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WHEN STUDENTS LOSE PERSPECTIVE: CLINICAL SUPERVISION AND THE MANAGEMENT OF EMPATHY

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This article examines the opportunities and problems that arise in the process of lawyer-client communication. The authors suggest that empathic communication is a critical dimension of lawyering and that without empathy, much valuable affective and cognitive knowledge about the client's case may be lost. A critical first step in this process involves identification with the client. In the article, the authors clarify how identification differs from empathy and challenge the oft-cited concern of "over-identification." In addition, they examine those situations in which identification with a client may have negative consequences for representation. These issues are explored in the context of how law students and lawyers manage the emotional content of their work. Addressing these concerns provides an opportunity for clinical legal educators to enhance the supervisory process by assisting law students to recognize, discuss, and interpret their emotional experiences of working with clients. The authors propose a model of clinical supervision that supports the development of skills that draw upon the empathic experience of interviewing. Finally, the article draws attention to the connection between these so-called "soft" skills and the impact of the lawyer's career on professional satisfaction and well-being.

INTRODUCTION

Gathering and assessing information is an essential element of lawyering. Lawyers need accurate and adequate facts to analyze and attempt to resolve the legal problems their clients present. Interviewing, one of the primary tools that lawyers employ to gather information, encompasses several skills, one of the most important of which is

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the use of empathic communication.¹ Although some legal educators treat empathy as a value,² we suggest that it is more accurate to understand empathy as part of the *process* of gathering information.³ We contend that empathy involves identification with the speaker; the lawyer is called upon to *feel* as the other does not only to solicit information but also to *understand* more fully the import of the speaker's words. This process requires that the lawyer learn to attend to the nonverbal communications of the client; in turn, this implicates a host of skills and techniques lawyers need to manage the emotional dimension of their legal work.

In this paper we explore how clinical legal educators can build a framework for students to recognize, discuss and interpret their emotional experiences of working with clients. We believe that skilled supervision in this area is essential to train law students to manage empathy and identification in the lawyering process. Thus we frame our discussion of empathy in the context of training law students successfully to navigate and negotiate the emotional dimension of

¹ See DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH*, 40, 41-42 (1991) (empathizing with clients "will enable [the lawyer] . . . to receive information that clients might not otherwise disclose . . ."); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION*, 116-126, 116 (1990) ("Empathy is the sine qua non for effective interviewing and counseling."); Philip M. Genty, *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 *CLINICAL L. REV.* 273, 275 (2000) ("Empathy is among the most important lawyering skills that students can learn in a clinic.")

² See Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 *CLINICAL L. REV.* 605, 616 (1999) (advocating for a clinical model that employs "empathetic engagement," a concept that "involves political commitments" and "recognizes that interpersonal issues and political issues exist on a continuum"); Stephen Ellmann, *Empathy and Approval*, 43 *HASTINGS L.J.* 991, 993 (1992) (arguing that positive judgment is "latent" in empathy and that lawyers should be able to offer clients approval defined as a "positive judgment and endorsement of part or all of the client's world view"); see also Genty, *supra* note 1, at 274 (linking the concept of empathy with the client's desires to be respected by the legal system); Teresa Bruce, *The Empathy Principle*, 6 *LAW & SEXUALITY*, 109, 112-113 (1996) (advocating that substantive values of inclusion would be incorporated into legal rules if judges employed empathy in their decision making processes.)

³ See Lynne N. Henderson, *Legality and Empathy*, 85 *MICH. L. REV.* 1575, 1576 (1987) (arguing that "empathy is a form of understanding, a phenomenon that encompasses affect as well as cognition in determining meaning; it is a rich source of knowledge and approaches to legal problems . . ."); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 *U. CHI. L. REV.* 361, 379-82 (empathy is "a tool used to achieve a variety of ends" and the recipient of knowledge gained by empathetic communication may choose how to use the information gained). Authors of one lawyering skills text have approached empathy as a tool lawyers may use to work with clients from different cultural backgrounds. ROBERT COCHRAN, JR., JOHN M. A. DIPIPPA & MARTHA M. PETERS, *COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH* 215 (1999) ("Empathy is a way for a lawyer to transcend differences by using his own humanness to understand the experiences of another.") We believe that this is one example of empathic communication, but argue for a broader application of this information gathering technique.

lawyering.

We open this paper with a discussion about what empathy and identification are and their relationship to lawyering. We argue that lawyer identification with a client is necessary to gather information. Identification is critical to the development of empathy, which in turn facilitates collaboration and full disclosure on the part of the client. We then explore when client identification plays a positive role and when it threatens the problem-solving abilities of the lawyer. In other words, when does a lawyer's identification with the client have negative consequences for the representation?

In the second section of this paper, we explore this question by addressing several issues regarding how lawyers manage the emotional content of their work – the emotional state(s) of their clients as well as the emotional reaction of lawyers to their clients. For example, we examine how the lawyer's self-awareness, ability to set and maintain boundaries with clients, as well as the lawyer's personal and professional development are involved in managing identification and empathy.

In the final section, we turn to the setting of law school clinics, in which students can practice empathy and identification and begin to learn how to manage these aspects of the lawyering process. We argue that the clinical supervisor should provide a framework for students to interpret their emotional reactions to their lawyering experiences. Further, we propose a supervision model to address the issues of empathy and identification in the clinical context.

