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CLIENT-CENTERED LAWYERING— WHAT IT ISN'T

*Monroe H. Freedman**

Several years ago, I happened to sit in on part of a colleague's class in family law. The professor showed clips from *Kramer vs. Kramer*, a movie involving a custody litigation between the divorced mother and father of a young child, whom both of them love.¹ At the outset, the lawyer tells his client, the father, "I'll have to play rough," but he provides no explanation of what that means.² Later, after the lawyer conducts a cruel cross-examination of the mother, the client first begins to understand, and says, "Did you have to be so rough on her?"³ The lawyer's only response is, "Do you want the kid or don't you?"⁴ The lawyer at no time makes any effort to counsel the client about the nature of hard-fought custody litigation, to suggest either an effort at conciliation with the mother or an amicable arrangement for sharing time with the child, or to seek out the client's true feelings and desires about possible courses of action.⁵

"That is client-centered lawyering, which is favored by my colleague, Professor Freedman," the professor said disapprovingly.⁶

I explained to my colleague that he had seriously misrepresented client-centered lawyering, and suggested that he read what I had actually

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1. *KRAMER VS. KRAMER* (Columbia Pictures 1979).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Although my colleague was wrong in his understanding of what client-centered lawyering is, he was correct that my philosophy of law is client-centered. As Abbe Smith and I say in the Preface to *Understanding Lawyers' Ethics*: "This book presents a systematic position on lawyers' ethics. We argue that lawyers' ethics is rooted in the Bill of Rights and in the dignity and the autonomy of the individual. This is a traditionalist, *client-centered* view of the lawyer's role in an adversary system . . ." MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS*, at vii (4th ed. 2010) [hereinafter *FREEDMAN & SMITH, ULE IV*] (emphasis added).

written on the subject—but I let it go at that. After all, he was a family law teacher talking to students in one class, not someone who worked and wrote in the field of lawyers’ ethics.

What has motivated me to write now about client-centered lawyering is a recent article by someone who is a serious scholar of lawyers’ ethics. Robert F. Cochran, Jr. is the co-author of an ethics treatise and the Director of the Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics at Pepperdine University.⁷ In his article, Cochran correctly quoted me as saying:

One of the essential values of a just society is respect for the dignity of each member of that society. Essential to each individual’s dignity is the free exercise of his autonomy. Toward that end, each person is entitled to know his rights with respect to society and other individuals, and to decide whether to seek fulfillment of those rights through the due processes of law

[T]he attorney acts both professionally and morally in assisting clients to maximize their autonomy. . . . [T]he attorney acts unprofessionally and immorally by depriving clients of their autonomy, that is, by denying them information regarding their legal rights, by otherwise preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions.⁸

The language in that quotation seems plain enough. The “free exercise” of the client’s autonomy is “essential.” The lawyer is to “assist[] clients to maximize their autonomy,” and the lawyer acts “unprofessionally and immorally” by “preempting [a client’s] moral decisions.”

In addition, in the same chapter of the book, I explained that “[i]n day-to-day law practice, the most common instances of amoral or immoral conduct by lawyers are those occasions in which we preempt our clients’ moral judgments.”⁹ One way that occurs is when lawyers “assume that the client wants us to maximize [the client’s] material or

7. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (2d ed. 2009); *Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics: Meet the Faculty*, PEPP. U. SCH. L., <http://law.pepperdine.edu/nootbaar/about/faculty.htm> (last visited Apr. 20, 2012).

8. Robert F. Cochran, Jr., *Enlightenment Liberalism, Lawyers, and the Future of Lawyer-Client Relations*, 33 CAMPBELL L. REV. 685, 687 (2011) (quoting MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS’ ETHICS* 57 (1st ed. 1990)). See also FREEDMAN & SMITH, *ULE IV*, *supra* note 6, § 3.08, at 62-63; MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* § 3.08, at 62 (3d ed. 2004) [hereinafter FREEDMAN & SMITH, *ULE III*]; Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 FORDHAM L. REV. 1717, 1722, 1727 (2002).

9. FREEDMAN, *supra* note 8, at 51.

tactical position in every way that is legally permissible, regardless of non-legal considerations.”¹⁰ Another way is to go forward without adequate consultation with the client about the client’s desires.¹¹ I also explain that a paramount aspect of client-centered lawyering is paying close attention to what the client says, according respect to the client’s desires, and, in appropriate cases, advising the client about the morality of particular courses of conduct.¹²

Despite that clear statement of my position regarding client-centered lawyering, Cochran goes on to say that client-centered lawyers claim to be neutral in counseling clients, but that, in fact, they “steer[] the client toward making self-serving choices,” and direct the client “to make choices based on consequences to themselves” regardless of the consequences to others.¹³ Cochran adds that “[o]f course, client autonomy has its costs, most obviously costs to other people, and to their relationships.”¹⁴ That, of course, is not a fair summary of my view of client-centered lawyering.

Moreover, one would expect that a scholar in the field would refer to the latest (here, the fourth) edition of a book, rather than rely solely on a first edition that is twenty-one years out-of-date. If Cochran had done so, he would also have realized that his claim is false that “client-centered [lawyers] claim to be neutral” in counseling clients.¹⁵ In fact, there are some circumstances in which client-centered lawyering does include pressing the client forcefully to adopt a particular course of conduct.

In a section devoted to analyzing some difficult cases in which clients express desires to pursue self-destructive courses, Professor Smith and I discuss cases (none of them involving harm to others) in which we would press clients hard to adopt different courses of conduct from those they expressly prefer.¹⁶ These cases include the Unabomber case.¹⁷ There, the defendant, Theodore Kaczynski, was charged with “capital murder arising out of his campaign against ‘technology,’ which he carried out by sending bombs through the mail to various academics and scientists.”¹⁸ The problem faced by Kaczynski’s lawyers was that their client preferred to be executed rather than to defend the case with

10. *Id.*

11. *Id.*

12. *Id.* at 50-57.

