

## Chapter Three Counseling

It is a big challenge to provide legal counseling service because, besides the series of skills of interview discussed in the previous chapter, it demands employment of some more specialized professional techniques. Our goal in an interview is to collect facts and to establish a relationship of rapport with our clients; while in the process of counseling, in addition to the continuation of the efforts to collect more facts and to maintain the relationship of rapport, we have another important goals: to help our client to reach decisions and to decide on how to take actions. Therefore, there is an urgent need for clinic students to more lawyering and practice skills to realize such goals. Most importantly, successful counseling is based on a firm lawyer-client relation, what we call “client-centeredness”.

### 3.1 Basics of Counseling

Counseling is the process in which lawyers help clients reach decisions by providing them with legal opinions. Since counseling accounts for a major part of lawyers’ business, clinic students, in order to achieve successful counseling, should carefully arrange the entire counseling process by strictly following a plan and steps of counseling. Generally speaking, counseling is the first substantial lawyering task after the interview with clients and determines what the next step is, mediation, negotiation, arbitration, or litigation, all depending on clients’ decision made in the counseling stage.

#### 3.1.1 About counseling

“What do you think I should do about it?”

“Well, if I were you, .....”

How many times do you find yourself in the middle of such familiar conversation demonstrated above? Your friends may come to you to talk about their problems with their romance, their work, their ideal for life, or other numerous personal details. You may well feel proud of yourself when you are able to give advice to your friends, even if your advice is not followed in the end. There are times when you lose your friends after your counseling them, whether your advice is adopted or rejected.

Whether or not the “if-I-were-you” model is an effective model for counseling friends or other people, it is found that, as a legal counseling model, it seldom works.

#### **Example**

*A client comes to the clinic to seek counseling. After explaining the case, he asks the clinic student: “Can I win the case?”*

*The clinic student answers: “Let’s first analyze the case. But we never guarantee to win a case because there are too many objective elements that .....”*

*The client interrupts him: “I’ve already asked several lawyers, and they all said it’s a sure win. Aren’t they more experienced?”*

*The student answers:*

1. *“Then you should go to them.”*
2. *“They said so just for money. Once they get money from you, what can you do with him if he loses?”*
3. *“You must trust us because only we can help you.”*
4. *.....*

*At this moment, if you were the student, how would you respond to the client to build his confidence in you?*

This Chapter is to present a very different counseling model as an alternative, that is, the client-centered counseling, which is a more effective and satisfactory way of counseling. For the purpose of thoroughly comprehending this model, we need to first understand the concepts and characteristics of legal counseling.

Counseling is a very important part of lawyers' practice. It is said that "Counseling lies at the heart of the professional relationship between lawyer and client."<sup>1</sup>, and that "Surveys suggest that lawyers spend most of their time in activities that the lawyers themselves describe as 'counseling.'"<sup>2</sup> Besides, "Counseling" in Chinese is "Zī Xún". According to *Ci Hai*: the

Comprehensive Chinese Lexical-Encyclopedic Dictionary, "Zī" means "to discuss, or to talk over",

and "Xún" means "to consult, or to ask for advice". Therefore, it can be easily inferred that counseling is a process of bilateral, interactive and participatory activities of communication, including consultation, discussion, explanation, analysis, the of weighing of strengths and weaknesses, and even the ultimate mutual decision-making. Legal counseling features as follows:

First of all, legal counseling is the activity in which lawyers provide advice, on the basis of interviews with clients, for them to reach decision. As exemplified in the previous chapter "Interviewing", it is found that it is very difficult to draw clear dividing line between interview and counseling. Through interviews, we establish a lawyer-client relation by way of collecting facts and information, building rapport, and winning clients' confidence. And we are to continue all such work through counseling. Our work in stages of interviewing and counseling largely overlaps. But there is an additional step of "action" in the process of counseling: we help clients work out choices of decisions and we always bear in mind the goal of counseling — to help clients actually reach a decision or decisions.

Secondly, the decision-maker at the end of a counseling process is the client, not the lawyer. As to the orientation of the client and the lawyer in counseling, there exist two different points of views in the US academic community. One is the traditional service-oriented view, namely, "lawyer-centeredness", which insists that the lawyer plays a dominating role in providing such legal services as interviewing, counseling and litigating, and that to hire a lawyer means to leave all the decision-making to him, while the client only plays an accessory role as to provide

<sup>1</sup> cf. Paul Brest, The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers, (Issues 3&4) 58L. & Contemp. Probs.5,8 (Summer/Autumn1995).

<sup>2</sup> Tomas L. Shaffer & James R. Elkins, Legal Interviewing and Counseling in a Nutshell 7 (2d ed. 1987).

information and to perform exactly as the lawyer instructs. This type of traditional service-oriented view maintains that it is the particularity of the legal profession that determines that the lawyer should be endowed with absolute authority. The other is the modern cooperation-oriented view, namely, “client-centeredness”.<sup>1</sup> On the contrary to the traditional service-oriented view, the modern cooperation-oriented view believes that only the client himself knows most clearly what he wants and how he should do, and the lawyer’s job is to provide him with legal assistance and advice in the process of his decision-making, including some legal education on the client if necessary. The lawyer must not only respect the client’s opinions but also listen to his opinions. The final decision should be consistent with the client’s goals, that is to say, in the whole process of decision-making, the client is the decision-maker, while the lawyer is no more than an assistant. Because law students working in clinics are lacking in practical experience, clinical teachers propose, in most clinics and in most clinical education textbooks, that students establish a “participatory, interactive and cooperative relationship” with their clients, that is, the “client-centered” modern cooperative relationship.

Thirdly, counseling covers a wide range including not only legal disputes but also transactional planning. The counseling that a client seeks for may be something concerning a legal dispute or conflict; or, it may not have anything to do with any disputes or conflicts, but is simply legal advice on transactions, such as the procedures and conditions to found a new company, amount and means of tax payment, drafting of articles regarding breach in a contract, procedures to apply for bankruptcy, and etc. With the progress of society and sound development of the legal system and market economy, more and more lawyers are participating into business activities. Counseling makes it easier to pursue efficiency and security in both work and life.

Lastly, counseling is an independent lawyering skill with unique rules and techniques.

### 3.1.2 Types of Counseling

Clients seek for counseling through various channels, including telephone counseling (such as the hotline service), correspondence counseling, face-to-face counseling and on-line counseling. Restricted by the means of communication, telephone counseling, correspondence counseling and on-line counseling only apply to issues involving simple and clear facts, and their contents are also limited to explaining legal provisions and legal procedures, reminding clients of issues that they should pay special attention to, informing them of approaches to legal remedies. Usually, no specific or specialized legal opinions are given in these three types of counseling. The counseling referred to in this Chapter is the face-to-face counseling.

### 3.1.3 Planning for Counseling

#### **A Case:**

*Before Liberation, the founding of the new government of China in 1949, YU A (female), being childless since she got married, adopted SHI B (female) and YU C (male) successively. In 1947, SHI B married CHEN D, and moved to Guangxi Province together with her husband. In April 1951, YU A spent 500 , 000 yuan (equivalent to “RMB 50 Yuan” of the current currency)*

<sup>1</sup> Interviewing, Counseling and Negotiating Skills for Effective Representation, Robert, M. Bastress, Joseph D. Hanbaugh, page 230, 1990.

buying from Liu a second-hand 3-room house near the barracks at the east entrance of the town. By following the Chinese tradition of “demising an estate to Son not to Daughter”, the adoptive son, YU C, was made the owner of the house as specified in the title deed for the house. In 1950, YU C joined the army, later transferred to serve in a corps of the People’s Liberation Army, and had never lived with YU A, his foster mother, ever since. In 1955, SHI B and CHEN D transferred their registered domicile onto YU A’s address and lived together with the foster mother. Following a flood there in 1963, the old one was torn down and the family of YU moved into a new house at No.169 Shiyantou. The old house was valued at RMB 128.50 yuan, and the new one at RMB 561.60 yuan. The house relocation subsidies for each person was RMB 115yuan, and so the total subsidies for the family was RMB 345 yuan, calculated on the basis of the 3 members in the family; and the balance of RMB 88.10 yuan, between the value of the new house and the sum of the value of the old house plus the total subsidies, was paid by CHEN D. It was recorded originally the actual payer was CHEN D on the counterfoil of No. 1110 warrant of house relocation; however, because the original owner of the house was registered as YU C, later, the name of payer on the counterfoil was changed into YU C, to which SHI B and CHEN D paid no attention. In 1989, the County launched a census for registration of privately owned premises. However, after the death of SHI B, due to the dispute between YU C and CHEN D with his daughter CHEN E, the house had never been registered. In 1990, YU C applied to the Real Estate Bureau of the County, asking for confirmation of his ownership over the house at No.169 Shiyantou. Without ascertainment of all the facts in the case, just based on a real estate sales contract in 1991 and the counterfoil of No. 1110 warrant of house relocation in 1963, the Real Estate Bureau of the County issued on September 7, 1994 to YU C a Real Estate Certificate, Ying Zheng Fang Zi No. 004273, to confirm that the house at No.169 Shiyantou was owned solely by YU C. Now, CHEN D and his daughter CHEN E want to claim their legal right of succession.

Effective preparation is a good beginning for planning counseling. The first step towards successful counseling is to make a plan on the basis of careful thinking and detailed analysis. A plan for counseling should include following contents.

(1) To investigate into facts and research laws

If the major goal of interviewing is to collect information for preparing decision-making, the major goal of counseling is to make the decision by making use of the information collected. To conduct skillful counseling requires students to gather facts as many as possible and to search for corresponding legal basis in consideration of the facts already known. It is very difficult to draw a clear distinction between interviewing and counseling, because very often the lawyer needs to go back to such information-collecting stages as interviewing, fact investigation and legal research when there emerge new doubts and new clues in preparing for counseling. The first item on the agenda of preparation for counseling is to master all the facts and information, to get familiarized with pertinent legal provisions, and to clarify the relations between certain facts and concerning legal provisions.

(2) To list the items to be decided

What is the major goal of the client in counseling? What does he seek for counseling on? What contents need to be decided? Only when clear about the questions that he is about to confront, can a lawyer be fully prepared for the counseling.