I. INTERVIEWING, EMPATHY AND IDENTIFICATION

A. Interviewing

While lawyers analyze many types of information in working with clients – legal rules, the informal customs of a particular forum or decision-maker, public opinion or attitudes regarding the population to which their client belongs – the information lawyers obtain through talking to clients and witnesses remains central to successful legal representation. The professional duty of lawyers to represent the interests of their clients requires lawyers to understand what their clients want, which in turn calls on lawyers to elicit, interpret and respond appropriately to information from their clients. Thus legal skills texts focus on interviewing techniques as a key to effective lawyering.⁴

⁴ BINDER, ET AL., *supra* note 1, at 31-81; BASTRESS & HARBAUGH, *supra* note 1, at 61-75; COHCRAN, ET AL., *supra* note 3, at 31-55. An extreme example of conceptualizing empathy as a skill is an article that claims "with only four hours of training lawyers and law students can learn to respond empathetically to clients." John L. Barkai & Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 Sw. U. L. REV. 505, 508 (1983).

However, interviewing is an art as well as a skill. The predominant approach adopted in legal texts toward teaching interviewing techniques over-emphasizes the skills aspect and pays little attention to the “art” of this communication mode.⁵ Interviewing is not a single event, limited to the initial meetings during which the client describes the problem. Rather, interviewing skills come into play every time the lawyer engages with the client and are part of the repertoire of counseling skills.

Interviewing involves eliciting information from clients and witnesses. This information-gathering may focus on particular events – asking a client to describe the sequence of incidents that caused her to flee the country and seek asylum – or may include obtaining the speaker’s impressions and perspectives about a broader topic – listening to employee members of a class action challenging workplace discrimination discuss the remedial measures they would like to request.

While encouraging a client or witness to talk is one aspect of interviewing, to interpret accurately the *meaning* of the words uttered, the lawyer must also factor in verbal cues and body language used by the speaker and make appropriate inferences. For example, a client may provide detailed information about a legal claim for political asylum, but may do so while displaying anger or hostility by shouting, being verbally aggressive or not making eye contact with the lawyer. These behaviors may indicate displeasure with the lawyer, frustration with life in a new country, or difficulty in discussing the topic. Thus the lawyer is called upon not simply to record the verbal content of the interview, but to synthesize it with additional information gleaned from the context and manner in which the words were delivered.⁶ In

⁵ Skills texts in this manner reflect the priorities and assumptions of legal education in general, which tends to emphasize abstraction and generalizable principles over particularized contexts and experiences of the individuals subject to the law. See Henderson, *supra* note 3. Henderson notes that “the ‘normal’ discourse of law disallows the language of emotion and experience.” *Id.* at 1575. And further, that “the emotional, physical, and experiential aspects of being human have by and large been banished from the better legal neighborhoods and from explicit recognition in legal discourse” *Id.* The legal literature on empathy is informed by and is related to the legal literature on narrative – a focus on the experiences of individuals, particularly members of subordinated groups, is to analyze and understand the impact of legal norms on traditional “outsiders” to the law and legal institutions. For examples of this rich scholarship see Henderson, *supra* note 3; Bandes, *supra* note 3; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989).

⁶ See also COCHRAN, ET AL., *supra* note 3, at 215 (incorporating cultural awareness into interpretation of client interview). Other disciplines use similar techniques. For example, participant observation is the essential skill of anthropological research and involves “establishing rapport in a new community; learning to act so that people go about their business as usual when you show up; and removing yourself every day from cultural immersion so you can intellectualize what you’ve learned. . . .” H. RUSSELL BERNARD,

this example, at a minimum the lawyer would need to ask the client additional questions to explore the sources of the client's anger and respond accordingly.

B. Empathy

The term "empathy" has been employed by legal scholars and educators to mean a variety of different things. Legal scholar Lynne Henderson summarizes the literature on definitions of empathy by noting three possible components of the word: "(1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively . . . and (3) action brought about by experiencing the distress of the other."⁷ For the purposes of this paper we limit ourselves to the first two definitions articulated by Henderson, defining empathy consistent with its emergence as a psychological concept around the turn of last century. Originating with the translation of the German word *Einfühlung*, to mean "feeling into," empathy developed as a concept in the field of psychology and refers to an emotional state in an observer that is akin to that of the subject.⁸

In her book, *From Detached Concern to Empathy: Humanizing Medical Practice*, Professor Jodi Halpern⁹ examines the contribution of empathy to the acquisition of knowledge in medical diagnosis and treatment. Halpern clearly delineates the dichotomous perspectives on the meaning of empathy: (1) the clinical detached observer stance, which is based upon observation and labeling of the patient's feelings, but which keeps the physician removed; and (2) the empathic stance, which allows the physician to see the world from the patient's perspective – from the inside out. Halpern rejects the detached stance as a distortion of the meaning of the concept. She notes that empathy has two components, the affective or feeling state, and a cognitive aspect that allows for interpretation of what is seen and felt. By embracing the concept of "emotional reasoning" that emerges from empathic communication, she elucidates the process of intuitive and cognitive decision-making that leads to a more accurate understanding of what the patient is attempting to communicate about the problem. In sum, Halpern notes that empathy is "an essentially experiential understanding of another person that involves an active, yet not necessarily

RESEARCH METHODS IN CULTURAL ANTHROPOLOGY 148 (1988).

⁷ Henderson, *supra* note 3, at 1579.

⁸ See STEPHANIE D. PRESTON & FRANS B.M. DE WAAL, EMPATHY: ITS ULTIMATE AND PROXIMATE BASES (2000) (citations omitted), available at http://cogprints.ecs.soton.ac.uk/archive/00001042/00/preston_de_waal.html.

