervising attorney. Again, we have enlisted practicing lawyers to conduct meetings with the students to hear and react to their proposals.

In general, we have done five to seven problems over the three-week course; together they have some aspects of every other first-year course. At least some criminal law is involved in several of the cases. Procedural issues come up constantly, and various problems involve different aspects of torts, contracts, and property. We add in state and federal statutes to the common law framework of the problem. We try, if possible, to have more than one area of law relevant to each problem, so that the question of how different fields relate to each other comes to the fore, as well as the problem of how to choose which legal issue is most central.

The problems last from one day to three days. A typical progression asks students to read a fact situation with the first discussion focusing on what the issues are, who the client is, what the client's goals are, and what laws might be relevant. A second assignment might ask the students to do specified legal research and report on how the law affects the client's rights and responsibilities. A third assignment might ask the students to propose a plan of action, negotiate an agreement, or clarify the pros and cons of available options.

A central premise of the course is the need to work quickly in a situation of uncertainty. Facts may not be fully known; the law may not be fully clear; the goals of other interested parties may not be known. A second major premise is the need to work in teams, usually of four to five students, rather than as individuals. Although a great deal of lawyering work is done by oneself, most lawyers also work in teams to accomplish their client's goals. Getting a sense of the benefits and tribulations of teamwork is a useful introduction to the practice of law

and stands in considerable contrast with the single person cold-call of the traditional Socratic style.

The Problem Solving Workshop is not meant to be a complete answer to the problem of teaching students counseling skills. Indeed, in many ways it is not a skills course at all, if one conceives of a “skills course” as centering on performances. At base, it is intended to sensitize students to the broad range of tools they need to have to successfully and ethically help clients to solve their problems. It gives students a methodology, an orientation, a sense of confidence, and an understanding of the reasons why they are being asked to look up the law. Lawyers do not research the law to give clients speeches about their legal rights; they do so to find the constraints the law imposes and the opportunities it offers that can enable the client to move past a crisis or to build a business or a relationship or to serve an organization. All of this is more fully appreciated if students are placed in the position of having to act as lawyers act: to interact with clients, to determine their needs, to develop their options, and to talk with others about what it would mean to counsel the client wisely.

### III. A PROBLEM-SOLVING FRAMEWORK

Teachers who teach traditional first-year courses (including us) teach both a subject matter (in our cases, property and contracts) and a way of thinking. The Problem Solving Workshop, as just suggested, teaches bits of various subjects, but teaches none of them systematically. It sensitizes students to the need to acquire various skills but does not train them adequately in performing them. What the Problem Solving Workshop does—or tries to do—is develop another way of thinking. This is the residue we hope will remain after the details of the various problems have faded from memory.

We all know law professors use the case method to teach law, but the Problem Solving Workshop has adopted a new kind of case method—the kind more typical of business and public policy schools. The old Langdellian case method asks students to read judicial opinions; it does that to teach students how to interpret cases, to read the law, to consider alternative rules of law, to make arguments on both sides of contested questions, and to understand the judicial role and

legal reasoning.<sup>3</sup> Such cases start at the end when the facts are decided, the legal issues identified and narrowed, and a ruling of law announced and defended.<sup>4</sup>

The problem-solving case method focuses on the client's situation at its very beginning—before the facts are all known, before the parties' goals are clarified, before the legal issues have been narrowed, before the dispute has crystallized or run its course.<sup>5</sup> This problem-solving case method asks students to consider who the client is and what the client's goals are or might be, what the facts are and what facts the lawyer needs to find out, what various legal rules affect the client's ability to achieve the client's goals, and what options might be available to help the client achieve her goals ethically and within the bounds of the law.<sup>6</sup>

In short, in this course we are training students to ask a different set of questions from those repeatedly raised in traditional first-year courses. If a way of thinking is identified by the questions it asks, we are teaching students a different way of thinking—a way which is, in our view, included, like the Langdellian way of thinking, within the portmanteau concept of “thinking like a lawyer.”<sup>7</sup>

Here are the questions we routinely raise, problem by problem:

- (1) Who is the client?
- (2) What are the client's goals?
- (3) What are the possible facts?
- (4) What are the legal constraints and opportunities?
- (5) What are the ethically and legally available options?
- (6) How should we proceed?

