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Cindy E. Faulkner
Thomas M. Cooley Law School

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THERAPEUTIC JURISPRUDENCE AND PREVENTATIVE LAW IN THE THOMAS M. COOLEY SIXTY PLUS, INC., ELDER LAW CLINIC

CINDY E. FAULKNER*, ASSISTANT PROFESSOR
THOMAS M. COOLEY LAW SCHOOL

Gertrude Smith phones the SixtyPlus, Inc., Elderlaw Clinic ("Clinic") to schedule an appointment. She informs the receptionist that she wants to come to the Clinic so she can "get a trust." Ms. Smith is scheduled for an intake appointment to meet with two student legal interns ("interns"). Ms. Smith arrives for her appointment, is introduced to the interns, and agrees to be interviewed. The senior intern (a student in her second term at the Clinic) begins the interview by asking Ms. Smith what brought her to the Clinic. Ms. Smith reiterates that she "wants a trust because it is the best thing for everyone." The senior intern asks what Ms. Smith means by that. The interview reveals that Ms. Smith is a widow and has four living, adult children, one deceased child, and seven adult grandchildren. Ms. Smith explains that she does not want her children to have to "go through probate."

Had Ms. Smith made an appointment with an attorney who is not familiar with the principles of Therapeutic Jurisprudence and Preventative Law, she might have only been asked why she came to the attorney and then answered some questions to get details about her assets. Then she might have been sent on her way. It is likely that she would have returned one time to sign paperwork and get her bill for \$1,500-\$2,000.

Fortunately for Ms. Smith, the Clinic is client-centered. The interns are taught to converse with their client, and to listen to what the client hopes to accomplish and why their client wants to accomplish that goal. This deeper look into clients' goals and values aids the interns in exploring various legal resolutions and explaining how these options might impact the clients' personal priorities.

* This article is dedicated to the wonderful students who have crossed my life-path, and to my colleagues at the Sixty Plus Elder Law Clinic. It is a wonderful way to live when you can go to the office every day, but never feel like you're going to work. Stacy Flannery, Research Assistant, provided many hours of reading, editing, and feedback. She was a treasure. And to Laura, thank you.

The Clinic uses a variety of methods to introduce interns to the principles of Therapeutic Jurisprudence and Preventative Law. These methods include: teaching interns client-centered interviewing and counseling techniques; requiring interns to act as guardians ad litem and perform guardianship reviews for area probate courts; inviting clients to an end-of-the-term reception to provide an opportunity to thank clients for their participation in the interns' legal education; and encouraging interns to learn if their clients are facing other legal concerns (prior to allowing the interns to close clients' files).

BASIC PRINCIPLES OF THERAPEUTIC JURISPRUDENCE AND PREVENTATIVE LAW

Therapeutic Jurisprudence is "a perspective that regards the law as a social force that produces behaviors and consequences."¹ Lawyers, therefore, are therapeutic actors and may directly impact the behaviors and consequences of their individual clients.² David Wexler and Bruce Winick were two of the original developers of the Therapeutic Jurisprudence concept.³ Originating in mental health law,⁴ the concept has expanded into a large number of legal areas and lends itself particularly well to elder law issues.⁵

With each interaction between the interns and their client, the interns listen to both what the client says, as well as how he says it, to determine whether the client's "emotional or psychological well-being will be in any way relevant in this client [interaction]."⁶ For example, Ms. Smith came to the Clinic with the specific goal of having a trust created for her. She believed this document would quickly and easily distribute her estate to her children upon her death. However, interns need to "use client counseling skills to quickly bring out information regarding [the client's] age, health conditions, family structure, vocations, and avocations"⁷ This information will increase the likelihood that the intern learns what the

1. David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125 (2000).

2. *Id.*

3. MARSHALL B. KAPP, *THE LAW AND OLDER PERSONS: IS GERIATRIC JURISPRUDENCE THERAPEUTIC?* 5 (Carolina Acad. Press 2003).

4. *Id.*

5. Dennis P. Stolle et al., *Integrating Preventative Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 20 (1997).

6. *Id.*; see also Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventative Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25, 27 (1997).

7. Stolle et al., *supra* note 5, at 21.

client actually hopes to accomplish and drafts a document that best accomplishes those goals.

During the intake interview, Ms. Smith reveals two major concerns: she wants to remain in her own home as long as possible, and she wants to keep the home in the family. Later, after consulting with their attorney/faculty supervisors, the interns advise Ms. Smith that putting her home in the name of the trust may impact her eligibility for Medicaid assistance in the event that she needs to reside in a nursing home.⁸ She learns that her initial statement of “wanting a trust” may not ultimately help her to accomplish the goal of keeping her home in the family.

The goal at the Clinic is for interns to learn as many of a client’s legal goals as possible. Ms. Smith’s goals competed between putting her property in a “trust” and keeping the family home. Learning Ms. Smith’s goals allowed the interns to fully advise the client of her options and the potential consequences for each of those options.

“Preventative Law is a perspective on law practice that seeks to minimize and avoid legal disputes and to increase life opportunities through legal planning.”⁹ It takes a proactive approach to a client’s legal issues, i.e., the attorney and client work together to determine the potential legal issues that clients may or will face and what can be done to plan for those issues in order to avoid undesired outcomes.¹⁰

THE SIXTYPLUS, INC., ELDERLAW CLINIC

Therapeutic Jurisprudence and Preventative Law are two concepts that blend well together, and in a client-centered practice, such as the Clinic, legal assistance is provided while “maximi[zing] attention to the psychological well-being of clients.”¹¹ The Clinic has offered free legal services to people sixty years of age and older for twenty-five years and has applied the principles of Therapeutic Jurisprudence and Preventative Law since before these principles were given proper titles. Not only has the Clinic diligently tried to practice these principles, but it always strives to develop new ways to apply them.

The Clinic was founded in 1979 by Fred Baker. The concept evolved

8. See 42 U.S.C. § 1396p(d) (2004); see also Ira Stewart Wiesner, *OBRA '93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context*, 19 NOVA L. REV. 679, 695 (1995) (indicating a sixty-month look-back period of ineligibility for Medicaid for transfer of funds into a revocable trust).