⁹ JODI HALPERN, FROM DETACHED CONCERN TO EMPATHY: HUMANIZING MEDICAL PRACTICE 39-77 (2001).

voluntary, creation of an interpretative context.”¹⁰

Halpern’s insights are equally important to the practice of law. Legal educators frequently tend to derive their understanding of empathy from the detached observer perspective. For example, legal skills texts introduce the concept of empathy primarily as a necessary skill to build trust by “saying the right thing.”¹¹ This “outside in” stance maintains professional distance yet ignores the importance for the lawyer of emotional communication (feeling and understanding) in recognizing the client’s needs.

Other scholars have developed the concept of empathy in a direction that takes it too far afield from its true meaning. For example, Peter Margulies has advocated for a “reframed” conception of empathy that encompasses “macro-level,” values like practicing law in a manner that “enlists the lawyer on the side of people who are subordinated, belittled, and impoverished.”¹² Clinical legal scholar Stephen Ellmann, while recognizing a distinction between the concept of empathy and the expression of values, like approval, advocates for lawyers to include expressions of approval in their communications with clients.¹³ He suggests that clients may perceive acknowledgement as approval and he asserts that there is positive value to clients in making this approval explicit.

These perspectives on empathy blur the distinction between an *emotional state* and desired or consequent *actions* or *behaviors* based on that experience.¹⁴ Moreover, approval or political solidarity masked as empathy may be counterproductive to the attorney-client relationship, because such statements may be misinterpreted by the client and direct the lawyer into pathways that the client has no interest in exploring. The client may perceive – correctly or incorrectly –

¹⁰ *Id.* at 77.

¹¹ See, e.g., BINDER, ET AL., *supra* note 1, at 40-42; BASTRESS & HARBAUGH, *supra* note 1, at 116; Barkai & Fine, *supra* note 4.

¹² Margulies, *supra* note 2, at 616.

¹³ Ellmann, *supra* note 2, at 993. It is critical to distinguish between acceptance and approval. Acceptance signals acknowledgment and respect – these are values not judgments – while approval implies an expectation on the part of the attorney that the client may try to meet. The danger thus is that the client may withhold or distort information relevant to the case in order to win the approval of the attorney. Ellmann cautions that lawyers need to be judicious in voicing approval, in part recognizing some of the pitfalls we outline here. Ellmann, *supra* note 2, at 1005 (acknowledging danger that attorney approval may “discourage client from speaking frankly about aspects of his situation or thoughts that contradict the ideals he himself initially expressed and the lawyer initially approved.”) Nevertheless, we suggest that empathy and identification, properly employed by the attorney, may achieve the desired goals of truth and respect Ellmann advocates, while avoiding the problems that may result from attorneys dispensing too freely with positive judgments.

¹⁴ See Bandes, *supra* note 3, at 379-380.

that the client is an instrument to the lawyer's larger political agenda or ambitions. In response, the client may withhold or distort information that may have an adverse impact on the legal claim. By viewing the client's legal claim through the distorted prism of a larger political agenda, the lawyer may also incorrectly assess the needs of the client.

We argue for the salience of the psychological view of empathy as an other-oriented feeling that is congruent with the perceived welfare of the subject. Thus for attorneys, empathy involves an emotional experience that mirrors that of the client's, a state of feeling in the lawyer generated by the client's words and nonverbal behavior. The only actions that directly follow from empathy are those interactions that lead to deeper understanding of the client's distress, or interventions based on empathic communication and other sources of information.¹⁵ As Henderson notes "there is not a direct causal relationship between empathy and helping behavior, but a connection between empathy and helping or altruistic behavior does exist."¹⁶

C. Identification

While empathy involves identification with another, and empathy and identification are closely linked, these terms refer to two distinct psychological mechanisms that require further differentiation. In the psychological literature, the concept of identification refers to the "normal" process of child development, in which identification with a parent is a reflection of the maturing personality. The noted psychologist Erik H. Erikson wrote: "Children at different stages of their development identify with those aspects of people by which they themselves are most immediately affected, whether in reality or fantasy."¹⁷ Although identification is similar to imitation in that an individual models the beliefs or behaviors of an influential other, imitation is a conscious process, identification is not.

In adult life, in the process of human interaction, frequently and *unconsciously* we take on the attitudes, behaviors and perspectives of others. In professions that involve intense interpersonal interactions

¹⁵ For example, a lawyer appropriately may feel sadness when a Tibetan client is crying and describing the murder of a family member for protesting Chinese rule in Tibet. Verbalizing approval of the client's state of mind or expressing political solidarity with Tibetan independence are possible responses that involve choices by the attorney about conveying values. Yet these choices are not empathy. And while these values may be desirable and clinical legal educators may seek ways to inculcate them in law students, we suspect that such discussions may have more to do with attorneys' political engagement with clients and their problems rather than about the meaning of empathy in the attorney-client relationship.

¹⁶ Henderson, *supra* note 3, at 1582 (citation omitted).

¹⁷ ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 158 (1968).

such as law, medicine, social work, mental health work and humanitarian assistance, professionals are vulnerable to these identifications for at least two reasons. First, the helping professions are built upon the concept of the professional championing the welfare of the client. Second, we identify with people in situations in which some aspect of the client resonates with an unrecognized aspect of our psychological make up, perhaps related to demographic factors such as age. There are positive and negative consequences to the process of identification among professionals. On the one hand, identifications may facilitate empathy and a deeper understanding of client needs. On the other hand, identifications can impede the helping role the professional is obligated to play.

Although in popular parlance the term “over-identification” often is used to refer to the situation that occurs when a professional loses a sense of objectivity with respect to the client’s wants and needs, this is a misnomer. Identification reflects a continuum of response. It is only when objectivity is lost that identification becomes problematic. Furthermore, we are troubled by the term “over-identification” because it carries a negative connotation and the implicit message that one should not identify with a client at all. However, identification is a critical component of building relationships, including lawyer-client relationships. Thus, the dilemma for the lawyer is how to reconcile the maintenance of a professional boundary with empathic understanding.