#### A. *Who Is the Client?*

Someone walks into your office asking for help. How could it be difficult to tell who the client is? The reason this may be hard is that

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<sup>3</sup> Joseph William Singer, *How Law Professors Can Write a Problem Solving Case*, HARV. L. BLOG (Aug. 20, 2013), <http://blogs.law.harvard.edu/hlscasestudies/2013/08/20/how-any-law-professor-can-write-a-problem-solving-case/>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

many clients are institutions, such as business corporations, government agencies, or nonprofit entities like hospitals or universities. When the client is an entity or institution, the person in your office is there as an “agent” of the client; she is not the client herself. In that case, it is important to ask what the entity’s legal and moral obligations are. Business corporations have legal obligations to their shareholders, but they also have legally enforceable contractual and business obligations to other stakeholders such as workers, creditors, suppliers, customers, and government regulators. Those various obligations may be consistent with each other, but they may also be in tension; shareholders may want to cut costs to maximize profits, while government regulators may want to promote investment in safety to prevent harm to the environment. Similarly, nonprofit entities like hospitals may have legal obligations to provide efficient high quality medical care, but they may also be teaching facilities that have obligations to educate the next generation of doctors and nurses.

It is important to understand who the client is because the person who walks in asking for assistance may have interests that diverge from the interests of the institution. Law, custom, and morality assign goals to institutions that may diverge from the interests of those who are legally entitled to speak for those institutions. A corporate executive may be more worried about keeping her job or maximizing her power than in acting in the best interests of the corporation and its stakeholders. A city councilor may be more interested in preventing the mayor from getting reelected than in solving the city’s problems. A member of the board of trustees of a condominium association may not speak for the condo owners as a whole and may have reason to lie about the facts. Even spouses have been known to speak more for themselves than for the family.

It is also important to remember that both the agent and the stakeholders are, at the end of the day, just people. Understanding the people involved and, where appropriate, building relationships with them is part of working with “the client.”

### B. *What Are the Client’s Goals?*

Most of the subtlety of identifying “the client” does not appear in ordinary, case law-based courses, for by the time a judicial opinion is written, “the client” has become “the party” who has an identified persona in the litigation setting. Even more so is this true of the client’s goals, which are usually treated as fitting within conventional patterns.

But early on in the life of a problem—when litigation is only one of many options—identifying the client’s goals is a major task.

Some clients are clear, while others are conflicted about their goals, but actively working to determine the client’s goals is important even when clients think they know what they want. Clients may say they want X, but what they really want is Y, and they think X is needed to get Y. They may not realize that there is another lawful way to get what they want—a way they never considered. The most obvious solution is not necessarily the best. The lawyer cannot figure out what the client’s goals are without talking to the client.

Most clients have many goals—various financial, emotional, personal, moral, religious, political, and psychological goals. Understanding the client’s goals requires a relationship of trust that enables the lawyer and the client to communicate honestly about the client’s situation and desires. The client needs time to think through what the nature of the problem is and what would constitute a successful resolution of it. The lawyer can help the client clarify her goals, which, because clients have multiple goals, may conflict. Short term goals may conflict with long term goals, financial goals may conflict with emotional goals, needs for order may conflict with desires for change, and family relations may conflict with business opportunities. The lawyer cannot solve the client’s problem without helping her clarify what her goals are and how to prioritize them when they conflict. Lawyers must communicate the law to clients in a way that helps the client make a wise decision from the client’s point of view; at the same time, many clients value candid advice that goes beyond the strictly “legal” when it is appropriate to do so.

### C. *What Are the Possible Facts?*

Judicial opinions state the facts of the case as they were determined by a trier of fact or as they are assumed for purposes of reaching a decision within a defined procedural frame. Law students, working from appellate opinions, are trained to treat the facts as fixed. But in the real world of problem solving, when a client walks into your office, you do not know what the facts are. The client tells you some of the facts—those the client knows and thinks you need to know. But the client may be leaving out important facts and focusing on facts that are less important from the standpoint of defining the client’s legal rights. The client may be innocently shading the facts a certain way and/or the client may be lying or deliberately failing to reveal harmful infor-

mation. And of course the client may simply not know some of the crucial facts. To find out how the law applies to the client's situation, the lawyer needs to ask questions both of the client and possibly of others.

It may also be necessary for the lawyer or client to create new facts, not in the sense of using an overactive imagination, but in the sense of acting to investigate or alter the situation. Doing due diligence can protect the client from being surprised by demands the other side might make or facts the other side might disclose of which the client was unaware. And a landlord facing a tenant who stopped paying rent may be well-advised to fix the furnace if it is not working properly both because the housing code requires it and so that the tenant cannot use the warranty of habitability to justify continued nonpayment.

#### D. *What Are the Legal Constraints and Opportunities?*

Here is where the lawyer's legal expertise comes to the forefront. What does the law say about the client's problem? Remember that the law sometimes prohibits actions, it sometimes requires actions, and it often permits actions. Several factors are relevant here.

First, the lawyer must find out from the facts and the client's goals what legal issues are relevant to solving the client's problem. Although in ordinary casebook courses students are told that the subject is, say, "Torts," in real life few clients come into a lawyer's office announcing: "I have a torts problem." Lawyers have to figure out what areas of law are relevant to the client's situation.