(3) To sort out files

Read and sort out all case files, including fact investigation files, results of legal statutes retrieval, legal research materials, and all recorded legal or non-legal particulars related to the case. Some clients may have already formed some ideas before they come to counsel a lawyer. For example, a supplier tells a clinic student: “I will sue the municipal government for administrative nonfeasance.” Later the student learns that, upon entering into a contract of supply with a developer, which specifies that the payment for construction materials shall be made after the construction begins, the supplier sent quantities of construction materials to the construction site, but couldn’t receive timely payment for the materials because the developer has again and again delayed the time to begin the construction even when now the construction materials rust on the construction site. The supplier wants to sue the municipal government actually in order to urge the developer to begin the construction as early as possible, so as to obtain the payment for construction materials earlier. The client aims at the payment. Understanding this, the student should not only help the client to analyze whether it is feasible to sue the government for “administrative nonfeasance”, but also think about the approaches to realize the client’s goal.

(4) To work out alternatives and point out their advantages and disadvantages

Students should work out several alternatives for the client to choose, and they should also point out the advantages and disadvantages of each alternative so as to ensure that the client will take into full consideration of various elements when weighing those alternatives. Students should make it clear with notes which results are inevitable, which results are inferred, which results need to be further investigated, and which results depend on certain actions.

(5) To plan the process of counseling

How to begin counseling? By starting with facts discussion and then explanation of legal provisions related to every fact? Or by starting with explanation of relevant laws and then analysis of facts on the basis of the laws? Or by starting with weighing the alternatives together with the client? What if new facts are discovered? Is it necessary to conduct further investigation? To actively explain laws and organize discussions, or to wait for the client to ask questions and then lead him into discussions? In counseling, students should be clear about the emphases and difficulties and adjust the plan for the process of counseling if necessary.

(6) Other preparations before counseling, e.g. tables and charts

Prepare some tables or charts of case facts and alternatives before counseling, which enable students to have a systematic command of case files. (See the following Table 1 and Table 2.)

**Table 1: Case Facts**

Number	Time	Information	Source	Evidence	Others
1	11-27-2009	Client Zhao was sent to hospital for treatment	Interviewing record on Nov. 29, 2009	Medical Record, Admission to Hospitalization	
2	11-30-2009	Medicolegal examination	Provided by the client	Examination Report	The opposing party objects
3	.....	.....	.....	.....	.....

**Table 2: Alternatives**

Number	Alternatives	Advantages	Disadvantages	Conditions	Chances	Client’s
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					of success	opinion
1	Mediation	Time and energy-saving, economical (saving litigation fees), easy to enforce, and quick to obtain the compensation	Have to concede in the amount of compensation, the opposing party may think the client easy to bully and thus to dodge and to repudiate the debt	If the opposing party can be reached and he agrees	50%	Not very hopeful
2	Arbitration	Guaranteed by legal procedures, claim for compensation in full payment, and a way to vent the client's anger	Time and energy-consuming, expensive in litigation cost, probably problematic in enforcement	If more evidence to prove the damage can be collected, and if XX is willing to testify in court	80%	More apt to litigation

(7) To prepare for enhancing rapport with the client

It will be fully embodied in the stage of counseling whether clinic students are able to make efforts to realize their clients' interests within legitimate limits and whether they can fulfill their duty for the case. Students should make good use of this stage to enhance rapport-building with their clients. For example, such effect can be achieved through ice-breaking talks.

Ice-breaking talks are informal talks with clients interactively conducted in the form of relaxed chit-chats. When it has been several days before you meet your client again, it is crucial to reestablish the connection between you so as to reinforce his confidence in you and a small talk helps relieve the client's anxiety. We may appropriately ease the client's nerves by employing different skills learned in the previous chapter "Interviewing" in accordance with the client's different moods. In addition, we need to control the rhythm of the talk. An example of failure is that an apprentice lawyer, pretending to be experienced, bragging non-stop before his client, even when his client seemingly shows no interest or displays a negative attitude. If a lawyer wants the client to play a positive part, the correct way is to respect the client as the major role and ensure his initiative in say. An effective ice-breaking talk contributes to formulating a kind of rhythm that helps to present, discuss and decide on choices and hence to intensify the client's part in counseling.

### 3.1.4 Steps of Counseling

A Case:

*When MU and YU got married, MU's daughters were quite supportive of their marriage and said that so long as YU took good care of their father, she could get MU's flat at the death of MU. And MU agreed so. YU thought that, by taking care of MU for more than ten years or so, on one hand she could live a fairly good life and on the other she could obtain a flat to leave to her son as part of his assets; besides, MU was a fairly good man. But she did not expect that, though after years of her hard work in taking care of MU, MU wanted to have his son back home and declared "You may live in my flat, but your son mustn't! You want the flat to be your son's, no way! It's my son's sooner or later!" In MU's pay check account, there was a deposit of between RMB 40,000 to 50,000 yuan which was scraped up after they married each other. But MU had never told her the password of the account; moreover, MU even said, "That is my salary; it's none of your business."*

*The flat was originally allocated to MU. And according to the housing reform policy, another RMB 3,000 yuan was needed to pay in order for the flat to be privately owned. YU thought that the flat was going to be hers in the future; therefore, she paid the 3,000 yuan. The money was from the payment she got for transferring her small grocery, and the rest of the payment, about more than 7,000 yuan, was spent bit by bit to fix up family expenditures.*

*The Real Estate Certificate of the flat was yet to come, and it was said by the end of this year all certifications would be completed, and the market value of the flat was at least RMB 150,000 yuan.*

*One of her neighbors suggested that she coax her husband into buying jewelry for her, because once divorced, the female party could get the jewelry. But she was worried about the possibility that in the future the jewelry would also be deemed as part of the community property. If so, even when all the jewelry was to be given to her, but if its value was to be deducted from her share of the community property, what was the point of having so much jewelry? She preferred money.*

How to carry counseling step by step in this case?

We have discussed the series of steps of interviewing clients, which are deliberately designed to attain multiple goals in interviews. Counseling is also carried out in steps. The first step is "update". Before official counseling, lawyers often ask their clients: Is there any new development in the case? Do we or does the opposing party have any new ideas, behaviors or actions? Is there a change for good or for bad? Is the client going to make supplementary explanations about some facts? As a result, timely update of information must be done before counseling in order to guarantee the efficiency and practicability of counseling.

Official counseling is carried out in six steps: to identify goals; to evaluate currently collected data available for realizing the goals; to generate alternative potential solutions; to evaluate each

potential solution by weighing their advantages, costs, risks, and chances of success; to decide on the best solution; and to begin actions in accordance with the decision made.<sup>1</sup>

### 1. To identify goals

If the client can clearly describe the case and accurately express his wants, clinic students should shape their goals consistent with those of the client's. But students must identify whether the client has accurately expressed his wants, whether the client's ideas and actions are helpful for obtaining his wants, and whether obtaining his wants really means realizing his expected goals. To identify the client's goals is a very important task at the stage of counseling. At this stage, special attention should be paid to the change of the client's goals.

First of all, the client's goals may change. The calm thinking for some time upon interviewing or any new changes in the case may alter the client's original goals. For instance, clients of divorce cases had formerly firmly disagreed to divorce, holding "not to divorce" as their goal, while later they agreed to divorce and changed their goal as to pursue bigger share of property.

Second, the client's emotion may change. The client in the center of disputes and contrasts often experiences fluctuating emotions. Both the outside influences and the inside anxiety may lead his emotions to go to the extremes. In some cases, the client grew angrier and angrier even beyond control, so angry that he claimed to sue the opposing party "at all cost". Maybe he is not clear how much is the "cost", nor is he able to calm down to weigh the advantages and disadvantages between the "litigation" and "alternative dispute resolutions". At this time, it is especially significant that the attorney assists the client to analyze and identify his real goals.

Don't expect the client to speak out his goals in one sentence. The client's goals must be abstracted from the client's words and sentences by conjecturing the client's real intentions, and then be expressed to the client for his confirmation. Goals can be divided into the ultimate goal and other goals to be obtained before realizing the ultimate goal. And there are major goals and minor goals. In terms of contents, there are positive goals, i.e. expected results, and negative goals, i.e. unexpected results. To identify the client's goals is the primary job in official counseling.

### 2. To evaluate currently collected data available for realizing the goals

Upon identification of the client's goals, a preliminary evaluation should be made on the currently collected data, whose contents should include the following aspects: whether the current data is sufficient to realize the formerly identified goals, how to make use of the data to realize the said goals, what is the strength of the current evidence, whether there exists overlapping, supporting or contrasting relationship among the data, whether these relationships may influence the strength of the current evidence, and etc.

What should we do when it is impossible to realize the client's goals through mere analysis of laws and case facts? For example, a client wants to file an action, but the action limitation period has already expired. To say sorry and to reject the client immediately might be counted as one way to deal with such a case. On top of it, if we put ourselves in the shoes of the client who has just suffered a heavy blow, there is really a need to adopt some moderate methods to comfort him.

Method 1: Think before act. Don't voice your opinion first, especially when you just interviewed the client and learned that his goals were unlikely to be realized. We'd better show our understanding to the client. Leave ourselves some leeway and time to think whether it is true that

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<sup>1</sup> Essential Lawyering Skills, Interviewing, Counseling, Negotiation and Persuasive Face Analysis, by Stefan H. Krieger, Richard K. Neumann, JR, ect. Page 33(1999).



none of the client's goals can be obtained, or whether it is the case that his major goal is impossible but there's hope for his minor goals. Even when there is only one ray of hope for solution, we should find it out and tell it to the client. In the mean time, the time for thinking can also be used to sort out the reasons why the client cannot obtain his goals so as to ensure that they can be expressed to the client in a prudent, rigorous and persuasive way.

Method 2: Give explanations. Patiently explain reasons and causes in detail and thoroughly analyze the case facts with care before passing the negative conclusion to the client, so that the client recognizes that such a conclusion is made out of serious thinking and understands without mistake the reasons and causes leading to the conclusion.

