Teaching The Lawyering Process

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The Lawyering Process

The decisions made by lawyers are important, for they directly affect the course of clients’ actions. By far, more decisions emerge from the lawyer’s office than from court proceedings, and these decisions occur in two different areas of a lawyer’s practice.

The first revolves around litigation. The law office is the entry way into the courtroom, and a vast number of decisions are made daily by lawyers whose practice concerns the basic but crucial determination of whether a lawsuit should be undertaken. When we initiate a suit we put a vast array of society’s machinery into operation. Often witnesses must be found and deposed, and juries struck. The subject matter of the litigation itself and the outcome of a suit may affect more than just the client’s interests. Equally important, and rarely discussed, is the decision not to sue, and when this decision is reached, we save cost to and involvement of society. In many instances, a decision not to file a lawsuit is final and decisive insofar as the client is concerned. Typically the decision belongs to the lawyer, although it may be a joint decision of the attorney and client. In the litigating process there is a vast array of other decisions, among them are those concerning the settlement of litigation. Once it is made settlement is also a final and binding determination; ordinarily it is as final and binding on the client as an appellate decision would be.

The other significant area of a lawyer’s decision-making lies in the area identified as preventive law. Here the law office is the only authorized place in which a client can go to obtain a legal decision. In preventive law matters there is no opportunity to refer the client’s proposed course of action to a court. Decisions made within the preventive law area are as conclusive as any within the legal process. A will once executed by a client is final and binding, subject only to revision or revocation at some later date, and a corporate charter and by-laws drafted by the lawyer determine the actions which a


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corporation may legally pursue. Innumerable situations arise in which the decisions made in law offices, and on which clients act, become final and binding upon the client.

Decisions made in the law office are, in my opinion, more complex than those made by appellate courts. Whether in the litigating or in the preventive realm the lawyer should consider not only the strictly legal and impersonal matters involved, but also the "human characteristics" of the client's problem. In the litigating process, for example, whether a lawyer should recommend settlement of a personal injury case may depend upon the client's age, financial well-being, and emotional stability. Family pressure to pursue litigation, along with other factors peculiar to the client, must also enter the lawyer's calculations. These human characteristics, however, are seldom considered by courts.

Human characteristics also reveal themselves in the preventive law realm, and, as distinguished from the litigation area, choices offered to clients often are of no concern to courts. The choice of an executor, though often exceedingly important to the beneficiaries of an estate, is generally of little importance to a court at the time of the probate of the estate. Also, in preventive law practice the lawyer may be confronted with a number of inquiries from the client for which there is no "legal" answer. Whether a client should purchase a certain parcel of property is not a question answerable by law books. It is often, however, a matter referred to lawyers, and a matter in which lawyers should consider a number of factors, including behavioral patterns of the client.

Despite the crucial importance which decision-making plays within the practice of law, and despite the complexity which often accompanies such decision-making, law schools devote little attention to how an attorney should confront difficult decisions. What follows are a few suggestions on how we might better emphasize in legal education a part of law practice that is every bit as necessary for the competent representation of a client as is an understanding of the "law" itself.

How To Teach About Lawyering Decisions

The major task in legal education is to collect examples of lawyering decisions. If our libraries could offer samples of decisions that would complement the vast number of appellate reports which fill their shelves, then we would have an ample base from which to teach. The present situation, however, reveals that our libraries contain almost no materials concerning lawyering decisions. We
have virtually nothing in the law library about the decision not to file a law suit. We have remarkably little material about the vast number of decisions concerning settlement. We have in our libraries nothing, or almost nothing, that reveals generally the process by which lawyering decisions are made. Until we can obtain those decisions and information concerning the process by which they are made, we have to substitute some other means of teaching and some other kinds of teaching materials.

In this connection, I have relied to a great extent upon my own experiences in law practice and to some extent upon the experiences of other lawyers. One of the major difficulties in developing materials is the fact that lawyering decisions are of low visibility. Court decisions on the other hand are highly visible. They are generally available to, and generally known by, the public. The visibility of the decision, however, has nothing to do with its importance. Perhaps the number of important low visibility decisions exceeds the number of those which are highly visible, but the low visibility decisions create the major difficulties in obtaining the materials needed for teaching.

I believe that the most fundamental part of the lawyer-client decisional process often occurs in the consultation between the lawyer and client. By consultation I do not necessarily mean a single lawyer-client conference, for there may be a series of consultations. I do not necessarily exclude the notion that the consultation may involve a written opinion delivered by the lawyer to the client without a face-to-face meeting. In any event, I have experimented with, and used, the lawyer-client consultation as a basis for endeavoring to develop materials with which to teach the lawyering process. In my opinion this can be done in several ways:

1. Starting with the typical appellate cases used in our standard casebooks, we can ask questions in class that concern lawyering decisions in those cases. For example, in a case that the plaintiff has lost, we might ask ourselves and our students to speculate about the nature of the advice and the soundness of the recommendations that may have been made by the lawyer during the initial lawyer-client contact. We can question the process by which it was determined that a lawsuit should be brought. We might even try to evaluate that decision. We might investigate the decision to take an appeal from a trial court judgment. We might ask whether there were alternatives to filing the lawsuit, and if so, what those alternatives might have been. With cases involving prearranged transactions which give rise to litigation, I often like to ask whether there
might have been some process in the handling of the transaction itself which could have prevented the dispute. In other words, I like to ask questions concerning preventive law problems.