9. Stolle & Wexler, *supra* note 6, at 27.

10. Stolle et al., *supra* note 5, at 16.

11. *Id.* at 19 n.27 (citing to Stolle & Wexler, *supra* note 6, at 28).

as a way for Thomas M. Cooley law students to gain practical legal skills while providing a legal resource for an underserved population: older area residents. Interns work directly with the clients and are supervised by faculty. The only requirement for services at the Clinic is to be sixty years of age or older. There is no income requirement; however, if a client is seeking estate-planning services and has an estate valued at over \$250,000 (not including her home), she is referred to a local attorney. As one might expect with a practice that serves only clients older than sixty years, the primary legal issue tends to be estate planning. However, the Clinic interns work on a wide variety of civil issues, such as breach of contract, property disputes, consumer law issues, etc. The Clinic does not accept criminal or tax law cases, or cases where fees are contingent upon the outcome.

When a person becomes a client at the Clinic, the client's specific problem is given a code and recorded in the Clinic's data base system. Some examples of these "problem codes" include: bankruptcy or debt relief; contracts or warranties; wills and estates; and guardianships or conservatorships. There are thirty-three possible problem codes, including codes for those cases that are not easily defined, such as "other individual rights" and "other miscellaneous." By labeling the various problems that are regularly seen in the Clinic and generating statistics as to their frequency, the faculty is better able to prepare the classroom component of the Clinic for the specific needs of many of the clients. Additionally, the faculty is able to demonstrate therapeutic and anti-therapeutic consequences by providing role-playing and simulation examples of typical legal issues presently in the Clinic and how to best approach those issues based on clients' needs.

Between January 1999 and January 2004, the Clinic averaged 952 cases per year. Approximately 240 of those cases are carryover cases, i.e., cases not closed the previous year. Annually, there is an average of fifty-four guardianship and conservator cases, forty-eight homeowner or property cases, and twenty-five contract cases. As stated above, the majority (approximately fifty-five percent) of the cases at the Clinic are estate-planning issues. The average number of cases per year that are coded as wills and estates is 281. Additionally, there was an average of 124 health-related cases, including clients seeking to have medical powers of attorney prepared.

Estate planning in the Clinic involves much more than preparing documents to administer an estate at death, such as wills and trusts. Estate planning also involves preparation of documents that will assist the client as they age and prepare for the client's needs if the client loses her

independence.¹² Many of the elderly become more dependent and fear that they will be a burden on their families.¹³ In an effort to curb these fears, interns encourage preparation of documents, such as medical powers of attorney¹⁴ and financial durable powers of attorney. These documents make it easier on clients' families to do what is necessary to make financial and medical decisions for their family member in the event of an emergency. Having these documents may also provide peace of mind to the client. The client learns that she has taken steps which may help her family avoid bringing a public petition (such as a petition for guardianship or conservator) in order to care for her.

In addition to estate planning, the principles of Therapeutic Jurisprudence and Preventative Law are apparent in other aspects of the Clinic. Because the Clinic is client-centered, the interns are trained to seek out information regarding other legal concerns of clients. Additionally, since the Clinic offers free legal services, clients need not fear that the cost of legal assistance will mandate prioritizing their legal concerns to conserve costs.

THE INTAKE

Interns are encouraged to apply Therapeutic Jurisprudence and Preventative Law principles almost immediately. Once a client has scheduled an appointment for an interview, the client is sent an intake form that she is asked to fill out and return. The intake form requests personal information about the client. The Clinic seeks information regarding family members, income, sources of that income, and personal wealth. At first glance, the intake form may seem invasive and unnecessary. For the Clinic, however, it is just one way that the "Therapeutic Jurisprudence framework for asking questions and for raising certain questions that might otherwise go unanswered"¹⁵ is established.

Preventative lawyers should develop the ability to "bring out information regarding [a client's] age, health conditions, family structure, vocations, and avocations, all of which may prove to be critical information

12. Phillip A. Parrot, *Financial Exploitation of the Elderly: How Lawyers Can Help Protect Their Clients*, 31 COLO. LAW. 39 (2002) (noting that seniors can become dependant on assistance from caregivers and advisors).

13. Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1832 (1992).

14. See, e.g., MICH. COMP. LAWS § 700.5506 (2004) (referring to "medical powers of attorney" as "patient advocate designations").

15. Wexler, *supra* note 1, at 127.

in drafting a document to distribute [client's] assets in accord with [the client's] intent."¹⁶ The intake form allows the interns to become familiar with the client and potential areas of concern before the client arrives at the Clinic. For instance, a client with a very low-income level may signal to the intern the need to determine if there are financial or debt problems. Additionally, if a client is divorced, there may be concerns of family dynamics that may need to be explored before an attorney-in-fact is appointed.

Beyond allowing the intern to discover possible problem areas for the clients, the form allows the interns to become therapeutic agents by familiarizing themselves with the clients and helping the clients feel more comfortable. A therapeutic agent is one who gathers the relevant background information from a client,¹⁷ and then "assist[s] the client to improve decision-making and planning to prevent problems, reduce conflict, and increase life opportunities."¹⁸ Having information about a client's family, income, and assets allows the intern to conduct an interview on a more personal level, which often helps the client to feel more comfortable and more willing to divulge relevant information, as well as other legal concerns.

THE INTERVIEW

The interview style that is taught and embraced at the Clinic is "client-centered" and the goal is "to help clients achieve effective legal solutions to their problems."¹⁹ The interview style was developed by David A. Binder, Paul Bergman, and Susan C. Price.²⁰ The focus, much like that of Therapeutic Jurisprudence and Preventative Law, is to find not only legal solutions, but also non-legal solutions and solutions through planning.²¹ The model developed by Binder, Bergman, and Price acknowledges that "identifying and helping clients resolve problems requires more than knowledge of relevant legal principles. You also need to know about clients' individual circumstances."²²

The completed intake forms, which interns are given prior to meeting

16. Stolle et al., *supra* note 5, at 21.

17. *Id.*

18. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 440 (1994).

19. DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 3 (West Publ'g Co. 1991).

20. *Id.*

21. *Id.*

22. *Id.*

the clients, provide the interns with basic financial and familial information about the clients. This information needs to be explored, thus allowing the interns to take the first steps needed in understanding the clients' individual circumstances. The interns are taught to use this limited information as a starting place for eliciting more complete information from the client.

For a client seeking estate-planning documents, the interns inquire not only as to how many children the client has, but must also ask the client to describe her relationship with each child. The interns can see from the intake sheet the amount and type of assets the client owns. However, the interns must also inquire about how the assets are titled; if the asset has beneficiary benefits; who has the client chosen as the beneficiary; whether bank accounts are owned solely in the client's name or if someone else has rights to that account. This information helps the interns to determine the best estate-planning options for the client.

Interns are encouraged to listen to the client. The purpose of the intake is not to specifically determine the client's legal goals, i.e., that the client wants a will drafted, but instead to determine the client's factual, i.e., outcome, goals. The interns should try to learn what the client wants to accomplish. What result does the client see when the document is used? How does the client see her children interacting? Who does the client want taking responsibility for decisions made on behalf of the client? Does this client trust the decisions of this person? Should the client trust the decisions of this person?

Interns are encouraged to use silence or continuers to encourage the client's communication. These moments of silence or words to encourage more ("mm-hmm," "go on," "I see"), coupled with non-verbal facilitators (such as eye contact and nodding), aid the interns in gaining the trust and confidence of the client while obtaining necessary information about the clients' factual goals.²³ Interns often learn that, while some clients may appear to have the same legal problem as other clients, after learning of the clients' different familial relationships and listening to their outcome goals, each client may prefer very different solutions or have set very different goals.²⁴

An example of this might be where two clients come to the Clinic, each stating that the reason they are seeking legal assistance is for identity theft problems. Both clients' credit ratings have been destroyed by someone who obtained each client's personal information and proceeded to

23. See Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321, 328-29 (1998).

24. BINDER ET AL., *supra* note 19, at 19-20.

get credit cards in the clients' names. Multiple charges were made to these unauthorized cards with debts accumulating over \$5,000 each. The interview clearly reveals that Client A's goals were to learn who had committed these acts and pursue all possible criminal and civil remedies. Client A wanted the thief to face criminal charges and experience harsh sentencing, as well as clear Client A's credit report. Client A also wanted guidance about working with the county prosecutor's office. Client B, on the other hand, was not interested in pursuing any legal remedies against the violator. Client B's only goal was to get his credit report cleared. Because the interns continued to question Client B about his goals, his family situation, and relationships, it became clear that Client B suspected his daughter was responsible for creating Client B's credit issues, but he did not want to pursue any legal remedies against her or anyone who was responsible.

Had the interns ignored the recommended intake procedure and interviewing guidelines, and merely learned the "legal issue" and ignored the clients' individual goals and circumstances, anti-therapeutic consequences could have assuredly arisen if the Clinic encouraged the criminal prosecution of Client B's daughter. An anti-therapeutic consequence of Client B's situation could have been that his daughter, who lives with Client B and helps him with basic activities of daily living, becomes angry that he pursued criminal charges against her, now refuses to help her father, and moves from Client B's home. Client B is now left in a situation more complicated and troublesome than when he arrived at the Clinic.

THE CLIENT-CENTERED APPROACH

The client-centered approach has five primary aspects that help the interns achieve the clients' goals: 1) identifying the problems from clients' perspectives; 2) involving clients actively in exploring solutions; 3) encouraging clients to make decisions based on the significant legal and non-legal impact that various options could have on the clients' lives; 4) recognizing the clients' feelings and the importance of those feelings; and 5) conveying the interns' desire to help the clients accomplish their goals.²⁵

The first aspect is identifying the problems from clients' perspectives.²⁶ This requires a deeper personal understanding of the clients. Interns need to consider clients' religion, health, previous experiences with

25. BINDER ET AL., *supra* note 19, at 19-22.

26. *Id.* at 19.

lawyers, and financial needs.²⁷ As the interns come to better understand their clients and are better able to understand their clients' goals, they are able to more fully understand why the clients choose particular legal options. As illustrated in the example of Client B above, when the intern places herself in the situation of the client, torn between love for his daughter, the need for her assistance in his daily living, and the possibility of no longer being able to remain in his own home, it is immediately clear why Client B seeks the least intrusive resolution.

The second aspect is actively involving clients in exploring solutions to their legal concerns. This aspect alone can have important therapeutic consequences. The Clinic's clients are almost exclusively over the age of sixty (with very few exceptions, i.e., representing the personal representative of an estate when the Clinic drafted the decedent's will and the client appointed a personal representative who is younger than age sixty) and the number of clients that are suffering from at least mild depression can be statistically relevant.²⁸ As we age, we often experience more social isolation and begin to feel a sense of uselessness.²⁹ By involving clients in the legal process and encouraging clients to make those decisions that ultimately impact them and/or those they love, the interns have added an element of self-worth to the clients' lives.

The clients are encouraged to call their interns when they have either new information or potential solutions. To an elderly person who may have little or no family willing or able to provide for her, the therapeutic consequences are clear. This is an opportunity to talk to someone and to feel actively involved with society. These interactions between the client and the intern often give the intern a clearer perspective into the clients' legal concerns, as well as a clearer perspective of the clients' ultimate goals, thus allowing more opportunities to explore other viable solutions, and possibly preventing a client from experiencing detrimental (anti-therapeutic) consequences.

The third aspect of a client-centered approach is encouraging clients to make decisions based on the significant legal and non-legal impact that various options could have on their lives. The elderly suffer from an epidemic of being grouped together, while characteristics of inability or

27. *Id.*

28. UNIV. OF MED. & DENTISTRY OF N.J., *Healthful Life Project: Hot Topics*, at http://healthfullife.umdnj.edu/archives/depression02_archive.htm (last visited Sept. 28, 2004) (reporting a depression rate among people older than sixty-five in ten to forty-five percent of the population and labeling depression as "a major cause of a poorer quality of life").