Method 3: Show sympathy. Once when we decline a client, we also feel sorry about him and we should pay special attentions along with sympathy to the client's response. Why the client cannot obtain his goals may be attributed to various reasons, including social, economic, legal, cultural and customary limitations, may not necessarily result from the client's own fault. To show understanding and sympathy is generally acknowledged as an effective way to ease the client's temper, especially when he responds with disappointment, depression, dissatisfaction and even anger. However, it is a taboo to eat your words in order to calm the excited client down, which often leads to the opposite effect that the client may transfer all the blame on you.

Method 4: Provide constructive advice. Even if students cannot help the client to obtain his goals, they may sincerely provide him with some constructive advice on his current situation: What to do to gain more benefits in the future? How to protect his own rights and interests? What issues should be paid special heed to? When what change occurs, there may be possibilities for the client to achieve his goals?

3. To generate alternative potential solutions (a skill to communicate with clients, explaining concerns arising from discussions about choices)

A good lawyer should offer his client as many alternative potential solutions as possible. What a lawyer can achieve with his sound legal competence and abundant practice experiences, clinic students may also achieve through the interaction with their fellow students, clinicians' supervision and their own active thinking.

Once when we have accomplished the classification of alternatives, we need to consider how to present to our clients the possible choices of alternatives. Both legal factors and non-legal factors ought to be incorporated into those alternatives. Legal factors refer to relevant substantial and procedural provisions which influence or even determine the outcomes of a case. Non-legal factors refer to social, family, economic, political, cultural, customary, psychological and physical influences related to the case. Undoubtedly, the client relies heavily on clinic students in the aspect of legal factors, while students must not ignore the client's ability to provide thoughts on non-legal factors. In practice, students often need to alter their strategies in dealing with the case on the basis of non-legal factors. We need to measure both the positive and negative results of every feasible alternative; and we also need to assess its chance of success.

How to start discussion with the client? Is it to ask the client to state whatever solutions that he can think of, or to inquire of the client about his plans of next step and then present to him the list of solutions already prepared when he finishes? Or, first present the previously prepared solutions and then start the discussion with the explanation of those solutions? The advantage of the former way is that it guarantees the client's freedom of statement, while it may also render the client unhappy — since you have already prepared solutions, why don't you bring them out first

but let me speak first? The latter way is more natural and apt to leave on the client an impression of the student lawyer's honesty, but it also means to take the risk of the client's unexpected response. Take the latter way as an example. It is recommended that the discussion go through the following process:

Firstly, explain the meanings of terminologies entailed in the names of various solutions. For instance, what is "arbitration"? What are arbitral authorities? Who compose the arbitral tribunal? What is the difference among arbitration, mediation and litigation? How is the effect of arbitration verdict? Must the verdict be enforced? If not, what is the consequence? Is litigation still an option if unsatisfied with the arbitration verdict? With a view to inculcating the clients with accurate meanings of the solutions to be discussed, students need to explain to different clients in different level of detail because of their individual differences. Besides, students should try to avoid the use of legal jargons, bearing in mind that such explanations are aimed at the client's understanding, instead of being part of an academic discussion with fellow students or teachers.

Secondly, explain the relationship between a specific alternative and the client's goals, including: Why to put forward such an alternative? What kind of relationships are there between the alternative and the client's goals? How to apply the said alternative to obtain the goals? Which goals can be obtained with certainty? Which with possibility? Which are impossible? How fat are the chances? What if it succeeds? What if it doesn't? How to weigh the pros and cons?

Thirdly, explain relations among alternatives, including: Are the alternatives related to each other? Is there an order of priority in accordance with law? Are they inevitable statutory procedures or selective procedures? Does that order of priority have an impact on the cost? Are those alternatives designed to obtain the goal in gradual progress or at one go? What are their strengths and weaknesses?

Lastly, ask the client whether he has additional alternatives and discuss with him whether such alternatives are better and analyze the feasibility of them.

Before counseling, we can prepare such a form as below:

Alternative	Strength	weakness	Chance of success	Client's response
1				
2				
3				

When we are discussing every alternative in counseling, we may fill in the form together with our client, whose response can be demonstrated in the form by using "√", "X" or "?". Our client can have a duplicate of this form, as a way to keep record of all alternatives and to plan for following steps. A complete record of "client's response" corresponds to the client-centeredness in counseling.

4. To evaluate each potential solution by weighing their advantages, costs, risks, and chances of success

In evaluating potential solutions, usually the client won't spend equal period of time on each of the alternatives; instead, he tends to focus on one or two of them, on which he spend more time discussing with students. Students are supposed to remind the client that he view all the alternatives as an integrity, instead of isolating them from one another. Because a relation of first choice vs. second choice, or a relation of plan A vs. plan B, may be identified among those

alternatives, certain thinking should be invested into whether and how the enforcement of the former affects that of the latter. Meanwhile, it should be ensured that the client understands the values of other alternatives, and he should be reminded in the discussion of the values of the alternatives that he ignores.

Different from the aim of alternative analysis, alternative-picking is to pick out certain alternative solutions for discussion. Analysis should be done on picked alternatives; and to pick out alternatives, the first thing to do is to explain to the client the meanings of those alternatives. Discussion at this stage is often general and lacking in pertinence.

*The following is part of a conversation between a clinic student and his client, Mr. Shan, whose payment of wages had been stopped for two month because he had exposed to the media his company's problems in administration.*

*Student: Do you think that we can first have a talk with the leaders of your company?*

*Shan: Yes. I don't want to go to court. I cannot afford the long time.*

*Student: In your case, you cannot file a suit directly. You have to apply for labor arbitration first, and then go to court if you are dissatisfied with the arbitration verdict. The court won't accept your case if you file the suit directly.*

*Shan: Really? That means an even longer delay. I can't afford it. My son is about to take the National College Entrance Examination, and we are in need of money.*

*Student: A successful negotiation indeed can save much time. But unlike arbitration or litigation, there is no procedural guarantee for negotiation. How do you think that your leaders would respond?*

*Shan: Our leaders care about their face very much; otherwise, they wouldn't get so angry with me. So they don't want arbitration or litigation. If I agree to settle this out of court, I can get the money right away.*

*Student: Reasonable.....You want to have your wages back earlier. If you file a suit with the court, you may apply for a prior execution. If the judge agrees, you don't have to wait for the judgment to come out to get your wages. But you still have to apply for arbitration before you file a suit. Certainly, to have a talk with your leaders first is a good way, saving you time and money.*

*Shan: En. To be honest, I don't want to fall out with the leaders; otherwise, it's difficult to get along with them in the future.*

*Student: You mentioned "fall out". Which solutions do you think may lead to the situation that you fall out with your leaders?*

*Shan: Except for the private talk with them, all others will.*

*Student: I understand. Negotiation is beneficial not only to your financial situation, your leaders' face, but also to the continuing relationship with your leaders. But, do you think there may be a counter effect? Like, if your leaders thought you were afraid of them? Would the same thing happen to you again? Just my wild guesses.*

*Shan: I'm not sure.....possible.....so what should I do?*

*Student: Let's see: In what manner should it be to talk with your leaders? On one hand it helps to ease the intense relations with them, and on the other it prevents them from making things difficult for you in the future. What's more, have you ever thought that what if the negotiation fails?*

.....

*This is a conversation embodying “client-centeredness” and employing the “T-tube” model frequently used in counseling.<sup>1</sup> In this conversation, there are explanations of legal provisions and considerations of non-legal factors; there are comparison of strengths and weaknesses between different means of remedy, and also analyses of a particular approach; there are identification and recognition of the client’s goals, and also reasonable prediction of the opposing party’s goals. The student understood, acknowledged and summarized the client’s concerns and goals, and at the same time, tried to explain to the client the alternatives he ignored and reminded him of the factors that he had never thought of.*

In introducing alternative solutions, attention should be paid to the following three points:

First, analysis of alternatives should be careful, integrative and complete. Every alternative is supposed to be a complete plan, not just designed for a certain stage or period. If it is impossible to have the knowledge of what will happen at a later time, efforts should be made to seek for rational prediction and preparations should be made accordingly. Clinicians in China once had a discussion on a case. A client came to the clinic and told the student working there that he had hired a professional lawyer to represent a relative of his, who violated the Criminal Law. But now the said lawyer asked the client to give a sum of money, times of the retaining fee, for “clearing channels”, claiming that it was the idea of the presiding judge. And the lawyer guaranteed that his relative’s penalty would be mitigated if the money was paid. The client asked the student what to do. The counseling that the student provided to him was: to record his remarks about asking for such a sum of money the next time when having a talk with him. The client followed the student’s advice and, several days later, gave the student a cassette with the recording of the lawyers requirement for “channel-clearance fee”. However, the student was rendered at a total loss as to how to deal with the recording. I don’t want to discuss the problems with the practicing lawyer in the case. Let’s focus on the student’s counseling and we can easily discover that, when providing counseling, the student didn’t have a clear objective in mind, nor had he analyzed the possible results, lacking integrative thinking over the whole case. Why to record such remarks? What to do after the recording was done? How to make use of the cassette? How to deal with the said lawyer? What to do with the client’s relative’s case? What is the relationship between the student and the client? And what is the relationship between the student and the said lawyer? The student was very passive, due to the lack of thinking over above questions.

Second, flexibility should be added to the analysis of alternative solutions. Owing to the existence of various uncertain factors that may influence the ultimate outcome, in analyzing alternatives, students should, on one hand, think creatively and predict boldly, while on the other, be flexible about the alternatives in case of unexpected accidents.

Last, in analyzing alternatives, special concern should be showed for what the client tries to avoid. In the previous example, the client’s goal was very clear: to get money as soon as possible. In the meantime, he was reluctant to fall out with his leaders or to damage his relationship with leaders. The consultant was making plans centering on the goal “to get money as soon as possible”. Even at the later stage of negotiation, he must not ignore the client’s concerns. If there is any action that may bring out negative influence (for example, to come into conflict with the leaders), it should be informed to the client in advance or to meet with the client’s approval.

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<sup>1</sup> David A. Binder etc., *Lawyer as Counselors: A Client-Centered Approach*, West Group 2 edition (February 2004), P. 288 (1990).