2. It is possible to develop, out of existing appellate cases, fictionalized versions of lawyer-client consultations. A fictionalized version of the lawyer-client contacts can be written, recorded on an audio machine, and played to the class. Such fictionalized versions can consume from three or four to ten or twelve minutes. Class discussion concerns various facets of law along with other aspects of lawyer-client consultations. At the University of Southern California I have been offered the opportunity to try this technique in many courses including contracts, civil procedure, torts, and corporations.

3. Another technique is to write fictionalized versions based on actual consultations. If it is possible to invite one’s self into a law office and to observe actual consultations taking place between a lawyer and a client, one may discover consultations that lend themselves to a rewriting of a fictionalized version for subsequent use in the classroom.

4. Perhaps the best known and most extensive use of the lawyer-client consultation in legal education has occurred in connection with the Client Counseling Competition. This is a competition now administered by the American Bar Association and which last year involved more than ninety law schools. Under this program, law students act the parts of lawyers in a simulated lawyer-client consultation. Many of the interscholastic competitions have been put on video tape, and many of the video tapes are available through the Law Student Division of the American Bar Association. The background material and the development of these interscholastic competition problems is also available through the American Bar Association. These video tapes and the materials supply data from which lawyering decisions can be identified and taught. They also furnish data for discussion of the humanistic aspects of the lawyer-client relationship.

The lawyering process deals with all manner of law office decisions. Some of those decisions are made directly to the client, but there are a number of other decisions in which the client is not directly involved. There are a number of procedural decisions made by lawyers in the litigation process such as how to plead to the complaint. Should the defendant demur or answer? Should the litigating party move for summary judgment and, if so, when and how? These decisions may or may not involve the lawyer-client consulta-
tion, but they are worthy of law school teaching.

There are litigation decisions that are made outside the law office and within the courtroom. Actions taken by lawyers in the courtroom are often the subject of the law of evidence. In that subject we learn which objections are valid and which ones are not. However, we do not necessarily learn whether an objection should or should not be made.

It seems to me that we learn about lawyering decisions by increasing our observation of those decisions. We ought to be able to learn by empirical observation as well as by reading books. If it were possible for those who prepare teaching materials to observe the decisions in law offices, it might be possible to recreate or develop materials for teaching the lawyering process. In this connection the practicing lawyer can be extremely helpful. My own complaint in this regard is that the practicing profession has not made available to the teaching profession the lawyering decisions that are made in law offices. Partly, this failure is attributable to the apparent lack of interest of the teaching profession in such materials. Partly, it is due to the fact that, as lawyers, we have neither identified the decisions we make nor made the decision-making process visible.

Clinical experience in legal education is a lawyering experience. Although experience is a teacher, it is a significant teacher only if it can be generalized. Generalization, however, requires a theory of generalization. Hence, we must develop a theory of lawyering at the same time that we make clinical experiences available. Clinical legal education in general is currently limited to a small segment of the total lawyering experiences. It is confined, for example, to litigation involving clients of low income. Also, the clinical experience includes no preventive law lawyering. From an educational point of view, we can accomplish a broader scope of experiences by simulation than we can by these clinical programs. Ideally we should try to offer both simulated and clinical experiences as part of law school education.

Various empirical projects can be used as special research or special term projects in law school education. I have used at least two such projects. In one of my courses I invite the students to do a term project on periodic legal check-up of a person who is the “client” for this purpose. The project involves the student’s focusing on an enormous number of facts that may be new to the student. In addition to teaching some legal facts of life, it forces students to identify legal as distinguished from extra-legal problems. As a learning process, and as a clinical experience, I think it is enormously
useful. It may be very useful for a number of other reasons in connection with the delivery of legal services. The other method I have used to enable the students to learn about lawyering is to have the students engage in the process of making a legal autopsy. In short this requires the students to find some judicially decided controversy in the legal community and to analyze that controversy by recreating it. It is a type of hindsight exploration of the total lawyering process in connection with a single resolved dispute. Ideally the students should explore at least four persons—the plaintiff, the defendant, and their lawyers. This is a way of learning about the lawyering process through direct review of a process which has been undertaken by lawyers in an actual controversy.

Although the best sorts of material may not be available to teach the lawyering process, we have an ample number of methods with which to begin. One of the big gaps in legal education is the failure of the teaching profession to teach enough about this process. I believe that we are beginning to do something about it, and I find this most heartening.