Second, it is almost always the case that more than one area of law is relevant to the situation. The client may be the victim of negligence (tort law) but also have suffered from a breach of contract. The client's property rights or familial rights (such as child custody) may be at issue. The client may face criminal liability. In addition, federal and state statutes and regulations may impinge on the client's situation. After analysis, it may become clear that one or more legal issues are prominent, but it is important not to miss other legal issues that may affect the client's rights and obligations.

Third, it is almost never the case that the best legal advice to the client is simply an explanation of what course of conduct is lawful and what is unlawful. It may be, for example, illegal to obtain the client's goals in the way the client has proposed, but there may be another, lawful way to attain those ends or get close to attaining those ends.

Moreover, legal rights and duties are not necessarily stopping places. They may be starting places, as well. Legal rights (including the right in many situations to insist on being sued before performing) may be bargaining chips to be used to try to find a win-win solution to the problem. For some students, this will already be obvious from what they have learned in other courses, but for some, the idea that legal rules condition not only the outcome of cases but also the outcome of negotiations will be a revelation.

#### E. *What Are the Legally and Ethically Available Options?*

Problem solving requires a combination of creative and critical thinking. Before we can figure out the best solution to the client's problem, we must consider a wide range of possible options that the client could consider. It is useful to begin by brainstorming different ways of solving the problem—ways other than "sue them." Putting a wide range of options on the table helps define the nature of the choices the client faces. It also increases the possibility of finding a solution that achieves the client's goals. This is so not only because options may help the client see another way out of the situation or clarify which of the client's conflicting goals is most important but also because solutions may be imagined that satisfy other persons with whom the client is engaged in the dispute.

In considering available options, one should always consider what happens if the client does nothing—not because this is always a real option but to clarify what will happen if the other roads are not taken. Further options may include calling the police, negotiating, making a deal, buying or selling property, contacting the press, changing the way the client does business, getting a third party to help, or approaching the legislature to change a statute. Generating a wide range of options is almost always useful to ensure that various ways to solve the problem are considered before the lawyer and client begin the critical process of weeding out solutions that are more trouble than they are worth.

#### F. *How Should We Proceed?*

Only at the end do we start to engage in the critical process of judging the pros and cons of alternative options and the extent to which the different options achieve the client's various goals. Sometimes a decision tree is helpful to organize the various choices that need to be made and to identify the likely consequences of different

choices and the uncertainties each path holds. Sometimes a comparison of monetary costs and benefits of different approaches is helpful. Other times a general list of pros and cons of different solutions can work. Often intuition and common sense are essential to judging which among alternative approaches is most likely to result in a positive outcome for the client. In the end, human judgment is required to clarify the plausible options, to predict their likely consequences, and to determine the wisest course of action. Clients are seeking recommendations and direction. They are not seeking a “two-handed lawyer”: that is, the lawyer who communicates all of his analysis as “on the one hand, we could do this” and then “on the other hand, we could do that.” But they are not seeking the lawyer who bombastically gives them orders either.

In deciding how to proceed, it is important to remember that clients are fully human beings. Lawyers should not start from the presumption that clients are seeking to get away with whatever they can; all clients have some kind of moral compass that guides them in their lives, and lawyers often help clients think through the question of determining the right thing to do. Clients who represent corporations or other institutions especially need to consider the legal obligations of those institutions and the stakeholders to whom they are answerable.

Lawyers are “counselors” because the client, not the lawyer, decides on the right course of action. But it is also true that many clients seek the lawyer’s advice. That advice (or counsel) usually focuses on the legalities of different courses of action, helping to define different ways to achieve the client’s goals and exploring the legal vulnerabilities each path creates. But that advice may also include consideration of common sense and an understanding of important ethical norms of the client, the lawyer, and the community at large. Legal education does a great job at teaching students to interpret ambiguous rules of law and consider how they apply to problems in the real world. It also does a great job at teaching students how to construct the best arguments on both sides of contested questions. Legal education should do as good a job at teaching students the basic skills needed to serve clients, and that requires an understanding of the basic components of problem solving that lawyers use.

#### IV. WRITING A PROBLEM-SOLVING CASE

As we have already said, most of the problems we have written are available for use by others. But as advocates for problem-solving

courses, we do not want to leave the matter there. For in fact, while writing a case like this may seem daunting, any law professor can do it in one of two ways. You can write what you know, or you can write what others have experienced.

To write what you know, start by picking a fact situation that arises in your field of law that is both common and interesting. In Torts, for example, it could be a corporate decision that might avoid potential accidents, or it might be responding to a past disaster or accident. All teachers know many issues that come up in their particular fields; the only trick here is to think about what the issue might look like at the beginning rather than at the end.