#### 5. To decide on the best solution

The process of decision-making is like the one of liquid flowing out a T-tube. The aforesaid counseling on Mr. Shan's case started with an open discussion covering negotiation, arbitration and litigation, and then it gradually narrowed down, and finally focused on a particular point, i.e. how to negotiate. This is the process to decide on the solution. The previous step of counseling incorporates a comparison among many alternatives, while this step of counseling focuses on exploration of different parts of one alternative.

The client's choice should be an open one, too. His choice should not necessarily be limited to only one alternative. In fact, the client basically makes his decision after evaluating one or two of the most important alternatives. What the student ought to do next including the following:

First, repeatedly compare the chosen alternatives, carefully answer questions about legal provisions related, and further weigh their advantages, costs, risks, and chances of success.

Second, improve the chosen alternative. Take into account not only other relevant factors, but also possible new circumstances that may occur in the process of execution and the ways to cope with those new circumstances as well as to cooperate with other factors with consistence. Work out the prediction of the best result, comparatively good result, generally acceptable result, bad result and the worst result.

Third, formulate a work plan. Explain to the client the jobs that the student is about to do next in accordance with the client's own decision, the timeline, and the items in which the client's cooperation is required.

After counseling, it is best to make the client to reach a decision as quickly as possible. If the client needs some time for consideration, the client may be given a time period for making his decision. Though the delay in decision-making may mean an opportunity to wait for a good timing and a longer time for the client to think calmly, it is a passive choice and it affects the attorney's efficiency, weakens the prompt effect of counseling, curbs the speed of solution, and even may hamper the relationship between the student and the client.

Real cases are never going to have an ending as rigorous and beautiful as those of the cases in textbooks due to the complexity of the reality. Even having gone through repeated discussions and evaluations, many clients still dare not make a decision by themselves and insist that students give the final word. Clinic student may be confronted with the following two situations:

First, the client insists that the lawyer commit himself on the decision. Just like a patient who may ask his doctor, "If you were me, would you undertake the operation?" the client may ask the clinic student, "If you were me, what would you do?" The client believes that the student owes him a piece of advice. And the student is supposed to come up with advice based on his overall understanding of the case after interviewing and counseling. The student may answer the question from two aspects: (1) orienting at the client's interests and goals, for the purpose of their realization, to propose feasible advice to the best of the student's understanding; (2) to propose on the basis of the student's own judgement, telling the client the student's own choice as the exact response to what the client asks "What would you do if you were I?" It is unlikely that the student and the client share identical values, ways of thinking or worldly wisdom, but such advice is still treasurable, because when the student puts forward the advice he certainly will explain the reasons of his choice, which can provide the client with a new insight into his case that he may depend on, and which can assist the client to get used to independent thinking so as to prevent his over-reliance on his attorney.

Second, give up decision-making and play a mere auxiliary role to help the client to reach decisions. This is one of the most difficult measures that many clinical students (as well as lawyers) have ever taken in counseling. Sometimes, even when clinical students or apprentice lawyers have tried every means, the client still firmly insists on his wrong decision. Even when conducting counseling in a client-centered model, more often than not we find ourselves in the middle of such a conversation as the following one:

Student: Well, We've reviewed all feasible alternatives. Do you have any questions about any one of them?

Client: No. I believe that I am pretty clear about them.

Student: So, which one do you choose?

Client: I think I would like to choose the third alternative, which seems to me the most advantageous.

Student: (with a disappointed and frustrated face) Oh, that. Obviously I didn't explain very well all those alternatives to you. Let me explain again.

And then the whole process has been repeated until the client finally reaches the "correct decision".

Why is it so difficult to leave the decision-making to our clients? Reasons are many. We have an enormous sense of responsibility for our clients, especially the first one we receive in our clinic. Consequently, we wish our clients to choose only the best alternative. And also because we are certain whether we have fulfilled our responsibility as lawyers, contrary to our intuition, we wish to have more control of the case so as to counteract the sense of uncertainty. All the aforementioned factors lead to the reluctance to leave the decision-making to our clients. We ought to always bear in mind that it is clients instead of lawyers that makes the final decision in a "client-centered" counseling.

It is very possible that the client has a clear knowledge that the hope is small, but he is still willing to take risks and pay prices only for such a ray of hope. Or, the client, due to his deep understanding of the opposing party, regards that a miracle that is impossible for others may happen to the opposing party and is therefore willing to take a risk. Or, the client voluntarily gives up part of his interests just to prevent from a bigger risk. Under all the above circumstances, the client's wish ought to be respected, though the ethic norms only require clients to identify some procedural goals and permit lawyers to decide the best way to realize goals (after discussion with clients).

6. To begin actions in accordance with the decision made.

Once the decision is made, all efforts should be invested in the next step of action. To cope with a certain situation coming up in the process of their study or practice, clinic students usually follows a model of thinking: identification, prediction and planning. Identification means to understand the situation, which is the basis of all actions; prediction is to foresee the direction of case evolution and the result by employing professional expertise and social experience; and planning refers to the making of plans of actions to influence or control the development of the situation. The whole process is an active and dynamic one.

And the above mentioned six steps are the embodiment of such a process in the stage of

counseling. Clinical students can achieve tactful counseling by combining the knowledge of such steps with professional skills of practice.

### **3.2 Practical Skills for Legal Counseling**

Clinical students should be capable of skillful use of language; especially, they should command the arts to tell and not to tell, in addition to a series of work skills for practice. Undoubtedly, there may arise many unexpected hot potatoes, for instance, how to tell “bad news” to clients and how to assist clients to reach “correct decisions” and take actions. Furthermore, clinical students need to cultivate a good sense of legal professional ethics in providing legal counseling service.

#### **3.2.1 Skillful Use of Language — the Art of Use of Words and the Art of Silence**

In receiving clients in clinics, we are often confused by students’ strange ways of questioning: time and again they keep silent when a direct oral response is demanded while talk non-stop when silence is needed. For example, in the primary interview, most clinical students, failing to thoroughly investigate disputable facts and details of the case, only rattle on when clients pause in a fit of strong emotion, and thus stir their memory of bitter experience and cause them to break off or even stay silent. Likewise, when confronting an experienced and confident rival in a negotiation, some students become speechless, dumb as a fish because of fear.

Competence of communication is vital nearly in every aspect of lawyers’ practice. Most of lawyers’ work requires interaction with people: listening to clients, building rapport with clients, handle affairs for clients, persuading judges or rivals, and etc. The key to lawyers’ success lies in the mastery of skills of communication, such as how to listen, how to persuade, and how to satisfy emotional and psychological needs of clients, judges, or opposing parties. As a matter of fact, they treat all them with professional expertise.<sup>1</sup>

To command the skills of verbal communication requires more practice in the ordinary life. A lawyer can develop his own style in the use of language through repeated exercise and practice in legal counseling. Here we would like to put some stress on the skill of silence, which, as important as words, plays a pivotal part in communications. It not only constitutes a way of communication but forms a meaning of its own. As one of the basic skills to communicate with clients, the opposing party, judges or other decision-makers, silence is of significant use in lawyers’ practice.

A lawyer has many purposes for his primary interview with his client: 1) to establish a client-lawyer relationship; 2) to identify the client’s goals; 3) to collect as many as possible facts from the client; 4) to relieve the client’s unrealistic worries.<sup>2</sup> Whether the lawyer is able to realize those purposes largely depends on his capability of communication. He should make his client feel at ease, encourage him to enter into free talk, and exclude from the communication cultural, psychological and social barriers.<sup>3</sup> In order for the lawyer to effectively take those measures, his silence or silent response to client is one of the core skills.

##### **1. Response to the client’s pause and hesitance**

Pause and hesitance are factually beneficial for a speaker to express themselves clearly in that

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<sup>1</sup> Gary S. Goodpaster, *The Human Arts of Lawyering: Ineterviewing and Counseling*, 27 J. Legal Educ. 5 (1975).

<sup>2</sup> Lesley Fallowfield, *Giving Sad and Bad News*, *The Lancet* 1993; 341: 476–478

<sup>3</sup> Gay Gellhorn, *Law and Language: An Empirically Based Model for the Opening Moments of Client Interviews*, 4 Clinical L. Rev. (1998).

they assist him to understand more clearly what he himself is talking, encourage him to explore his thoughts and feelings more deeply, and help him adjust his use of words. On many occasions, especially at the beginning stage, the client's silence and hesitance can give him more time to adapt to the environment and to mend his mood. If he feels uneasy about the fact that he has to resolve the legal issue, the short period of pause and hesitance can help him realize that he cannot evade the reality. If he is not sure of his memory of some facts, such pause and hesitance can help him clarify it. Nevertheless, with a view to effective use of pause, a lawyer must discard a widespread of misunderstanding that silence means a failure in communication. When a speaker fears that he may be regarded as incapable of expression if he cannot continue to talk, he usually feels a big pressure that leads to his inability to fully comprehend his own thoughts and feelings and hence failure to give complete information. In such a case, very often the listener doesn't wait for the speaker to articulate his thoughts and feelings but feels impatient with the pause and therefore tries to fill in the "gaps" with his own words.

As a matter of fact, such a case frequently occurs in conversations between lawyers and clients. Lawyers believe that conversations should progress smoothly and continuously and that any difficulty in communication would mean their poor skills of communication. Accordingly, they are apt to cut in when the clients pause or hesitate and to respond to the pause with bombarding questions, which consequently disrupts clients' thinking and leads to the clients' real meaning be replaced by the lawyers' statement. The ultimate result is that the clients completely give up their own judgment and entirely rely on the lawyers. Such a way of communication is certainly to hinder the harmony between lawyers and clients.

In order to avoid such hindrance, lawyers need to overcome their insecurity about the pause or hesitance in the course of conversations and to suppress their desire to accelerate the process of dialogues with clients. Especially in the primary meeting, a lawyer need be very sensitive about possible hindrance in the relation between his client and him. He should consider the client's pause or hesitance as an opportunity for the client to relax himself instead of a failure in communication. Lawyers should avoid using repetitive, interrogative or close-ended questions to fill in "gaps" in conversations or to give expression to the clients' intents. On the contrary, lawyers should employ methods to encourage clients to continue to talk, such as silence, body language (e.g. nodding or leaning forward), or some encouraging expressions (e.g. "Is it?", "Well, yeah", "It's okay. Take your time", etc.).