29. Amee McKim, *The Lawyer Track: The Case Humanizing the Career Within a Large Law Firm*, 55 OHIO ST. L.J. 167, 177-78 (1994); Rein, *supra* note 13, at 1832.

disability are attributed to them whether or not they actually suffer from those inabilities and disabilities.³⁰ Like a child who is consistently told that he is too young, the elderly tend to be consistently told they are too old, when, in fact, they may just have a different view of the world than their family or even the law.³¹ By allowing clients to address their problems and be part of their solutions, the clients at the Clinic are given the opportunity to assert their abilities and to avoid the stigma that often comes with age. Not only do these opportunities to participate in the outcomes of their legal concerns take away clients' social isolation, but they also inspire therapeutic consequences for clients' overall mental health.

The client-centered approach, adhered to by the Clinic, encourages clients to be the primary decision-makers in all legal and non-legal issues.³² This involvement in the decision-making process is particularly important because the clients are in the best position to determine what a satisfying outcome is for their lives, while allowing the Clinic's legal services to respond to the goals and values of each individual client.³³ Additionally, the clients are given the continued opportunity to assert their independence and assist in finding outcomes and resolutions that bring them peace of mind, i.e., therapeutic consequences.

Although many clients appreciate the opportunity to actively participate in their legal issues, they also come to the clinic to be guided to a decision through the legal advice and counsel offered by the interns and faculty. The interns, therefore, must take special care during the interviews to listen, pay attention, and learn the clients' values.³⁴ The therapeutic consequences of the interns' recognition of the clients' values are immeasurable. Often, as clients become more comfortable with the interns, they become more willing to speak freely because they feel that the interns are working for them, not only in achieving a legal resolution, but in achieving a resolution that the clients find reflects their goals. When services at the Clinic are complete, the client is often left feeling as if her personal, legal, and sometimes even spiritual goals have been met.

The fourth aspect of the client-centered approach is the interns' recognition of the clients' feelings and the importance of those feelings.³⁵

30. Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 684-87 (1991).

31. Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1079 (1994).

32. BINDER ET AL., *supra* note 19, at 20.

33. *Id.* at 20-21.

34. *Id.* at 21.

35. *Id.* at 21-22.

During the required class time for the interns, and during the interns' supervision with their faculty supervisors, much time is spent on reminding interns that they will encounter a variety of emotions from their clients. The interns are encouraged to respond by acknowledging the clients' emotions, responding in an empathetic manner, and allowing the clients a safe place to experience and express these emotions.

By providing clients with this safe space, the interns enable the clients to unburden themselves of the emotional issues that may interfere with conveying information that is necessary for the intern to have in order to gain a more comprehensive perspective of the clients' situation. Clients may present themselves to the Clinic for legal assistance shortly after having lost a loved one or after realizing they are struggling financially because they have become prey to a consumer scam. These situations often stir emotions of sadness, shame, or even guilt in clients, and can often act as barriers in communications with the interns. Often, the interns are at least forty years younger than the clients. Therefore, the clients are not always willing to reveal their closely held thoughts and emotions to younger legal interns. When the interns clearly convey to the clients that they are willing and able to listen and be empathetic to the client, and allow the clients to feel and express their emotions, the clients become much more responsive.³⁶

The last aspect is the interns' repeated conveyance of a desire to help the client.³⁷ The interns begin building their relationships with clients by asking open-ended questions, listening to clients' responses to those questions, and encouraging clients to speak openly and honestly about their goals and concerns surrounding the legal issues that brought them to the Clinic. These first steps allow the interns to build a rapport with their clients sooner, to enhance their ability to gain more information from their clients, and to discover their clients' true goals.³⁸ Throughout this process, the interns remain attentive and appear interested.³⁹ By expressing the interns' desire to help clients resolve their legal issues, and by learning how the clients see the resolution and why they want to see those resolutions, the clients may begin to feel a level of comfort and understand that they are cared about as an individual, and not just legal issues. It is important to remember that "[l]egal problems do not exist in an emotionless vacuum."⁴⁰ A client often needs to talk about her feelings and will be motivated to do

36. *See id.* at 22.

37. *Id.*

38. *Id.* at 21-22.

39. *Id.* at 46.

40. *Id.* at 21-22.

so when the intern displays a desire to help and a willingness to listen.

Understanding the framework of the client-centered approach is only the beginning. It is always important to keep in mind that what the client thinks is the problem may not be the actual legal issue.⁴¹ To identify the true issue, it is important to begin the interviewing session with open-ended questions.⁴² The intern seeks a description of the client's problem in her own words and pays close attention to any underlying messages. For example, if we revisit Ms. Smith from the opening hypothetical, she was asked what the intern could do for her. Ms. Smith responded that she "wants a trust." However, the true problem lies not in the fact that she currently does not have a trust; rather, the problem lies in her last statement, "it is the best thing for everyone." By continuing to ask open-ended questions about "everyone" and why the client thinks a trust would be better, the intern learns important information about Ms. Smith's values. As the intern listens, she is able to gain insight as to the client's legal concerns, as well as her personal goals.

Most important, perhaps, is that the interns are then able to determine the client's emotional investment in those legal issues. Open-ended questions are likely to cause emotions to rise to the surface as the client conveys the information. This is an opportunity for the intern to make the client understand that the intern is there to listen and to help. The client can then leave the interview assured that her goals have been heard, that solutions are being determined, and, perhaps, feeling a little stronger after having the opportunity to talk about emotional issues.

The interns are taught to encourage clients to discuss both their factual goals and their legal goals, but interns must continue to ask more and more questions to get to the factual goals. Again, consider Ms. Smith from the opening hypothetical. Ms. Smith came to the Clinic with the clear legal goal of having a trust drawn up for her. During the interview, the intern learns that Ms. Smith fears being a burden on her family. She fears the cost of probate court. She fears the amount of time it will take to settle her estate in probate. She wants to be sure that she treats her children and grandchildren equally. She wants her beneficiaries to acquire their gifts as soon as possible after she dies. She wants her family to receive their gifts with as little expense as possible. These are Ms. Smith's factual goals. These are the personal goals she wants her trust (her initial legal goal) to accomplish.