We understand identification and empathy as communication modalities, integral to the way in which lawyers gather information from clients and witnesses. This leads us to examine their impact on legal representation. Identification and empathy permit lawyers to “enter” into the emotional state of their clients. To the extent that identification facilitates empathy toward the client, we assert that it is helpful. The ability of the lawyer to experience the emotional state of the client provides the lawyer with a far richer understanding of the client and the client’s legal needs than if the lawyer were limited to analyzing communication based on verbal content and body language alone. However, to the extent that identification leads to an advocate becoming overwhelmed by an emotional experience such that it clouds the attorney’s professional judgements, we argue that identification creates a problem with adverse implications for the representation of the clients.

Although empathy requires the observer to identify with the subject, identification does not necessarily lead to empathy; however it is a necessary step in that direction. For example, a lawyer who identifies with a poor, socially marginalized client fighting an eviction notice

who cannot afford another apartment, may come to believe that the case is hopeless and there is little if nothing the lawyer can do to assist the client. Identification can fail to produce empathy when lawyers are working with groups as well. In the human rights context, lawyers interviewing victims of torture or trauma may become overwhelmed and disturbed as a result of taking in the experiences of suffering.¹⁸ In such situations, the lawyer distances herself from the client, and in so doing, can no longer “imagine” or “be with” the client’s state. Although she does identify with the pain, she disengages and may often no longer be able to acknowledge the client’s experience or even the client’s *questions*. The cognitive component of empathy is foreclosed.

In addition, identification that occurs with a *class* of clients defined by characteristics such as gender, ethnicity, age, or status can interfere with empathy. Although a professional may identify strongly with the cause of a class or group of people, empathy is limited to a feeling state the professional experiences in relation to a single client. For example, where the client is a young professional who has initiated a lawsuit based upon racial discrimination, identification with the client’s age, status, ethnicity – characteristics reflecting social factors – and perhaps, the lawyer’s own life experience may influence the views of the attorney, leading to the danger of missing or discounting information being communicated by the client, which is vital to the case.

Sometimes professionals fail to identify with their clients. A “lack” of identification may occur for many reasons, including the rejection by the lawyer of tendencies in him or herself that the lawyer perceives in the client. In addition, the inability to feel a commonality with a client may be caused by the professional’s value judgments or biases. In either situation, representation may be compromised by such lack of feeling or antipathy on the part of the attorney. One such example is the lawyer who constantly battles with controlling his or her rage. While the attorney may have had episodes of overt aggression in the past, this individual successfully manages these emotions. When confronted with a client who manifests verbal aggression and

¹⁸ See PRICILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 217 (2001). For a discussion of adverse affects of qualitative field research on the researcher see Patricia A. Omidian, *Life Out of Context: Recording Afghan Refugees’ Stories*, in RECONSTRUCTING LIVES, RECAPTURING MEANING: REFUGEE IDENTITY, GENDER, AND CULTURE CHANGE 151 – 178 (Linda A. Camino & Ruth M. Krulfeld eds., 1994); Linda Dunn, *Research Alert! Qualitative Research May Be Hazardous to Your Health!* 3 QUALITATIVE HEALTH RES. 388 (1991). Psychotherapists who work with survivors of torture and other severe traumatic events are aware of the profound effects that listening to a recounting of these events has on them. See Debra A. Neumann, *Vicarious Traumatization*, CAL. PSYCHOLOGIST, Dec. 1996, at 12.

anger, the attorney shuts down and may begin to avoid the client. As another example, a lawyer's own experience of an alcoholic mother may interfere with her ability to competently represent a client seeking to maintain custody of her child against a state petition charging the mother with neglect. The lawyer may experience marked resistance to any identification with the client. In fact, the identification may be with the child.

If some identification is necessary but too much is harmful, what is the right amount? While it may be difficult to determine in advance what is the "right" amount of identification, the appropriate level of identification is exceeded once it impairs the lawyer's motivation or professional performance. Thus identification is an issue that an attorney needs to manage in the larger context of the attorney's emotional relationship to legal representation.

The above examples suggest that in the professional socialization of lawyers through education, supervision and mentorship, it is critical to incorporate the affective dimensions of lawyering. The challenge for those who teach or supervise attorneys is to establish a model of lawyering in which openness to the client is encouraged and openness to one's own emotional responses is valued as a source of information in developing a case.

II. SELF-AWARENESS, BOUNDARIES & DEVELOPMENT

Legal education devotes insufficient attention to developing the attendant skills and mechanisms lawyers need to negotiate successfully the emotional demands of the profession. Lawyers and academics frequently discount the emotional aspects of professional work as a "distraction" or "irrelevant" to the tasks of lawyering.¹⁹ By labeling attention to these issues as "soft" or "touchy-feely," the profession does a disservice to its students, its practitioners and its clients. To address these demands, we argue that clinical legal educators need to inculcate in law students at least three essential skills: self-awareness, boundary setting, and development of the personal and professional self. Students must learn to engage each of these in the process of maintaining an appropriate use of identification and empathy.