**Example:**

*Wang Hong worked with a factory in Dongguan. Unfortunately, last year she was hospitalized upon an injury at work. After paying RMB 2000 yuan for the primary medical treatment, the factory refused to contact her any more. Without any other choice, Wang Hong, with the hope to seek for compensation from the factory, came to a legal clinic for counseling.*

*Wang Hong: Like last Thursday, Friday, Saturday, I cried everyday. Every time when I think of the sum I need to pay for the medical treatment and my children's tuition for school, I barely have any courage to live on.*

*Student: (Leaning forward and patting Wang Hong,) don't worry too much. We help you to obtain compensations from your factory for your work injury. After the factory paid RMB 2000 yuan in June to you for hospitalization, did they pay you any other compensation?*



*Wang Hong: Not any. My husband went to the factory to ask them to pay the compensation, they.....*

*Student: It's okay, go ahead. Only in this way, can we find sufficient evidence to sue them.*

*Wang Hong: They threatened that, if my husband did it again, they would even stop paying his salary of the last half of the year.*

*Student: Does your husband have any work record?*

*Wang Hong: (anxious) Records, are records necessary? What should we do?*

*Student: Don't worry, take it easy.*

*Wang Hong: (Silent) Er.....*

*Student: Take it easy. Other evidence, such as pay slips, do you have them?*

*Wang Hong: Right! We punch in, and there must be records of us going to work. Do they count?*

*Student: Great! Anything else?*

Even “active listening” is not an appropriate way to respond to pause or hesitance because it also influences clients’ thinking. As “a way to collect the client’s information and to give feedback that reflects your understanding of the client’s statement, active listening ensures the client that the lawyer understand what he is talking about. However, when a client is pausing or hesitating, the information he is giving is very vague. Thus, any attempt to respond to the client at that moment is running the danger of misunderstanding the client’s real intent. Especially when in the primacy meeting, it is very risky to interfere in the client’s complete description of his thoughts and feelings.

## 2. Utilize Silence to Collect Information

In many a conversation, even when clients have finished describing the case under encouragement, there are still many gaps in some crucial issues. The clients may not having paused or showed any sign of hesitance, but they are keeping on with empty talk rather than giving any further substantial information. In such a case, lawyers are confronted with a barrier to collect necessary information.

Example:

*A lawyer is asking a women, who is suffering family violence and seeks for immediate divorce.*

*Lawyer: Does your husband often beat you?*

*Women: Yes.*

*Lawyer: In what condition?*

*Women: When he is in low mood, especially when he gets drunk.*

*Lawyer: Why didn't you report to the District Women's Federation?*

*Women: (silent)*

*Lawyer: Then, all you want is merely divorce?*

*Women: (silent)*

*Lawyer: What's your husband's opinion?*

*Women: He won't divorce.*

*Lawyer: How many times has he beaten you for this year?*

*Women: Too many to remember.*

....

*When the client firmly says "Too many to remember", she is possibly conveying some other information of her concerns. On one hand, the client may decide to bring the case to court at any cost ignoring many facts to be investigated; on the other hand, she may just want to "forget about the whole thing"; or, the client might hesitate whether to retain this lawyer, "I can't be sure right now whether to go to court, so it's too early to hire a lawyer."*

As a way to respond to such an uncertain answer, silence can promote more thoughts and further discussions on similar issues. When meeting such a client who does not remember key facts, is not sure of any moves to take, or has not a decision whether to hire a lawyer, lawyers are inclined to ask more questions in order to clarify crucial points or to conduct further investigations, which, though, sometime are very useful, but actually too many words may distract the client from his focus, prevent him from his own conclusion, or lead to his loss of confidence to freely express his own thoughts and feelings.

For the purpose of effective use of silence to encourage clients to think and to reach their own decisions, lawyers must have a good knowledge of silence. According to studies on psychological counseling, the cure that silence can provide to encourage clients to think is most beneficial at the "working" stage after the primary stage. Unless patients already know that their doctors are finding solutions, silence could be an impediment for their cure. Some critics suggest that counsels relieve the anxiety about silence by saying, for example, "if you can't talk now, you can just keep silent until you think you can".<sup>1</sup>

To employ these skills in practice, a lawyer must enable his client to know clearly what information they are seeking for: what is the work that the client must do, or what is the issue that they must have a decision on. He should also give the client some information, telling him to spend some time on thinking and decision-making. If possible, a conversation may be suspended with a view to fulfilling such a purpose.

And a lawyer must be clear that silence in counseling is used as a tool to relieve the client's anxiety and to promote his thinking. If the client does not understand that the lawyer is being purposefully silent or if he thinks the silence lasts too long, he will feel awkward and confuse the lawyer with a silly, and he will doubt whether the lawyer cares about his problems or whether the lawyer agree with him. In some literature on counseling, there are many suggestions for the period of silence: 3 to 6 seconds, 15 at most; or 4% to 20% in a 20-minute conversation. But it is generally held that the actual period of silence should depend on the specific reality, including complicity of the issues involved, the extent to which the client relaxes himself, and the intangible time pressure for the client to recall some information or to make a decision. The client's verbal-implications, concentration on thinking, or uneasiness in behaviors are all tips for the lawyer as to how to continue counseling.

### 3. Deal with Client's Long Silence

In the course of interviewing or counseling, clients often express their feelings and thoughts

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<sup>1</sup> C. C. Langdell, *A Selection Of Cases On The Law Of Contracts*, Boston: Little, Brown & Co., 1871. Reprinted 1999 by The Lawbook Exchange, Ltd. P.42.

through long silence. For instance, the victim of family violence may interrupt her description of her spouse's abuse with long silence, which reflects her enormous suffering. A newly-widowed woman is very likely to find it painful to discuss about distribution of her husband's legacy. Sometimes in the process of litigation or mediation, a totally unforeseeable accident may happen and cause drastic change in the case or in the relation between participating parties, and may give a heavy blow on the client's emotions. For example, a significant proposal is approved or denied, the client's claim for property is dismissed, or an unexpected ouster order is made. All such things will render the client dumbfounded.

However, that type of silence is not part of the client's language, nor a signal of his attempt to recollect or to ponder. On the contrary, it reveals that the client cannot find a right word to convey his message, that is, he has been so emotionally involved that it is beyond his words to describe it.

Knowledge of long silence benefits a lawyer in many aspects. For improving rapport, to show empathy to the client in long silence helps intensify the lawyer-client relationship. Even if the lawyer believes that he himself would not feel the same about the same experience, he should not neglect the impact such experience has on the client. At least, when facing a client in long silence, the lawyer should not fall to probing information or asking inquisitive questions. He may respond to such silence with "active listening" that displays his empathy. Take the above mentioned newly-widowed woman as an example. When she feels difficult to discuss about distribution of her husband's legacy, the lawyer could say: "I know you must have been suffering since your husband passed away." The lawyer should be silent together with his client especially when the client is obviously incapable of concentration. It is not a good timing for the lawyer to demonstrate his skillful use of language, when the client believes that her experience is beyond language. Actually, the lawyer's long silence is probably the most proper way to show the client that he understands her pains.

For collecting information, long silence also plays a vital role in getting the whole picture of a case in that it helps to narrow down the range of fact investigation. For instance, in a case of sex discrimination, if the client falls into long silence when talking about a colleague of his, who may be relevant to the case, it can be nearly certain that there must be something between them. Such silence may merely mean the client's kind protection of a good friend to prevent his friend from involvement into the case, or it may mean his worry whether his honesty could be testified by his colleague. Yet, such silence also makes it clear that the client's colleague is related to the case and there is something that renders the client reluctant to speak out what happened between them. Very likely there is a more sensitive issue, which may require an interview with other witnesses. Extremely long silence may suggest that the client is rethinking his strategies to be employed in the case. Take as an example a radically disputed case (where an unfavorable ruling is made or a claim is rejected). When the client respond to such unexpected occurrences with extremely long silence, the lawyer probably need to explore other strategies with the client.

#### 4. Interpret Clients' Silence in Counseling

A lot of literature has discussed the following skills for counseling: how to provide clients with information necessary for them to reach decisions, how to exchange evaluation of different alternatives, how respond to problems, and how to deal with the choices made by clients. But little has been devoted to the discussion on how to understand and respond to clients' silence. A client generally responds to his lawyer with some simple signs to indicate his agreement, such as mere nods or mumbles like "I guess, yes". Many lawyers, especially inexperienced ones are very to

interpret such response as agreement.

American society, especially its eloquent lawyer culture, generally holds such a concept that silence represents agreement. If the client does not raise any disagreement, the lawyer will assume that he agrees and thus there is no need for further conversation. That is why in law schools' clinics many students often complain angrily to their teachers that their clients seemed to have agreed with the students' advice the day before but changed their ideas later. When clients change their mind, students probably do realize that they have misinterpreted their clients' silence as agreement. Yet considering the variety of meanings of silence, a client's little response may be interpreted in many ways: like, it may be a temporary decision and the client need to think more about it; or he feels concerned about the advice but he fails to express his concerns; or the client may just want to avoid arguing with the lawyer who he thinks has ignored his feelings.

A lawyer must be sensitive to silence in counseling. He ought not to come to hasty conclusions about indefinite responses or nods. Especially for those clients whose decision-making has been largely deprived of most of their life, lawyers should try to encourage them to explain their feelings so as to identify the connotation of their silence. Usually, it is best that clients themselves articulate their rationale for their own decisions, so even when there may be pause or hesitation in their response, lawyers should give them the chance to completely recount their thoughts and feelings.

#### 5. Cultural Difference in Interviewing and Counseling

In order to correctly interpret a client's silence and to effectively use silence, a lawyer must interpret such silence under a cultural background where the client is from. As explained previously, silent attitudes in different cultural background means differently. If a lawyer attempts immediate communication with his client without explaining his little knowledge of the local vernacular, he is very likely to fall into a very unfavorable situation. When interviewing or counseling a client from a different culture, the lawyer's lack of sensitivity to silence may seriously affect the conversation between him and his client. For instance, in the primary stage of interviewing, a talkative lawyer may find it very difficult to understand a client from the culture that deems it appropriate to talk little with a stranger. If this client responds to probing questions with very few words or even silence, the lawyer should know it is just a different culture. For lawyers, a better relationship with his client is more important than an empty talk.