41. *Id.* at 34.

42. *See id.* at 51. *See generally* Gellhorn, *supra* note 23 (discussing the model for lawyer-client interaction).

The interns at the Clinic are taught to motivate client dialogue.⁴³ The client-centered approach focuses on inhibitors, the things that inhibit a client from opening up to an attorney, and facilitators, the things that encourage a client to relax and be completely open with the intern.⁴⁴ While the concept is not difficult, the interns must learn that what motivates one client may serve as an inhibitor to another. However, there are many common facilitators and inhibitors found among a large number of clients.

The first inhibitor that is often found in the clinic is the “ego threat.”⁴⁵ A common scenario is the client who is a retired, blue-collar worker who has scrimped and saved during his adulthood to provide for his family. His children are successful and his mortgage is paid in full. He considers himself to be smart and motivated. Unfortunately, he has fallen victim to a recent scam regarding life insurance. He purchased a policy for a flat rate and has now discovered that the only value that the policy has is the value of the paper it was written on. The client in this situation is likely to be inhibited by a fear that the intern will think that he is uneducated or gullible. The ego threat may also stem from a fear that the client’s personal, private information might become public.⁴⁶ The interns can easily address these fears by assuring the client of confidentiality and offering empathetic understanding. Later, the intern can actively involve the client in the process of finding a solution. This involvement acts as a therapeutic agent because the client feels a sense of self-worth, thus bolstering the client’s confidence in the abilities that he has always appreciated about himself.

A second inhibitor that is common within the clinic is the “greater need.”⁴⁷ Clients often want to talk about events or topics that initially appear to be of little or no interest to the intern.⁴⁸ However, as therapeutic agents, the interns are trained to listen. What the client is talking about often reveals the client’s focus, values, goals, and concerns to the intern, and, thus, advances potential solutions. Clients may also talk about topics of little significance to avoid discussion of a more difficult subject. As the intern listens and appears interested, the client becomes more comfortable and is more likely to open up on the more difficult topics about which the client is seeking solutions.⁴⁹ Again, let’s return to Ms. Smith, the client

43. See BINDER ET AL., *supra* note 19, at 34.

44. *Id.* at 34.

45. *Id.* at 39.

46. *Id.* at 36.

47. See *id.* at 39-40.

48. *Id.* at 40.

49. *Id.* at 41.

who wants to focus on getting a trust. As the interns encourage Ms. Smith to talk about her family, her children, and her grandchildren, it is revealed that she has one son who has a felony conviction, has been imprisoned, and to whom she has been financially generous. The intern learns that Ms. Smith has great anxiety about being fair to all of her children and not wanting the siblings to fight over her estate and their "fair" shares after her death. Ms. Smith is torn between the greater need of caring for her son and being fair to all of her children.

As the intern discovers what inhibits a client, the intern is better able to understand what may facilitate a client. The most important facilitator utilized by the intern is the empathetic understanding achieved by active listening.⁵⁰ When an intern is able to convey empathetic understanding to the client, the client is more likely to put trust and confidence in the attorney-client relationship being established.⁵¹

Empathetic understanding is often as simple as acknowledging the client's feelings regarding a specific situation and showing an interest therein.⁵² The session with the intern becomes analogous to a therapy session, and the client may feel better just having the opportunity to talk about what is bothering him and have someone display understanding. Particularly with older clients who are more often isolated from society, the interns can provide serious therapeutic effects merely by listening to the clients and expressing concerns. Empathetic understanding requires active listening.⁵³ The interns ask open-ended questions and respond with minimal prompts to encourage the client to continue.⁵⁴ When an intern responds to the client's feelings, whether they are expressly stated or vaguely conveyed, the client is comforted by the interns' interest. The interns are gaining a rapport with the client, as well as gaining insight into the client's needs, values, and goals.

COUNSELING TECHNIQUES

The first step interns take when counseling their clients is to compare the client's factual goals with what the client stated were his legal goals. Often interns will realize that the client's stated legal goals may not be the best options to accomplish the client's stated factual goals. Client B, earlier described as a victim of identity theft and credit card fraud, is an

50. See *id.* at 40, 46.

51. *Id.* at 40.

52. *Id.* at 41.

53. See *id.* at 47.

54. *Id.* at 52.

example of this potential problem. Client B came to the Clinic with the legal goal of eliminating unauthorized debt. Client B hoped to remove these charges without determining who had made these charges. However, the interns' investigation reveals that Client B's creditors are not willing to remove the charges Client B asserts are unauthorized unless he agrees to pursue criminal charges against the violator. Upon initial evaluation, it appears that Client B will not be able to achieve both his factual and legal goals.

The next step of the counseling process is to formulate and evaluate potential solutions for the client.⁵⁵ Knowing and understanding the client's specific goals are essential to this step. As the intern formulates possible solutions, the client's goals and values should be clearly reflected. The potential solutions are presented to the client, and the client is the one who makes the ultimate decision as to which solution he believes is best for him. At this point, the intern needs to make clear all the potential positive and negative consequences of the solutions presented.

Again, looking at potential solutions for Client B, interns have a minimum of three solutions to present to him: he can choose to do nothing and be responsible for the charges that are in his name; he can agree to work with the creditors to determine who made the charges; or he can talk with his daughter and explain his dilemma. Clearly, Client B's first two options will not satisfy his factual and legal goals, and the third option may not either. However, more therapeutic consequences are likely to occur if Client B uses the third option. Client B will have the opportunity to present his concerns to his daughter, provide his options to her, and potentially mediate a solution with her assistance.

Reviewing all of the potential positive and negative consequences of proposed solutions is very important, particularly in estate planning cases. Because a person's estate plan can dramatically impact their eligibility for Medicaid,⁵⁶ the interns need to look far beyond today, into what may happen to the client in the future. These problems can be discussed with the client, and what may seem absurd to one client may be just the solution another client is seeking.