13. Cochran, *supra* note 8, at 688.

14. *Id.*

15. *Id.*

16. FREEDMAN & SMITH, ULE IV, *supra* note 6, § 3.07, at 58-60.

17. *Id.* § 3.07, at 58. See also FREEDMAN & SMITH, ULE III, *supra* note 8, § 3.07, at 59-61.

18. FREEDMAN & SMITH, ULE IV, *supra* note 6, § 3.07, at 59.

an insanity defense—a defense that, in his view, would have undercut his message about the evils of technology.¹⁹ As Smith and I explain, this is a case that poses a painful dilemma for client-centered lawyers who oppose the death penalty.²⁰ “Our view is that someone ought to be representing the client’s desires. The problem, however, is that important facts and legal issues may never be presented to the fact-finder, potentially resulting in the client’s death.”²¹

Far from remaining neutral, Professor Smith and I write that “we would have pressed Kaczynski hard to pursue the legal strategy” that would save his life.²² In the final analysis, however, after exploring various alternatives, Smith and I disagree. As we explain, Smith believes that “no reasonable criminal defense lawyer would do what Kaczynski wanted—forgo the only defense that might save his life.”²³ However, Smith would also seek appointment of a guardian ad litem to represent the client’s desires.²⁴ My position is that “Kaczynski was not urging an indefensible position, in view of Kaczynski’s deeply held ideology, and [that] his impassioned commitment to his cause was entitled to deference.”²⁵ Whatever Cochran might make of that discussion, the counseling at issue is not neutral. And I can’t help wondering what Cochran himself, or you, Thoughtful Reader, would do in a case like that.

Finally, Cochran expresses his own “Collaborative Lawyering” view—which is difficult to distinguish from my own client-centered position. In his view, Cochran writes, “the relationship between lawyer and client should be a collaborative one. . . . Lawyers should advise clients about moral issues that arise in representation in the way that friends advise friends, raising such issues for serious discussion, but not imposing their will on the client.”²⁶ The collaborative lawyer, he explains, “engages in moral conversation with the client but generally leaves decisions to the client.”²⁷ Interestingly, Cochran never explains what he means by “generally” leaving decisions to the client, although the implication is that at least on some occasions, he would impose his will on an unwilling client.

19. *Id.*

20. *Id.* § 3.07, at 60.

21. *Id.*

22. *Id.*

23. *Id.* § 3.07, at 61 n.80.

24. *Id.* § 3.07, at 61.

25. *Id.* § 3.07, at 61 n.80.

26. Cochran, *supra* note 8, at 690.

27. *Id.* at 691. Oddly, Cochran criticizes me for saying that I would follow the client’s instructions if the client rejected my advice. See SHAFFER & COCHRAN, *supra* note 7, at 26.

In a final misunderstanding of client-centered lawyering, Cochran writes:

One of the best ways to raise moral concerns in the law office is by asking questions which come naturally in the course of decision-making. As to each alternative under consideration, the lawyer can ask the client, "What will be its effect on other people?" The lawyer and client should consider all of the consequences that might arise from various alternatives, not (as with client-centered lawyers) merely the consequences to the client. The lawyer might also ask, "What would be fair?" Such questions call on clients to draw on their own sources of moral values.²⁸

Except for the words in parentheses, that is a good summary of client-centered lawyering. For example, there is an illustration in the current edition of *Understanding Lawyers' Ethics* of a conversation I had in a law office, suggesting to a client that he might not want me to evict a war widow with a young child, in accordance with his initial instructions.²⁹ Without undue pressure on my part, the client changed his mind, and chose not to evict her.³⁰

Ironically, Cochran and Shaffer have used that incident as an illustration of moral counseling in their treatise.³¹ Another case used by Cochran and Shaffer to illustrate moral counseling is one in which a contentious adversary, in proposing a redraft of a contract, made a million-dollar-a-year error in my client's favor.³² Although my client's first reaction was to take advantage of the error, I was able to persuade him (again, without undue pressure) to reveal the error to the adversary, in part because doing so might create a better relationship than had previously existed between the parties.³³

Client-centered lawyering is premised on respect for the dignity and autonomy of each member of society. Clients are therefore entitled to know their rights with respect to society and other individuals, and to decide whether to seek fulfillment of those rights through the due processes of law. Lawyers therefore act both professionally and morally in assisting clients to maximize their autonomy. And lawyers act

28. Cochran, *supra* note 8, at 692.

29. FREEDMAN & SMITH, ULE IV, *supra* note 6, at 74.

30. *See id.*

31. SHAFFER & COCHRAN, *supra* note 7, at 25. *See also* Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319, 327 (1987).

32. *See* SHAFFER & COCHRAN, *supra* note 7, at 25. *See also* Shaffer, *supra* note 31, at 327.

33. *See* SHAFFER & COCHRAN, *supra* note 7, at 25-26. *See also* Shaffer, *supra* note 31, at 327-28.

unprofessionally and immorally in preempting or overriding their clients' desires.

That obligation to maximize a client's desires cannot be fulfilled without counseling the client, which includes paying close attention to what the client says, and according respect to the client's desires. In addition, in appropriate cases, client-centered lawyering includes the lawyer's advice to the client of what the lawyer believes would be a moral course of conduct to take. Nevertheless, "[i]n the final analysis . . . the lawyer should always remember that the decision whether to [forgo] legally available objectives or methods because of non-legal factors is ultimately for the client and not for [the lawyer]."³⁴

Professor Cochran can put that forth as "Collaborative Lawyering," but it has been, for decades, what is called client-centered lawyering.

34. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1986).