### 3.2.2 Other Practical Skills of Counseling

Actually, counseling is a big challenge for students, because it is not only a comprehensive test of students' ability of receiving, inquiring and advising clients, but also it requires them to reach a high level in listening, speaking, reading and writing and to acquire the ability of acute observation. Such requirements can be met through repeated exercise in practice. The following are some suggestions in this regard.

#### 1. Recording Promptly

Researches have proved: it is not possible for an average person to remember over 7 types of new information at one time, hence the importance of prompt records. The form of alternatives prepared by the student may not be a complete one. Therefore, in the course of counseling, he needs to add complementary items into the table to discuss with his client, especially such items as strengths and weaknesses of different alternatives and various elements that influence decision-making. After the discussion with the client, the student may make a copy of such record

for the client, which serves as a basis for both the student's and the client's further thinking. A full-scale record can refresh the student and the client's memory to enable them to work out more well-conceived strategies, when case facts totally change and strategies need to be adjusted accordingly, when the first choice of the alternatives fails and a new choice must be made, or when the student is preparing the pleading and other trial documents and when court proceedings are processed.

The counseling record is also part of the required contents of the clinic files.

## 2. Participating in Discussion

As embodied in the previously discussed example of a student counseling his client, Mr. Shan, the student plays a role of participant in the course of counseling, rather than a dominator. By playing such a role, the student gives full play to the initiative of the client, encouraging the client to provide more valuable non-legal information to reveal the client's real expectations, wants and goals. It is a type of participatory counseling based on facts, in the process of which the student approves of the client's opinions and naturally reminds him of risks and then discusses with him on countermeasures. Students should guard against providing counseling like an expert or in a manner of giving a speech or directives, for such counseling seems to strike the client with awe, in fact, may be very impractical or even misleading.

## 3. Being Neutral

According to "client-centeredness", students should be neutral about various alternatives in counseling, not to hint at their preferences. Otherwise, clients may be influenced in making their choices and prevented from active expression of their wants. Neutrality is also embodied in language skills. Mere ingratiation with the client may impose on him an impression of the student's unreliability and irresponsibility; while mere denial or recommendation of a certain alternative may force the client into accepting the student's advice due to the student's strong attitude. The appropriate way is: to patiently explain and neutrally analyze strengths and weaknesses of each alternative, providing necessary law-related information for the client to make his choice.

## 4. Adjusting relationship

The relationship between the clinic student and the client deepens as with their frequent contact. Whether the student is punctual, conscientious, diligent, considerate, honest or professional, all influences the client's impression of the student and the relationship between them. The student often needs to work very hard in order to establish rapport with the client and to build up a relationship fit for work.

### 3.2.3 Some Special Issues concerning Counseling

After interviewing and the first counseling meeting with our client, we have already collected the basic information from the client and our next step is to roughly assess the case. If we find that we are not in an optimistic situation, how should we tell the "bad news" to our client? In this case we may adopt such strategies as consolation, empathy, active discussion, and etc.

#### 1. Be prepared

Clients usually have many expectations, while clinical students ought to avoid conveying "bad news" until the clients are psychologically ready, which, in many cases, means to put off the "bad news" to the following counseling meetings. In real practice, even when a lawyer realizes from the very beginning that the client's goals are impossible, it is still wise for him to delay

relevant discussion. With more time, the lawyer can prepare a more satisfactory explanation and maybe a creative solution, an alternative that help realize the major goal of the client.

During the interview, if the client insists on an apparently impossible result, the lawyer should not tell his how hopeless it is. Instead, the lawyer should feel empathy with the client and encourage him to explore what is possibly the most crucial aspect of a solution.

**Example:**

*Suppose a client's husband left her and told her that he intended to divorce her and to marry "another woman".*

*Client: I won't divorce him! Let them live in their guilt, but I won't agree to divorce.*

*Lawyer: Well, according the Marriage Law, you really can do nothing to stop him divorcing you. If you bring it to court, he will make it. However, we can try using the alimony and the house to give him pressure; then he won't be at ease.*

*Although the lawyer may be correct about his legal advice, it is not necessary to pass such information to the client at this moment. It is better for the lawyer to show his empathy with the client and to find out the reasons why the client wants to maintain the marriage.*

**Example:**

*Lawyer: I dare say he pissed you off. You don't want to give him what he desires. What happened that leads you to this result? Can you talk more about it? Has it been a time? Can it be any help if you talk to him?*

*Accordingly, the lawyer may discuss about the client's current needs and put forward alternatives directed at short-term goals.*

*Lawyer: I can that you are very angry with him. Could you tell me anything about your children and property? What do you want to guarantee a stable life for you and your children in the future?*

## 2. Stay cool

It is appreciable to aim at providing clients with information and service, yet such a reaction may be too early. Like in the above example, the client refuses separation or divorce and is not willing to take it rationally. However, the lawyer must assist her to accept the fact that her marriage is over before she can seriously consider various alternatives.

When a lawyer carries himself like "a guide in the legal world" and takes "tactical actions" on his client, his intent is to lead the client to a direction that he thinks reasonable and appropriate. Nevertheless, professionals in this field point out that such a move is inadvisable. If a lawyer needs to alter the direction of counseling, he must have a solid reason to adopt such tactics. Very often clients enlarge the scope of conversation by talking about their life, experience and needs. In such a case, a lawyer ought to know how to respond to the clients in pain — whether he is willing to help them or comfort them.

Only by keeping his head, a lawyer can avoid hurting a client in pain and can interact with

the client in a supportive attitude, after which, there is the possibility for a private and confidential counseling meeting of ample time. Once it is made clear that the lawyer is to convey the case conclusions to the client, a private counseling meeting should be adequately arranged to cope with a difficult conversation.

### 3. Show empathy

When a client discloses some disadvantageous case facts, a lawyer should show empathy to the client and take notes of the clients' concerns and suggestions, which is highly necessary.

Example:

*A counseling meeting with a tenant about to be driven may involve information exchange as follows:*

*Lawyer: I need to explain to you the legal aspects of your problem. The lease specifies that the rent should be paid on the first day of each month, while you failed to pay the rent three weeks ago. In accordance with Clause 15, your landlord has the right to require the judge to order you leave.*

*Client: But this is unfair — I am laid off, and that's why I couldn't pay this month's rent.*

*Lawyer: It is really unfortunate that you are to be driven due to unemployment. The landlord should give you some time to find a job and then to pay the rent. But I talked to the landlord's lawyer and he said they will continue with the litigation unless you pay the rent before this weekend.*

*Client: I've already told you that I have no cash, no job, and no place to live. I didn't even pay the water and electricity bills. Why couldn't the judge understand?*

*Lawyer: It seems that they are hitting a man who is already down. But the judge must execute laws. The law provides that the landlord has the right to take back the room and sublet it to others if the tenant fails to pay the rent in time or to make it good promptly. Therefore, even if he understands your difficulty, it is still very likely for him to order you leave.*

*It is most important for the client to understand laws and how they are applied to the case. The combination of laws and facts enables the client to reach such understanding and saves the client from mere reliance on the lawyer's assertion or evaluation or risks. Besides, in cases of similar kind, if the lawyer just has had a cursory interview with the client, he might have misunderstood some key facts. The client's statement can correct the lawyer's mistakes in understanding and facilitate better analyses from both of them.*

### 4. Watch and respond to the client's emotional reactions

Once hearing "bad news", a client tends to react in various ways that a patient does. As a matter of fact, research shows that the extent of a patient's knowledge of his disease or treatment influences his reaction and even his construction of the new as good or bad. For example, a recidivist may not take imprisonment as something horrible, and a tenant who has relatives to return to may be happy to move out of a room that he can't afford. Thus, lawyers must pay attention to client's concerns.

Patients often display an attitude of disbelief or denial. Likewise, a client who feels hurt may also display an attitude of disbelief. A lawyer should understand that it means that the client feels

the result emotionally unacceptable, not that the client wants to argue with him. Consequently, the lawyer should show empathy to the unfairly-treated client. If the client's emotion is not clear, the lawyer should continue to find it out. If the client demands more information about applicable laws, the lawyer should explain them to him. Yet, it is most important for the lawyer to prevent arguments about his analysis. If the client is mad about the lawyer's improper handling or if he threatens to hire a "real lawyer", the lawyer should also explain his true feelings to the client, instead of attacking the client with words like "You can't find a better one".

Example:

*Client: If you call yourself a real lawyer, you should know how to bury this guy with documents and get him out of way!"*

*Lawyer: I understand you must have been depressed very much by the litigation. To be honest, I also feel depressed when you are challenging my opinions and expertise. I wish to have a thorough discussion with you on this issue, and then you will understand why I say that guy has better chance to win and why I want you to seriously consider reconciliation.*

Just as a doctor must be cautious about excessive comforting patients, a lawyer should also prudently stick to his frank advice rather than change it easily to please his client. Even if the client asserts that "I don't believe they can convict me of any guilt", the lawyer should not change his prediction that "You are surely to be convicted" to that "One can never be certain what the jury will do — it's just like playing an intellectual dice game". No matter how the lawyer's frank advice is accepted, he should never give it up only because of the client's complaint. A lawyer may not always fight for his client. For example, in the event that when a lawyer finds his client of a criminal case a dangerous suspect capable of more crimes, he may not feel it a pity that his client is facing imprisonment. However, a lawyer may feel really sympathetic with an abandoned wife or an unemployed client. Therefore, a lawyer must be very sure of his feelings about his client and the situation that the client is in. If he is sympathetic with the client, there is nothing wrong for him to tell the client about it. From time to time, the lawyer may act as a defender for his client when the former is explaining law to the latter. When a lawyer tells his client that the latter is going to lose the case, it is revealed that, in the lawyer's eye, law is unfair and unmerciful, which is possible. If such an idea is the lawyer's true feelings, it will help the client to maintain his pride when facing loss of the case. Yet, if the lawyer has not gathered a whole picture of the client, his sympathy should be focused on the things that he is already pretty sure. Most clients are afraid of unknown challenges, and no matter what makes them so afraid, lawyers can show their empathy with the clients fear about an insecure future.