When the interns accept this challenge of looking at future possibilities, they are learning to practice looking forward to avoid future legal issues for their clients. Thus, they are learning to utilize preventative law practices. This concept of learning what a client's circumstances are

55. Wexler, *supra* note 1, at 130.

56. See Laura Herpers Zeman, *Estate Planning: Ethical Considerations of Using Medicaid to Plan for Long-Term Medical Care for the Elderly*, 13 QUINNIPIAC PROB. L.J. 187, 190 (1998).

today, evaluating options of what her future might be, and determining the best possible, foreseeable outcome that best accomplishes this client's factual and legal goals is what a lawyer who practices preventative law strives to do.

After the interns conduct research and assess solutions, those solutions and effects are discussed with the client. Together, the interns and the client determine what solution best fits the client's needs (again, with the ultimate decision resting with the client) and the interns then begin the necessary steps to implement that solution. The principles of Therapeutic Jurisprudence have a very significant impact on how this approach is taken in the Clinic. For example, a client has determined that a medical power of attorney to direct his medical treatment will best serve his future healthcare needs. However, the intern cannot draft the document and provide it to the client without more information. The intern must thoroughly discuss the client's perspective on life-sustaining treatment in a variety of circumstances. The intern must learn from the client the nature of the relationship between the client and the prospective agents for the client's healthcare decisions. Any concerns determined by the interns must be discussed with the client. An example of this would be if the client chooses his daughter to be his agent for medical decisions (patient advocate)⁵⁷ and the intern learns that the client has not had a good relationship with this daughter for a number of years. However, the client feels it is important for him to choose this daughter because she is his closest relative. While not easy, the intern must discuss with the client the reality of his daughter accepting the responsibility of making medical decisions for her father, and whether the daughter will follow the client's wishes.

The intern reviews every document in very specific detail with the client to ensure a proper understanding of the powers given to the agent (patient advocate or attorney-in-fact). The Clinic has implemented a policy of speaking in plain English when working with clients. Not only do the interns discuss very clearly with the client what a specific document is and the potential benefits and consequences of that document, but also the particular paragraphs of each document are discussed. Before asking the client if they have any specific questions, each clause of the document is described in plain English. For example, in a medical power of attorney, a clause for palliative care is often included. Many clients may not understand the term "palliative care," but may be afraid to ask, out of fear that they may look ignorant. The interns take the fear out of clients' asking

57. MICH. COMP. LAWS § 700.5506 (2004).

by covering the specific clause in plain English and the consequences of each clause without the client having to ask. The client is then given the opportunity to ask questions. After the explanation, the client may, in fact, have questions, or may not agree with the consequences a particular paragraph provides. In this regard, therapeutic consequences are generated because the client has a full understanding of the document and ensures that the document includes only those powers that the client is comfortable in relinquishing. Additionally, anti-therapeutic consequences are avoided because the client removed powers that she did not want to relinquish and thus, would potentially have had a negative effect when the agent (patient advocate or attorney-in-fact) utilized the document.

IMPLEMENTING SOLUTIONS

Because the principles of Therapeutic Jurisprudence and Preventative Law are important in all aspects of working with clients, the interns' tasks are not completed merely by drafting the clients' documents, educating clients in simple terms about what powers the documents provide, and properly executing the documents. There are particular concerns with estate planning documents (wills, medical powers of attorney and durable powers of attorney). Many clients are concerned that, even if they understand their estate-planning documents when they leave the Clinic, they will not be able to convey the same understanding to their agents. The Clinic encourages clients to invite their patient advocates and attorneys-in-fact to also schedule an appointment regarding their respective duties. If a client would like, interns will also talk with prospective personal representatives.

When the agents speak to the interns and learn in simple terms the rights and responsibilities of being patient advocates and attorneys-in-fact, the clients can be more assured that all concerns have been adequately addressed. Even if the patient advocates or attorneys-in-fact are unable to make an appointment at the Clinic, a written explanation of these duties is provided by mail for all parties to have for future reference.

The most important continued aspect of the Clinic, and an aspect that promotes the most dramatic therapeutic consequence, is in the context of will drafting. A client who comes to the Clinic and has a will drafted is also informed that when the client dies, the personal representative can come to the Clinic, and the Clinic will probate the estate at no cost to the personal representative, with the exception of the court fees. Many clients fear being a burden on their family during life and most assuredly do not want to be a burden after death, particularly a financial burden.

Additionally, there is a fear about the expense and complications of probate. By providing the client with probate assistance, free of attorney fees, the client is assured that her death will not cause her family any additional legal expense to settle her estate.

CLOSING THE FILE

When an intern has met his client's goals and completed legal services for that legal issue, the Clinic's job is not complete. Clients are encouraged to call and return if they face other legal problems in the future. Clients are also sent a satisfaction survey to better serve future clients. Preventative Law suggests that a client check up is a way for "the law [to] be applied or invoked in a sensitive and therapeutic manner."⁵⁸ Unfortunately, the heavy caseload and the resources of the Clinic limit the ability to offer a regular legal check up, or to do a scheduled follow-up with clients. However, clients are encouraged to return if new legal concerns arise, or if they have a change in circumstances and would like to change their estate-planning documents, at which time the clients are provided a legal check up. In addition, interns are encouraged to ask their clients if they have estate-planning documents, and if so whether they would like those documents to be reviewed or updated.

FUTURE USES OF THERAPEUTIC JURISPRUDENCE AND PREVENTATIVE LAW

As society continually changes, the Clinic is always looking for new ways to generate therapeutic outcomes. In the context of estate planning, an old concept of an "ethical will" is re-emerging.⁵⁹ An ethical will allows a person to pass more than mere property when she dies; it also allows a person to pass her words of wisdom, life lessons, and other intangible qualities. These intangible qualities often contain more emotional value than the material value of the tangible property the client may be passing on in a traditional will.