Self-awareness is the ability to stand back, observe and analyze one's feelings, actions and behaviors. In the context of law practice, it is important for lawyers to develop self-awareness to enable them to analyze how they feel about a client and the legal representation. While in general, legal education and the legal profession avoid addressing the emotional dimension of the practice of law, how a lawyer

¹⁹ See Henderson, *supra* note 3.

feels about the client and the casework has a profound impact on the legal representation.²⁰ There are a plethora of anecdotes about lawyers changing their law practice or leaving the profession because they *feel* frustrated, sad or disillusioned about their clients or the broader social impact they feel their work has. Thus we argue that self-awareness plays a crucial role in facilitating recognition of and acknowledgment by lawyers that their emotional state *is part of* the legal representation. Equipped with this knowledge, law students may begin to pay attention to whether and to what extent they have problems identifying with clients, thus enabling additional intervention if appropriate.

The establishment and maintenance of *professional boundaries* also is critical for students to master. Lawyers are service providers in one of the helping professions. As such, lawyers are in the position of having to respond to client needs and demands. Often the parameters of the representation may be unclear and therefore the lawyer must (re)negotiate the scope of the legal work to be performed. Working with marginalized clients and communities presents particular challenges in this regard, because the needs of the affected populations are so great and varied. Lawyers must decide whether and on what basis they can take on additional or new legal work for a current client with multiple legal needs. Further, in considering the scope of the representation, lawyers must address not only the legal problem(s) they will seek to resolve, but also the type of services they will provide. These challenges provide the opportunity in legal clinics for educators to explore with students the complex demands that working with such clients make on their professional role. For example, a lawyer may encounter a client who has been thrown out of temporary housing and has not eaten for two days. Should the lawyer feed the client? Find a shelter? Take the client home? Certainly not all lawyers face these dilemmas, yet they are dramatic illustrations of the types of decisions legal professionals must confront and often revisit with clients throughout the course of the representation. Because the need to (re)establish professional boundaries is embedded in the attorney-client relationship, it is a skill that law students will employ throughout the duration of their careers.

Self-awareness and boundary setting are critical outgrowths of empathic communication with clients. As we have argued, law students must become aware of how their own needs or beliefs may influ-

²⁰ For a critical self-reflection on the importance of the psychological concept of transference to the ability of the anthropologist to gain insights in the subject of fieldwork see Paul Riesman, *Fieldwork as Initiation and as Therapy* (unpublished manuscript on file with the authors).

ence their responses to a client's predicament. If a lawyer's desire to fight for social justice interferes with the ability to hear what the client is saying, then the client will lose the representation to which he is entitled. For example, one law clinic student representing a community group starting a micro-credit bank is asked by the client to broker a meeting with local business leaders. The student, believing that systemic racism is the root cause of disparate development, advises that only labor organizations and workers rights groups can help the organization because these groups are waging the same fight. In this situation, the student does not hear that the group has good relations with local entrepreneurs and thus, the student compromises the organization's strategy. Consequently, resentments can build and the client organization may come to believe that the clinic is not working in its best interests.

Similarly, if a student places herself in the position of giving approval to a client based on her own needs for control, then once again, the process of empathy is destroyed and the client will be disempowered. This situation can be illustrated by the following example: a law student working with members of a community activist group fighting toxic dumping encourages their leader to speak at numerous community meetings about her personal health consequences that have resulted from the contamination. The student tells her that her public appearances are important to the cause. By constantly repeating her experiences, the leader is becoming depressed but cannot share her distress because she fears disappointing the student advocate. This issue raises the question of how the supervision of law students must encompass these critical issues. Boundary setting is not based solely on what services are offered or the amount of time spent but also on the need to maintain a boundary based on a recognition of client needs and those of the lawyer as well. This recognition grows out of both self-awareness and empathy.

Finally, the lawyer's *personal and professional growth* influences the legal professional's emotional reactions to and engagement with legal practice. While frequently overlooked as a dimension of legal problem-solving, the progression of a law student into a competent legal professional entails attention to these two factors. Mature attorneys are able to manage and balance the emotional demands of their work. They are aware of their emotional reactions to their clients and are able to establish and maintain boundaries with their clients without creating stress for themselves and without generating distress for or provoking a negative reaction from their clients.²¹ Yet this takes

²¹ See also Dunn, *supra* note 18.

time and requires an expanse of opportunities and experiences from which to master these techniques.

Although informal mentoring by more senior practitioners helps develop new attorneys entering the profession, these relationships may focus more on professional as opposed to personal growth. There is a common attitude among professionals in many disciplines that one's "personal" issues, including one's emotional reactions to and experiences of work, are inappropriate in the context of a "professional" discussion.²² Thus even though an attorney may find it difficult to complete a legal task, like prepare a client's statement, because it is painful to discuss and write about the client's torture, the attorney will not raise this with a supervisor. If they address these issues at all, lawyers may turn to friends, family and mental health professionals in an attempt to make sense of their emotional relationship to their work.

Although we believe that professional development among attorneys would be improved if lawyers supervising new entrants to their ranks incorporated discussion of the skills described above to promote management of the lawyer's emotional reactions, we focus on legal clinics. We do so because of the explicit educational missions of these institutions and the unique opportunities they provide to innovate legal education.

III. A MODEL FOR CLINICAL SUPERVISION

We assert that the role of the legal supervisor includes not only providing substantive law training and carefully reviewing legal work product but also attending to the issues regarding students' emotional experiences engendered by and reactions to their legal work.²³ We are *not* advocating that clinical supervisors serve as friends or therapists to their students. However, if a goal of clinical legal education is to train and socialize law students into the profession, clinical legal educators must engage with the personal and professional growth of their students. The role of the supervisor is to provide an analytical framework and facilitate a process through which students may inter-

²² See Annette Friend, *Mentors: Trusted Counselors*, LEGAL TIMES, May 20, 2002, at 30. The author cautions mentors against discussing topics that "might cause either individual or mutual discomfort" such as personal relationships and financial matters. We agree that mentors are not parents or psychotherapists, however we posit that mentors should be equipped to maintain professional boundaries through discourse with mentees rather than avoidance or silence.