### 3.2.4 Cultivation of Professional Ethics in Counseling

Case:

*An old woman was driven out of the home by her son, and lived on begging in the street. She came to a clinic at the advice of some one. The clinic accepted her case and decided to initiate*



*a lawsuit on behalf of her to make a claim for maintenance payment in accordance with law. On investigating her son, her daughter-in-law poured out their own grievances, such as the bad temper of her mother-in-law, housing shortage, their child's preparation for the National College Entrance Examination, depression of their work units, etc. They offered RMB 200 yuan and asked the student in the clinic to "think for the sake of us and be fair". The student in charge of the case did not take the money. After his returned to the clinic, students carried on a discussion.*

*One opinion holds that it is right for the student not to take the money. Because the money was offered by the opposing party, taking the money means being bought over by the opposing party. The student is the representative of the old woman, and definitely he should not speak for the opposing party. The clinic students are offering legal aid services, and should not take any money from either party.*

*Another opinion holds that since the old woman is in a great need of money, having no idea of where the next meal comes, the student is justified to take the money over to help the old woman out. In addition, the money is what her son and her daughter-in-law owe her. Moreover, isn't it the purpose of the student to get some money back for the old woman?*

*How to comply with professional ethics in counseling?*

In counseling, we should comply with professional ethics, practice client-centeredness and think in the client's position.

1. To work out practical counseling plan in an responsible attitude

Related laws of the United States specifies: a lawyer shall respect objective facts in counseling and his advice must be feasible, that is to say, in rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.<sup>1</sup> Although there are no such provisions in the law of China, compared with the United States, there are also cases of big problems resulted from careless counseling advice.

A law program produced a TV station once reported a case: a country girl from Sichuan was abducted by a human trafficker and sold to a farmer in Fujian at the price of 2,500 RMB to be his wife. The girl attempted to escape for several times but was caught and brutally beaten every time, so she was forced to live together with the buyer's family and later gave birth to a son and a daughter. After 8 years, the girl finally found an opportunity to run away and she bought a train ticket to go back to her home in Sichuan with the money that she had secretly saved. Once regaining freedom, she didn't want to go back to Fujian ever again. Her family introduced a local native to her, and after some time of dating, they decided to get married. But the marriage registration organ refused to register for them unless she could obtain the divorce certification issued by the local government of her former residence in Fujian; otherwise, her marriage would be deemed as "bigamy". In the program, the host invited a law expert to give advice to the girl. The law expert's advice is: that it is nothing wrong with the decision made by the marriage registration organ and the girl should go back to Fujian to obtain the certification; and that if there is any danger, she might resort to police or the local government for help.

There is a lot of impractical advice like that. For example, there is some advice about a property inheritance dispute in the country that insists that both the daughter and the son should

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<sup>1</sup> Model Rule of Professional Conduct, Rule 2.1.

equally inherit their parent's real estate and savings. But the reality is that the daughter has been married and has moved to live with her husband according to tradition, thus it is not possible for her either to move back or to sublet or sell her part of the room that she inherits (which will generate even bigger trouble). In this case, the legal provision for the daughter and the son to equally inherit real estates is but a nominal one. In providing practical counseling, the lawyer should not mechanically understand and apply the law, and should not provide lip-service only to the client. About this case, practical advice may be that the daughter inherits more movables in place of the real estate; or that the son inherits all the real estate and compensate the daughter with cash or other interests in the amount calculated on her share of the real estate.

Therefore, in counseling, lawyers must assume a responsible attitude towards the advice for decision-making, aiming at working out operable solutions for clients on the basis of reality.

2. To cultivate sense of social responsibility and to balance the conflict between clients' interests and the public interests and the conflict between different values

The major means of legal aid is to provide free service to the poor and the weak in society. Some particular legal aid institutions or volunteers may have wider and deeper pursuits, such as, to use a certain case to popularize law and to enhance the whole society's awareness of law and rights and interests, to set up discussions on a particular social phenomenon, to draw the judicial departments' attention to a blind area in law, to explore theoretical issues and to make suggestions for legislation or amendment through providing legal service for a particular case, and so on. In other countries, a lawyer with such pursuits is called a "Cause Lawyer", referring to a lawyer who engages in the cause of public interests in pursuit of his goal, ideal and political view. Nowadays, the legal clinics in China also have the features of the legal aid institutions. Some are even directly related to a particular legal aid institution. Therefore, the clinic students are naturally influenced by the legal aid institutions' goals and edified by the legal aid volunteers' pursuit of the social value of legal aid. Meanwhile, the legal clinics also make it a goal to cultivate the students' sense of social responsibility. Clinic students may be faced with the conflict between the client's interests and the public interests.

**Case:**

*In a clinic of a law school, two students were caught in a dilemma.*

*Dozens of farmers rejected the government's enforced land expropriation, feeling the compensation offered too small, and so they resorted to the legal clinic for help. After accepting the case, the clinic students carried out many interviews and investigations, finding there were many cases of illegal land expropriations. The students held that if the case was filed to court, plus the media's interference (the media had already reported the case and they indicated that they would continue to report the follow-up of the case if the clinic students were to represent those farmers), it was very possible to draw the attention of the local government, the competent authorities and even the whole society. If so, it was going to be a forceful strike on the frequent illegal land expropriations there, and the significance was much more than a mere solution of one case. However, they concurrently noted that it was going to be very difficult because the land expropriation project had already started and the government had made investments into the project. Even if their claims were supported by the court and they could have the compensation increased, the balance between the increased compensation and the litigation fees might not guarantee the farmers much substantial benefit in the end. It could be easily judged that the*

*farmers' interests had always been the most important concern in their mind. But if they were to concede to the local administrative department which had already violated the law and to ask them for an increase in compensation as a trade-off for litigation, it was against their former wish to take advantage of the case to bring about more social impact on the similar law-violating activities so as to protect farmers' interest on a larger scale. As a result, they were caught in dilemma.*

There are several questions that need be discussed: What were their expectations when the clients went to the clinic for help? Why did the clients wish that their case could have some social influence? Did they care more about the social influence or about their own interests? Was their major goal to reform the irrational social reality or to protect their own interests? Were they oriented more at present or at future? After careful thinking, we can come to the conclusion that the clients wanted to first address the current problem concerning their own interests. And then we continued to discuss: Could the social value of an individual case be the goal for the clinic students to pursue? How to realize such a goal? Should the clients be told about other values of their case? And when? Do the clients need or must they pay a price for promoting social changes? As far as I am concerned, in dealing with legal aid cases, social effect should be pursued only on the premises of the clients' knowledge and agreement. If a positive social effect can be achieved in handling an individual legal aid case, or if the client agrees to make efforts for enlarging the social effect, the student can cooperate with the client to attain the goal. To fully acknowledge the student's concern about the clients' interests and to recognize the students' sense of social responsibility are very good ways to cultivate the students' ability to make a rational choice when confronted with various conflicting interests and values.

### 3. To resolve the conflict between clients interests and the teaching goal

#### **Case:**

*A clinical student had a problem in handling a divorce case.*

*The respondent (the client's husband) left and the client (the petitioner) had been waiting for a long time. The judge asked the client whether she chose a trial by default or chose to continue waiting for her husband to come back until the expiration of the trail time limit. The client consulted her representative, the clinic student. In supervising the student, I found that the student was eager for the trial by default. She gave a lot of reasons. For example, it was not good for the client to recover from her emotional pains if the trail was further delayed; since the client's husband's whereabouts was unknown, such waiting might not have any result; the client was in bad need of a residence, yet the apartment, the property co-owned by both her husband and her, was occupied by her husband's brother; and.....Finally, she told me her own reason: since it was approaching the end of that semester, if the client chose the trial by default, she could have one real trial experience during the period of her studying in the clinic; but if the client chose to wait, the hearing of the case might be delayed to the holidays or even to the beginning of next semester when the case was transferred to other students, and she would lose the chance to represent the client in court. Obviously, it is the last reason that accounted for her inclination for the trial. Under the circumstances, the student even neglected the negative results of the trail by default.*

In the following supervision, we first separated the counsel's learning goal from the case facts to analyze the benefits and risks of the trial by default: the benefits are that it helps the client to recover from her emotional pains, that it is a quicker way to reach solution, and that it may satisfy the client's urgent need for a residence; while the risks are the lack of evidence to prove the community property, which may lead the court to make unfavorable decision on property partition or which may cause the difficulty in enforcing the court's decision even when it makes a favorable decision. And then we went on to analyze the benefits and risks of waiting. Through the analyses, the student realized that it was her personal inclination that blinded her to the thorough consideration of all possibilities. When she realized her problem and really understood that "the client's interests are the major goals in handling a case", we started to analyze the influences that her personal factors might bring about. The client had been satisfactory with the student's representation, would she chose the trial by default when she knew that to continue waiting meant the possibility to change the representative? Was the student supposed to tell the client her personal factors? Did the client have the right to know that her representative might be changed next semester? If she knew that, was her decision influenced? Was such an influence a positive one? The student believed that the client had the right to know that. As a matter of fact, we had already explained the case takeover policy to the client when accepting the case. And now the iteration was only a necessary reminder. And we would also emphasize on our promise of the quality of representation even when the case was taken over by a different person. The student expressed that she would give full support to whatever decision the client would make providing that the client knew all the factors. Such ideas of the student are approvable because they were all based on the client's rights and interests.

Upon the abandonment of her personal inclination, the student relaxed a lot and became more active in thinking, and she then thought out many ideas. For instance, instead of passively waiting like this, she could try to find some clues of the respondent's whereabouts by inquiring of his former work unit; and she could have a talk with the respondent's brother to see whether there might be any hope for the client to move in the said apartment first..... Such positive advice not only brought a favorable turn to the case, but also generated many practice opportunities for the student — even if she could not have the opportunity to participate in the trial, she would have opportunities to investigate into case facts, to collect evidence, to negotiate and to think, and also she could prepare trail documents to provide assistance to the student who was to take over the case next semester, thereby gaining her goal of learning. Where conflicts arise between the client's interests and the student's personal interests or other interests, it is no doubt that "taking the client's interest as the basis" is the correct resolution. There may be more than one resolution in practice, because the indefiniteness of the reality may produce enough opportunities for us to search our mind to seek for a "win-win" result.