An ethical will can provide great comfort to a client who is sad that his personal property is quite limited and he has little to give his family as his legacy. An ethical will that provides guidance to a client's descendants,

58. Stolle & Wexler, *supra* note 6, at 25.

59. See generally Judith Frank, *The Human Legacy: Using Ethical Wills to Enhance Estate Planning*, 6 T.M. COOLEY J. PRAC. & CLINICAL L. 65 (2003); James Edward Harris, *Level Five Philanthropy: Designing a Plan for Strategic, Effective, Efficient Giving*, 26 U. ARK. LITTLE ROCK L. REV. 19 (2003); ETHICAL WILLS, *Preserving Your Legacy of Values*, at <http://www.ethicalwill.com/> (last visited Aug. 24, 2004).

reminds those descendants of his love and affection for them, and points out what qualities he admires and respects in each of them, can offer a sense of peace to the client and a lasting memory for his descendants. These final memories may very well outlast the client's remaining personal property.

Clinic faculty and staff believe that this could be utilized more in the Clinic, and that an ethical will has many therapeutic consequences. Because the Clinic offers free legal services and strives to serve an underrepresented population, many of the clients are at very low income levels. The creation of a traditional will for some clients is almost futile because they have little or nothing to give. Clients have been very upset at the prospect of leaving nothing behind for their children. Therefore, an ethical will allows the client to leave something behind at no expense whatsoever, and often with a value to the family far exceeding any tangible assets available.

GUARDIANSHIP REVIEWS AND GUARDIAN *AD LITEM* ROLES WITH PROBATE COURTS

Michigan law mandates that when a guardian is appointed, the guardianship must be reviewed after the first year, and then every three years after.⁶⁰ The Clinic faculty agreed that requiring interns to perform guardianship reviews would expand the interns' experiences, as well as provide a vital community service. However, when the Clinic agreed to perform these reviews, the prospective Therapeutic Jurisprudence benefits for the interns and legally incapacitated individuals⁶¹ were still unknown.

This project began with particular goals and outcomes. Some of those initial goals determined by the Clinic faculty for the interns were to give the interns direct interaction with the court, to give the interns experience in a role where they were not advocating on behalf of anyone, and to expose each intern to a guardianship case. But it is the unexpected and unanticipated outcomes that provide equal, if not greater, benefits than the anticipated outcomes.

The interns are provided with a protocol to follow when assigned a guardianship review and when acting as a guardian *ad litem*. When reviewing a guardianship, the interns must review the legally incapacitated individual's (LII) file at the probate court, confirm where the LII is residing, make arrangements to meet with the LII, and arrange to speak

60. MICH. COMP. LAWS § 700.5309 (2004); MICH. CT. R. 5.5408(A)(1).

61. MICH. COMP. LAWS § 700.1108(a) (2004) (defining "ward" as "an individual for whom a guardian is appointed).

with or meet the guardian and any other caregivers. It may also be necessary for the interns to meet with health care providers, or at least review the medical charts of the LII.

Interns are to meet with the proposed LII when a petition for guardianship has been filed and the interns are acting as guardians *ad litem*. When the interns and proposed LII meet, the interns are to fully inform the proposed LII of her legal rights, that she can oppose the guardianship. If the proposed LII tells the guardian *ad litem* (intern) she wants to oppose the guardianship, the guardian *ad litem* (intern) must inform the court of the person's choice to oppose the guardianship. An attorney will then be appointed by the court for the individual. In this case, the interns are not to speak with either the proposed guardian or the person who brought the petition for guardianship, if that person is different than the proposed guardian. If the proposed LII does not indicate that she wants to oppose the guardianship, the interns are to also interview the petitioner for the guardianship, the proposed guardian, family members, other interested parties, and caregivers. Interns prepare a report of their investigation and present that report to the court.

However, if the proposed LII seems to acquiesce to the guardianship, and the interns continue the interviews with interested parties and determine the proposed ward does not meet the statutory requirements⁶² for a legally incapacitated individual, the interns are then able to recommend less restrictive options to the court. These options may provide more therapeutic results for the proposed LII and, perhaps, for the proposed guardian. For example, after thorough interviews with necessary parties, the interns not only determine whether the proposed LII is competent "to receive or evaluate information in making decisions,"⁶³ but also learn that she would appreciate help with everyday challenges of paying bills, working with home repairmen, etc. The interns may suggest to the court in the guardian *ad litem* review that the proposed LII complete a Durable Power of Attorney and a Medical Power of Attorney. This allows more freedom to the proposed LII and proposed guardian by allowing these documents and decisions to remain private, without necessity for further public hearing and public reporting, and without requiring the reporting/review mandates of the proposed guardian.⁶⁴ Perhaps the greatest therapeutic consequence is the fact that the individual is able to maintain her autonomy.

62. MICH. COMP. LAWS § 330.1631 (2004).

63. MICH. COMP. LAWS § 700.5304(3)(b) (2004).

64. MICH. COMP. LAWS § 330.1631.

The first therapeutic benefit came from the interns being given an opportunity to visit the LIIs in their own homes, their living environments. The proposed LIIs and the LIIs who are assigned for guardians *ad litem* and guardianship reviews live in a variety of housing situations, including: private homes or apartments where wards reside alone; private homes or apartments where wards resided with other family members; adult foster care homes;⁶⁵ and nursing homes.⁶⁶ This exposure to the personal lives of LIIs provides interns with an insight into the elderly population and their clients that an office-visit-only relationship does not allow.

While the LIIs for whom interns are preparing guardianship reviews are not Clinic clients, the required visits with the ward, the court-appointed guardian, caregivers, and other appropriate persons often places interns into environments where many interns have never been before.⁶⁷ This out-of-the-office experience may provide interns with their first exposure to a nursing home, an adult foster-care home, or a private home where three or four generations of a family live together. Interns are now able to have a better personal understanding of a client's situation when he comes in and wants to remove his attorney-in-fact. The client wants to make this change and revoke his durable power of attorney because the attorney-in-fact placed him in a nursing home. The client now wants to return to his own apartment.