²³ The psychological dimension to learning and teaching are more explicit in some of the helping professions, in particular the supervision of psychotherapy students. See RUDOLPH EKSTEIN & ROBERT S. WALLERSTEIN, *THE TEACHING AND LEARNING OF PSYCHOTHERAPY* 3-15 (1972).

pret their emotional reactions to their experiences as legal advocates.

Thus legal clinicians need to attend to the emotional responses of their students to their legal work in a manner that encourages role-appropriate professional development. A clinical supervisor not only should teach interviewing techniques, but also should include a discussion of the need of the interviewer to pay attention to and interpret her or his emotional reactions to the verbal context and body language of the client or witness. Similarly, the supervisor should introduce the psychological concepts of empathy and identification and their application to legal practice. Finally, the supervisor should facilitate student self-awareness and boundary-setting abilities in the context of developing the student as a legal professional.

How is a supervisor to do this? We offer a supervision model to address empathy and identification that consists of three steps: (1) recognition of a problem with identification; (2) communication with the student about the problem; and (3) initiation of an appropriate corrective response. Our approach to recognizing and addressing identification issues will cover a broad range of professional behaviors that require intervention by the supervisor. Rather than offer suggested responses to a variety of performance problems that arise in clinical teaching, we focus our attention on some examples of the ways in which problems with identification may manifest in the attorney-client relationship. By so doing we hope to illustrate that identification issues may surface as a performance issue. This highlights the importance of arriving at a correct understanding of the problem. We think that supervisors will be able to adapt our suggested approach for addressing these issues to steps two and three (communication about the problem and initiation of corrective action), should the supervisor and student determine that the root of the problem is not identification but some other cause. Therefore we devote our discussion to the more germane question of how to determine whether a student is having trouble with distortions in identification with the client.

This model presupposes that the supervisor adopts an approach to clinical teaching that is consistent with the emotionally attendant mode that we have described. It requires the supervisor to make explicit to students that the clinical experience incorporates the emotional dimension of the lawyering process. Thus supervisors and students must operate within a framework in which supervisors are comfortable with engaging students in the emotional dimension of legal work as well as encouraging students to self-reflect on this aspect of their clinical experience.

A. *Recognition of the Negative Influence of Identification*

How does a supervisor recognize that a student's identification with a client may be adversely affecting the representation? We believe that there are two primary indicators: (1) the emotional response of a supervisor toward a student; and (2) the factual problems that emerge through a student's behavior. A supervisor's own reaction to information from the student about the client, the legal work or matters related to the case, may provide the supervisor with the first clue of student adverse identification.²⁴ Supervisors experience emotional responses to students – both positive and negative – in a manner that mirrors the process that students undergo vis-à-vis their clients. Thus, supervisors should be attuned to and reflect on their feelings generated by students' behaviors. Generally, the stronger the negative reaction of the supervisor, the greater the need to probe the student's motivation for the behavior. Every action a student takes on a case generates some emotional response in the supervisor, yet not every action requires a dialogic analysis between the supervisor and student. We are concerned here with student behaviors that threaten to compromise effective representation as opposed to improvements in performance that would be expected in the usual progression of professional competence. In sum, we are concerned with behaviors that raise a "red flag" that effective representation may be threatened.

For example, a supervisor asks a student how she responded to a client who had come in requesting emergency housing assistance the day before. The student reports that she has not done anything as yet because she "forgot." A possible reaction by the supervisor might be frustration, dismay and/or anger at the student (all of which would be appropriate). However, a strong emotional reaction of the supervisor also might alert the supervisor to the possibility that the student could be identifying with the helplessness of the client and feeling powerless herself to intervene. In this example, during supervision, the student admitted that she felt that the client had so many problems that thinking about the client made her depressed. She wanted to avoid the client altogether. In addition, as this example illustrates, the behavior of the student is another indication of an adverse student response. Although the student could identify with the client, she became overwhelmed by the client's despair and expressed her own emotional state by behaving in a role-inappropriate way, that is, by avoiding the client.

Students may display problems with identification in a number of ways. They may become angry with their clients or believe that their

²⁴ See Reisman, *supra* note 20.

client's legal claim has no chance of success. For example, a juvenile client represented by a law student in a custody proceeding tells the student that he does not want his father to have custody because his father has abused him. The student receives an evaluation from a psychologist that states that the client exhibits no symptoms of abuse and expresses the opinion that the client possibly may be using allegations of sexual abuse to get attention. The student, who up to this point, has been a zealous advocate, becomes furious with the client and storms into the supervisor's office demanding that the clinic drop the case. The law student feels betrayed.

Students may react to their clients' emotional distress by becoming involved in the personal lives of their clients at the expense of working on their legal claims. We give the example of a clinic student drafting estate planning documents for an HIV positive client. The sixty-year old client is the care provider and sole blood relative for his two grandchildren, whose parents died in a car accident. The client developed resistance to the HIV medicines, and treatment is no longer effective. His doctor has told him that he can expect to become incapacitated within the next several weeks. Yet the client has not told his grandchildren of his health status, unable to confront the fear he knows his grandchildren will feel at the prospect of his demise. The student befriends the client and grandchildren and visits the client's home repeatedly, ostensibly to prepare the legal documents, but instead listens to her client discuss his emotional state. She takes the grandchildren on outings, returning to the office without executing the documents. After two weeks of telling the supervisor that she is still working on the documents, the student abruptly tells the supervisor that the clinic's approach to assisting clients is too narrow and that the student is providing the client with more critical, holistic services, placing the client's emotional needs first and that the documents will get done when the client is "ready." By identifying with the client, the student has blurred the boundaries of her professional role.