### **3.3 Simulations of Counseling**

#### **Family Difficulty**

The subject of this chapter's simulation is family difficulty.<sup>1</sup> Ask students to read the story and divide them into groups. As a way to answer questions, students in each group respectively play the roles of Mrs. Wang, Mr. Wang, clinical students, and observers in the clinic. Both clinicians and clinical students can further practice legal counseling skills on the facts and plots in the remarks column and make summaries and evaluations after the role play.

### 3.3.1 The Story

A couple, Mr. & Mrs. Wang came to ask for your advice on a problematic matter which is very rare. And you interviewed them last week. Ten days ago, the executive of the pension house, where Mr. Wang's Father, Senior Wang, is staying, told them that, if Senior Wang could not undergo an operation to treat the interior injury of his kidney caused by his fall, he would live for not more than two months.

6 months ago when Senior Wang was identified as incapable of legal transactions, Mr. Wang was appointed as his statutory guardian. According to relevant provisions or agreements concerning statutory guardian, the operation can only be performed at Mr. Wang's permission. But Mrs. Wang did not agree because she "did not want her father-in-law to live such a life". Senior Wang had fell into his dotage long ago, and now his health began failing, too. She explained: "I knew Senior Wang did not want to live on in such a way. Besides, it is a big burden for us to pay for his living expenses, medical treatment and nursing charges." In the interview several days ago, Mr. Wang did not say a word. He just barely nodded as a sign of his agreement with his wife.

The pension house executive said they could not send Senior Wang to take the operation without Mr. Wang's approval. Just as mentioned above, Senior Wang can only live one or two months longer without taking the operation; while if he undergoes the operation, he can live two to five years longer. The Wangs asked you about the result if they disapprove of the operation.

You agreed to counsel them and they would come back to you in 15 minutes. Your legal research reveals that:

- Mr. Wang shall not be liable for any criminal or civil responsibility if he refuses to grant approval to the operation.
- The pension house may apply for change of statutory guardian in order to obtain an approval. (There used to be a precedent judgement entered by a grassroots court.)

Through contacts with the pension house executive, you have noticed that he has no knowledge of the possibility of change of the guardian and he believes that he can do nothing without Mr. Wang's approval.

What advice will you give to the Wangs? Are you going to tell the pension house executive about the possibility of change of the guardian? Are there any other choices you can think of?

### 3.3.2 Questions for In-class Discussions before Counseling

1. Can you refuse to accept Wang's case? If you accept it, can you back out later?
2. What plans do you have to handle the case if you accept it?
3. If Senior Wang is not your client in a legal sense, can you also take care of his interests? What if he is? If he isn't, so who is/are?
4. Can you tell the pension house that they may apply for change of guardian so as to obtain an

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<sup>1</sup> This simulation exercise is adapted from the teaching materials of "the Roundtable Conference on Experiential Legal Education" held by Temple University and Tsing-hua University between Jul. 22<sup>nd</sup> and Jul. 28<sup>th</sup>, 2007.

- approval or the operation? Can tell them any information? If you can, will you?
5. How much information do you have to tell the Wangs? Is there a limit?
6. If you have any ethical concerns about the case, how will these concerns influence the case?

### **3.3.3 Notes for Clinicians (and actors & actresses) in Role Play**

#### **1. Teachers' notes for students:**

“Do you remember that we have made an appointment to meet the clients at 11:15 today? Do you forget it?”

“Let me help you to refresh your memory. We lawyers are so busy that we forget things we should not forget. You are lawyers with \_\_\_\_\_, \_\_\_\_\_ & \_\_\_\_\_ Joint Law Firm (use your students' names), and your office is right on the 28<sup>th</sup> floor of a skyscraper in the CBD of Guangzhou.”

“15 minutes before they come, you can divide yourselves into 5 groups, discussing what advice to give them. I will usher them in at about 11:30. You can ask them questions first or you can tell them your advice directly.”

“Do you have any other questions?”

#### **2. Questions about facts and possible answers:**

To what degree is Senior Wang incapable of legal transactions?

— He has retained his sanity, but he is not very clear about the nature of his illness.

What his illness is exactly about?

— He has got Alzheimer's disease and very serious respiratory disease, that's why he is using a respirator that he always tries to remove.

How much is his nursing charge? Are there any governmental subsidies?

— No, all privately-borne, almost RMB 6,000 yuan a month, paid from Senior Wang's own property.

How much property does he have?

— About RMB 300,000 yuan.

Who is the beneficiary of the above mentioned property?

— Senior Wang.

Why is Mr. Wang his guardian?

— Because he is the son of Senior Wang. But Mr. Wang always follows his wife's idea, especially in the area of family finance which is managed by Mrs. Wang.

How is the relation between the father and son, Senior Wang and Mr. Wang?

— Very good, but it is not good between the “in-laws”.

### 3. Questions that Mrs. Wang wants to ask the lawyer:

Am I getting any trouble? This is my biggest concern. I spend several hundred yuan on this law firm only to get the answer.

Besides, if we approve of the operation and pay for corresponding nursing charges, we are going to use up our life's savings from hard work.

My husband has always been a layman to family finance, so we both agree that I act as the administrator of property. Therefore, from a legal perspective, I should be the one to make the decision whether to approve of the operation, am I right about it?

If I pay you fees, then when some object to my decision, you will defend me and tell me my legal rights, won't you?

### 4. Mr. Wang's role:

Often in a passive state, reluctant to answer questions, never state but imply that you are willing to see a different result. But your wife knows more about these stuffs. If you were the one to make decision, you probably would approve of the operation. Yet now you are the decision-maker, so you are not very certain.

When you are asked questions by some others, your wife always cuts in attempting to answer for you. She cut in at least once or twice.

### 5. Advice from each group after discussion:

- “You may disapprove of the operation.”
- “You may disapprove, but you'd better measure carefully your interests and his needs.”
- “You should not disapprove, because it is not a right thing to do.”
- “I think I am obliged to inform the pension house of their obligations and rights.”

### 6. Concepts concerning lawyers' roles and responsibilities in favor of other actions

1) Lawyer instrumentalism: Laws are clear, yet the client does not know anything of them. But because of the lawyer's involvement, he now knows. Actually I myself don't know what the best way is. A lawyer is no more than a tool to inform people of laws, trying to maintain the client's autonomy of will.

2) Moderate instrumentalism: A client is a person who trusts the lawyer with his affairs. That

means lawyers should serve their clients' interest. A lawyer's job is to guarantee the best profits for the client's action. Because I myself don't know what the best is, I must conduct investigation first. Therefore, a lawyer is a counselor, or a coordinator.

3) Lawyer's autonomy of will covering the least obligation of advice: A lawyer must not be involved into anything unethical. Maybe I don't know what the best is, but I know that once find there is conflict of interests, I cannot help you to the extent beyond the lawful limit.

4) Defender of ethics: In this case concerning a guardian, there should be slight difference in the issue who is the client.

#### 7. Ways to promote active class participation:

Why to pay close attention to Senior Wang's health problem? This is a law firm, not a medical clinic. Mrs. Wang wanted to know about relevant laws, but you asked her medical questions. Why?

Will your advice be influenced by the answers to the question about Senior Wang's health?

Why did you ask questions about money? You have same concerns, haven't you?

It seems that some of you have doubt about Mrs. Wang's motive, right?

Would you act differently if you feared that Mrs. Wang didn't care about Senior Wang's interests?

#### 8. Legal grounds:

*The General Principles of the Civil Law of the People's Republic of China*

Article 17 A person from the following categories shall act as guardian for a mentally ill person without or with limited capacity for civil conduct:

- (1) spouse;
- (2) parent;
- (3) adult child;
- (4) any other near relative;
- (5) any other closely connected relative or friend willing to bear the responsibility of guardianship and having approval from the unit to which the mentally ill person belongs or from the neighborhood or village committee in the place of his residence.

In case of a dispute over guardianship, the unit to which the mentally ill person belongs or the neighborhood or village committee in the place of his residence shall appoint a guardian from among his near relatives. If disagreement over the appointment leads to a lawsuit, the people's court shall make a ruling.

If none of the persons listed in the first paragraph of this article is available to be the guardian, the unit to which the mentally ill person belongs, the neighborhood or village committee in the place of his residence or the civil affairs department shall act as his guardian.

*Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the*



*General Principles of the Civil Law of the People's Republic of China*

(12) The close relatives as prescribed in the *General Principles of the Civil Law* shall include: spouse, parents, children, brothers and sisters, paternal or maternal grandparent, grandchildren, and maternal grandchildren.

(13) The provisions of Article 16 of the *General Principles of Civil Law* shall be applied for the determination of guardians for minors who suffer from mental illness.

(14) When designating guardians, the people's court may regard the items (1) (2) and (3) of paragraph 2 of Article 16 of the *General Principles of the Civil Law* and the items (1) (2) (3) (4) and (5) of paragraph 1 of Article 17 as the sequence for designating guardians. In case the persons who have the qualification of guardianship in the first sequence have no guardian capacity or is bad to the wards, the people's court may, in light of the principle of favoring the wards, determine the guardians by choosing the best one in the persons who have the qualification of guardianship in the second sequence. If the ward has identification ability, his opinions shall be solicited according to the circumstances.

A guardian may be one person or may be several persons in the same one order.

(16) In case of a dispute over guardianship, a guardian shall be appointed by a concerned institution in accordance with paragraph 3 of Article 16 or paragraph 2 of Article 17 of the *General Principles of the Civil Law*. The people's courts shall not accept any cases involving a guardian not appointed.

*Law of the People's Republic of China on Lawyers*

Article 38 A lawyer shall keep confidential the State secrets and commercial secrets of the parties concerned that he comes to know in the course of his practice activities and may not divulge the private matters of the parties concerned.

A lawyer shall keep confidential the matters and information that the client or others do not wish to be divulged and that he comes to know in the course of his practice activities. However, facts and information pertaining to a criminal offence that jeopardizes state security, public safety or seriously jeopardizes the safety of others or others' property that the client or another is preparing to commit or currently committing shall be excepted.

Article 39 A lawyer shall not represent both parties involved in the same case or represent a client in a legal matter in which he personally or a close relative has a conflict of interest.