Next, choose a client. The new case study method focuses on serving the interests of clients and helping them navigate the law to achieve their goals. This stage also involves choosing the other parties with whom the client may need to deal to achieve the client's goals.

Then, construct a fact scenario that involves the client wanting something. Either the client wants to achieve a result or the client wants to solve a problem or dispute. Think of the facts a lawyer would need to know to determine what the client's goals are and what facts would be needed to apply existing rules of law. In writing the problem, withhold some of those facts so that students will learn to look for facts that are not yet known but need to be known to solve the problem.

After that, consider various rules of law that are relevant to the situation. This is the part that is closest to what law professors ordinarily do in their classes. Pick a rule that requires interpretation or a situation that implicates several rules, including those that cross subjects. Pick a fact situation that might prompt a judge to distinguish a precedent, craft an exception to the rule, or apply a competing rule.

Then, in connection with the rules, consider what options are available to solve the problem or achieve the client's goals. Think of the rules not as the ending point that decides what happens but as rules of the game that create both constraints and opportunities. The law may prevent the client from doing certain things but may allow her to achieve her goals some other way. Another party may have conflicting goals, but there may be ways to help both achieve their underlying interests.

Finally, put it all together. Start the problem with the story or fact situation. A client comes into the lawyer's office with a story and a

problem. That is Part I. The class discussion will involve talking about who the client is, what the client's legal obligations or goals are or might be, what facts are needed to find out what happened, what the client wants, and what laws might be relevant to solving the client's problem, constraining the client's actions, or empowering the client with respect to other actors. Then identify the relevant law: what cases or statutes should the students know about? Either make a list and require them to look up those cases or statutes and report on what the law requires or summarize the law yourself. That is Part II. Class discussion will entail figuring out what the law is and how it applies to the client's situation. Finally, think about how to structure a class discussion or a simulation that involves the potential options, their pros and cons, and how to communicate them to the client. That is Part III and done.

That is it. This is easier to do than you might imagine. Perhaps you can start by taking a legal issue you teach in class and imagining how it arises from the client's perspective in the real world. What was the first meeting with the lawyer like? What was the client's experience like before the first meeting? Take it from there. Use what you know, and you can do this.

Or, you can do essentially the same thing by starting from the experience of a practicing lawyer whom you know. Within the limits of confidentiality—which can often be satisfied by changing a few facts and names—most lawyers love to talk about interesting situations they have been involved with. Why let all that talk go to waste? There are some things you will have to be careful of—in particular you will want your problem to admit of a multiplicity of possible solutions (so that what the lawyer tells you he or she did is not the indubitable last word). But there will also be advantages—such as access to real documents in all their detail that you can put before the students. Again, if you remember that what you want to do is to enable the students to start at the beginning and ask questions like “what are the client's goals” and “what might be the facts,” you will find that you can do this. Indeed, if our experience is any guide, you will have fun doing it.

## V. CONCLUSION

Lawyers are termed counselors for a good reason. Lawyering involves not only knowing what the law is or predicting what judges or administrators will say about the legality of any action. It involves working with clients to help them clarify their goals, attain their dreams,

comply with their responsibilities, and magnify their possibilities. Just as it involves advising judges about how to interpret ambiguities in the law, it also involves helping clients figure out what those ambiguities mean for them. Counseling means helping clients negotiate with others to make the world a better place for themselves and those with whom they form business and personal relationships. It means helping clients get past tragedy and heartache using the tools the law provides and within the constraints the law imposes.

Law schools and law professors can help teach law students to use their legal acumen to be wise counselors. We can do so by enabling students to practice doing good and avoiding harm. We can teach the benefits and difficulties involved in working with others to achieve goals set by those we serve while communicating the legitimate norms imposed by the rule of law in a free and democratic society. We can help students learn to deal with uncertainty and moral ambiguity while preparing them for the joys, rewards, and difficulties of legal practice.

You cannot learn to ride a bicycle or play the violin by reading a book; you have to get on the bike and pick up the bow. Law schools and law professors have long known this; that is why we use various forms of the Socratic method in our teaching. Compared to lecturing as done on many college campuses, even the most traditional law school class is substantially experiential. We can help students learn to counsel clients by analogous techniques. We can give frameworks to help them figure out what is important to know and to find out, we can allow them to try it out in a supervised setting, and we can give appropriate feedback. We ought to start in the first year, when students' ideas of what there is to learn and know are most plastic. Ideally, a course like the Problem Solving Workshop is followed in the second and third years of law school by clinical work that involves actual work for real clients in a setting that includes supervision, training, and instruction by competent clinical faculty. Counseling, like reading a case, is a practical art, and the practice of law starts out with just that—practice.