In each of these examples, the students' emotional reaction to the client threatens to jeopardize the ability of the student (and clinic) to serve the client's interests. In these situations, the supervisor is called upon to intervene and "fix" the problem. For those clinics adopting a non-directive supervision model, i.e. where the pedagogic priority is to maximize student learning by giving the student primary responsibility for strategic decisions, how the supervisor intervenes is critical. Ordering or telling the student what to do impedes the development of the student's capacity to recognize these junctures as critical moments of professional judgment and the opportunity to practice the exercise of role appropriate behavior.

A supervisor cannot assume the causes for the behavior – and therefore the appropriate intervention – without actively engaging the student in a joint problem-solving approach. In the first two examples, the supervisor might think the problem was that the student was unable to empathize with the client, causing the student to behave inappropriately. To identify the genesis of the student's reaction, a supervisor should try to empathize with the student. Intuiting the basis of the student's behavior helps the supervisor generate information to use in assessing the problem. The supervisor will have to test out possible explanations by initiating a discussion with the student to probe more deeply the student's reactions and responses to the client. We explore in the next section the possible structure and content for these conversations.

B. Communication with Students About Negative Responses

Once the supervisor believes that the student may be experiencing problems with identification with a client, the question becomes how the supervisor should raise this concern with the student. Under any circumstances, it is difficult to confront an individual about his or her emotional motivations, particularly when those motivations are unexpressed. It is more challenging especially if one has reason to believe that the person may not be aware of the reasons for the behavior. The clinical legal supervisor-student relationship is no different. In fact, there are additional constraints because of the respective professional roles and the power imbalance between the educator and student. Nevertheless, we believe that the supervisor can establish a working environment that will facilitate successful discussion of this sensitive area.

Therefore, we suggest that the steps we offer in our supervision model incorporate four critical elements: (1) establishing and maintaining the learning environment; (2) adopting a problem-centered focus; (3) elucidating the problem; and (4) reframing the problem as one regarding professional role. These elements enable the important step of initiating a corrective response.

1. Establishing and Maintaining the Learning Environment

First, at the beginning of the semester the supervisor should “set the stage” for students to engage in reflective discussion of the emotional dimensions of their work. The supervisor should introduce the necessary vocabulary and key concepts – empathy, identification, self-awareness, boundary-setting, personal and professional growth – to prepare students to engage this topic. Moreover, the supervisor should provide this information in a group context so that the students do not

perceive the supervisor to be “targeting” any one person or otherwise indicating disapproval of student(s). In addition, the supervisor should model these behaviors with students and in situations in which students will observe the supervisor acting in professional role with clients and others. Finally, the supervisor should revisit these issues in a group context periodically throughout the clinical experience. This will help to validate this approach and deepen students’ understanding of the various ways in which these concepts arise.

2. *Adopting a Problem-Centered Focus*

If a supervisor believes that a student may be identifying with a client in a manner that compromises the representation, the supervisor should address the student in a one-on-one meeting. The supervisor should adopt a problem-centered focus to the issue. In other words, the supervisor should attempt to locate the problem *outside* the student’s personality. To return to the earlier example of the student whose client had a housing crisis, a supervisor might open the conversation by stating: “I’m a bit puzzled that you forgot to follow up on the client’s problem. The client is in a real predicament at the moment.” This approach contrasts with one that frames the problem as the fault of the student by starting off with: “I can’t believe you failed to follow up with the client! That client is depending on you for help and you just walked away, what’s the matter with you?” Although the second approach may be what a supervisor might be *thinking*, it likely will put the student on the defensive and make it difficult, if not impossible to discuss *why* the student behaved in this particular manner.

3. *Elucidating the Problem*

The supervisor should attempt to have the student elucidate the systemic pattern that contributed to the problem by asking a series of focused questions. For example, the supervisor may start by asking the student to provide details first about her actions, i.e. “So what was your understanding of what should happen after your meeting with the client? What did you do?” Then the supervisor may begin to ask the student questions about her emotional reactions, i.e. “So how did you feel when the client broke down in tears after telling you he had been kicked out and had no place to go?” The supervisor should collaborate with the student to gain an understanding of the student’s perspective and experience of the problem. In other words, the supervisor should look for opportunities to empathize with the student and try to validate the student’s emotional response. Thus in this example, upon hearing that the student felt despondent when the client broke down, the supervisor might interject: “I think that’s a completely nor-

mal and very human response.” Or “I’ve had that same experience with a client too, I found it very difficult to see a client in such a desperate situation.” This approach is different from approval of the student’s behavior, when a supervisor, in a misguided attempt to be supportive, might say: “You’re right. Sometimes when things get overwhelming you have no choice but to avoid the situation.”

Returning to the earlier example of the law student who felt betrayed by the juvenile client and who demanded that the clinic terminate representation, how might the supervisor approach the issue of betrayal? Because of the intensity of the student’s reaction to the news, the supervisor might acknowledge the student’s feelings and then engage the student in thinking about her response. The supervisor might begin: “I know you were very close to this client. It must be hard to work with someone who you feel has lied to you. How do you think that you should handle this situation?” The supervisor might then discuss with the student the difficulties in providing representation for a client that makes one angry by offering similar experiences and strategies both for recognizing these negative responses and for working with them to continue to be the client’s legal advocate.

In the example of the HIV client, the supervisor might begin a conversation by asking the student about the status of the client’s health and the most recent prognosis from the client’s doctor. Assuming there has been no improvement, the supervisor can revisit the goals of the representation: assisting the client with estate documents so that the client can take steps to provide for his grandsons’ emotional and financial care. The supervisor can frame the issue in terms of the shared goals of the clinic, client and student by asking: “So, given what you’ve told me, it seems that the client won’t meet his need to designate a guardian unless he executes these documents while he is still competent to do so, and we are under time constraints. Why do you think you should wait?” The student may respond with a comment such as: “The client is not ready.” The supervisor might then ask how the student knows this and may even raise the question as to whether the student’s own feelings may prevent her from hearing what the client’s wishes are.

By empathizing with the student and based on a foundation of trust between the supervisor and student, the supervisor may encourage the student to delve more deeply to inspect the motivation for her behavior. In the examples that we have given, the student whose client faced emergency housing needs reacted to the crisis by mirroring the client’s emotional state of hopelessness. In the example of the youth who claimed sexual abuse, the student felt betrayed by the client with whom she had identified and subsequently distanced herself

in order to defend against her own feelings of betrayal. The student identified with the grandchildren of her HIV client and felt overwhelmed by their impending loss, and found herself unable to complete the documents that would acknowledge their fate. Once the student has recognized that the problem – an inappropriate response – stems from the student’s emotional reaction to the client, we recommend the supervisor ask the student how he or she believes the pattern of behavior may be changed. Thus the supervisor establishes a framework for the conversation that encourages the student actively to reflect on the behavior and for the student to participate in further discussion about an appropriate response.

4. Reframing the Problem as One Regarding Professional Role

At this point in the discussion, the supervisor should reframe the problem in terms of the professional relationship between the student and client. Given that most students will not have sufficient and appropriate experiences upon which to draw in crafting a response, the supervisor will play a more active role in this regard. While it is critical for the student to acknowledge and recognize how her emotional responses have affected her professional performance, the supervisor needs to provide a way to locate the problem in the context of the legal representation. This will help the student to address the issue and, if necessary, repair the attorney-client relationship.

We refer again to the example of the student with the HIV positive client to illustrate this approach. After discussing the student’s ideas about corrective steps, the supervisor might punctuate the discussion by offering observations that reframe the issue based on the content of their conversation. The supervisor could say: “Based on what you’ve told me, it seems to me that one way to understand this is that you found it difficult to witness the client in the middle of a crisis. That’s understandable. Now the issue is how to deal with this. The client has come to you for help because you are the legal advocate, right? By preparing his estate documents, you can help him plan for and make more secure the future of his grandchildren.”

Thus the supervisor acknowledges and validates the student’s emotional experience, but reframes the discussion in terms of role-appropriate responses – what legal action can the student take on behalf of the client? Once again, the supervisor should model appropriate alternatives. Thus the clinical legal educator assures the student that the supervisor remains receptive to discussing the student’s feeling about the representation, and maintains a collaborative approach to solving the problem that the student’s emotional reaction has created.

C. *Initiating an Appropriate Corrective Response*

As indicated above, the appropriate corrective response when students have problems in identification with clients should be based on the assumption that the role of the supervisor is to *support* students in changing their behavior. Consequently, the supervisor should not prescribe a course of action or direct the student to adopt a particular attitude or behavior. Rather, once the student has recognized the link between the student's emotional reaction and role-inappropriate behavior, the goal of the supervisor is to encourage the student to act differently. Assuming that the process of recognition and reflection has worked well between the supervisor and student, these two will be able to collaborate on a strategy to assist the student in addressing the problem.

In the examples of the client with a housing problem and the HIV client, the supervisor and student might agree to a list of detailed and concrete legal options or other actions that the student will pursue to assist the client. Thus the corrective action – specific, manageable tasks – is designed to enable the student to take control and thereby address the student's emotional reactions of hopelessness and helplessness that contributed to the avoidance behavior. In the case of the victim of alleged sexual abuse, the supervisor and student could agree that the student should gather additional information about the reactions of at risk youth to give the student a broader base of knowledge from which to evaluate the client's responses and the student's anger.

Once the supervisor raises the issue of identification and its manifestation in supervision, we recommend that the supervisor and student schedule more frequent meetings or create time for the student to "check in" with the supervisor about the progress of the action plan. These subsequent conversations may entail repetition of several of the steps and themes in the initial discussion. The goals for the supervisor are to maintain open communication with the student, to monitor the situation closely, and to intervene with the student immediately, if needed, to address repetition or new manifestations of role-inappropriate behavior. To achieve these goals, the supervisor must communicate and demonstrate support for the student to address the problem. A supervisor may recommend that a student maintain a journal during this period to record his or her observations, reactions and feelings about the action plan and its implementation. The journal serves as a source of data that the supervisor and student may analyze together to help the student work through problematic identifications.

CONCLUSION

The emotional reactions of lawyers and law students to legal work too frequently have been diminished or outright ignored. Yet these responses impact the delivery of legal services in direct and concrete ways. This paper focuses on the impact of the psychological phenomena of identification and empathy on the ability of legal professionals competently to perform in role. Because information gathering is a vital component to legal work, the need to identify and empathize with clients and witnesses will remain an on-going part of the lawyering process. To address these issues, lawyers need to develop the skills of self-awareness and boundary setting as well as attend to their personal and professional growth.

We propose a model of clinical legal supervision that enables supervisors and students successfully to recognize, communicate about and develop appropriate corrective responses to problems with identification. We hope that this model will serve as a basis for further discussion of how educators can best attend to the emotional dimensions service providers experience in the helping professions, and that others will elaborate this framework further. By attending to and teaching about the emotional dimensions of practice, we stand not only to improve the quality of service lawyers provide but to raise the satisfaction level of the profession as a whole.