Interns who have been to the nursing homes, and have talked with caregivers, guardians and family members, are able to have more meaningful discussions with the client about the potential outcomes of leaving the nursing home environment versus the client himself choosing to stay at the nursing home. The intern can discuss with a bit more knowledge the type of care the client is receiving, the amount of care needed if he moves out on his own, and the types of services the client will need to arrange, such as getting assistance with errands, taking medications, and meal preparation. This ability by the intern to have a more open, informed discussion allows the client to be involved in determining if a move is reasonable at all, or if other options, such as adult foster care, should be considered. If an intern has never visited a nursing home, she is unlikely to be aware of the environment and the services available to a client. However, this guardianship review has now served a purpose for the court, as well as making the intern better prepared to determine therapeutic consequences for some future clients' concerns and

65. MICH. CT. R. 5.408(2).

66. *Id.*

67. *Id.*

issues.

Another therapeutic outcome arises when the interns have completed the review, prepared the report for the court, and recommended that the court hold a hearing to evaluate the guardian.⁶⁸ Therapeutic consequences result by allowing the LIIs' to have a voice and for their voice to be heard by the judge. In a small number of guardianship reviews, the interns have determined that the guardians have not been meeting either the statutory mandates⁶⁹ or the personal needs of some of the LIIs. Giving the LII their day in court allows the guardian to either be replaced, or to at least be put on notice that someone (the LII, a family member, or the caregiver) is not satisfied with the guardian's involvement. Sometimes, the caregiver is the one who voices that concern because the LII has dementia, or because the caregiver tried to contact the guardian for guidance and the guardian failed to respond or did not respond in a timely manner. When the guardian does not respond to the caregiver's calls or does not provide for the LII's personal needs, such as clothing, and personal maintenance, such as haircuts, this review allows for those concerns to be voiced, and therapeutic consequences to be experienced by the LII and, sometimes, the caregivers. If the guardian is not changed, the guardian at least becomes aware that she is being monitored and someone is taking notice. Often, this alone will improve attention to the LII. If a new guardian is appointed, this, too, usually brings positive changes to the life of the LII.

END OF THE TERM RECEPTION

The last concept of Therapeutic Jurisprudence to be discussed is the end of the term reception that the Clinic holds for the clients. This concept grew from another department and a different experience, but provided such insight that the idea was introduced to the Clinic, and has now become an integral part of the interns' educational experience.

The idea of the reception came about unexpectedly while teaching trial skills in the Practice, Advocacy and Litigation Department at Thomas M. Cooley Law School. Teaching voir dire to students by asking them to perform questions on each other was much too artificial and provided minimal learning opportunities. The students' backgrounds, while diverse, had led them all to law school. The law students posing as potential jurors could not help but determine that the questions asked of them by their colleagues were not really the questions that were intended to be asked, so students sitting as the venire (the potential jury pool) would answer

68. *Id.*

69. See MICH. COMP. LAWS § 330.1631.

questions as they, the venire members, believed they *should* have been asked. Also, because the students sitting in the venire were sitting with peers, questions were not always answered honestly. The idea of working at area retirement centers was presented to, and accepted by, the Thomas M. Cooley Law School administration, as well as by a few retirement living facilities. Residents of these retirement facilities were asked to participate in a mock trial educational event. The students came to the residents. The retirement facility would provide meeting space for the student lawyers and venire to gather. The residents were asked to sit as a venire. Residents were told they could answer questions as they personally believed or they could take on the personae of another.

This exercise became a very positive experience for the students in the class and for the residents at the facilities. Students were asking questions to a venire of people they did not know, who were of diverse backgrounds, and who would not answer just to appease the students. The residents reported that they enjoyed the experience, participated with enthusiasm, and always asked for the class to return during the next term.

One evening, the participating facility provided punch, cookies and brownies to both student and resident participants. It was such an interesting experience to watch this inter-generational connection. The students got to know these elderly residents on a more personal level, and they were able to learn of the residents' educational, work, and family histories. The residents asked questions of the students, such as how and why the students came to law school, where they were from, etc. The discussions were energy-filled, enthusiastic, and enjoyed by all participants.

It was following this experience that the suggestion was made to the Clinic that we set aside some time at the end of the term to allow the interns to meet with their clients. This time would allow the interns and clients to socialize, and provide an opportunity for the interns to thank the clients for participating in the interns' legal education and for being patient as the interns were learning this new practice of law.

This has proven to be a worthwhile endeavor for the Clinic. Clinic faculty understands that a public forum for clients to mingle and interact with each other and with interns is not always comfortable or even appropriate. However, it has proven to be successful with this population and these clients. The clients are sent an invitation and, of course, have the option of attending.

The reception is held at the Law School's facilities, but it is not held in the Clinic's space. Not holding the reception in the Clinic's space

removes the interns and the clients from the familiar office environment. Both the interns and the clients have preconceived ideas of their roles in that office area. The reception is held in an open lobby with walls of windows, so it is a bright and pleasant environment. The lobby allows for easy access to the reception, the openness allows for the interns to readily see their clients as they arrive, allowing the interns to immediately greet them. A small buffet consisting of teas, coffee, fruit and pastries is served. Tables with chairs are available, as are small, stand-up tables. This allows for and encourages conversations between the interns, clients, and faculty.

This setting provides interns an opportunity to learn new information about their clients. This information has not necessarily been critical to the legal issue of the client, but has often been essential to who the client is, and how the client perceives himself. An example of this is when an intern learned that his client had been an Olympic boxer in the 1950's. A small group of interns gathered around the man, were intrigued by his story, and were anxious to learn of his experiences. Clearly, this experience played a huge role in the next fifty years of this man's life. Having this information gave the intern a new respect for his client, a clearer understanding of the client's decision-making process, and a new personal admiration for the client's accomplishments in life.

The new knowledge interns and clients acquire from one another (previous life experience, current family situation), allows for the development of a deeper respect and understanding. This reception provides another opportunity for interns and clients to better communicate and relate to each other. While one-half of the interns leave at the end of every term, this reception is held with both the first-term interns (junior interns) as well as with the second-term interns (senior interns). By including the junior interns, the clients gain more comfort with the "new" interns, and the junior interns gain greater insight into the clients. The senior interns, who gained from their experience with the end of the term reception their first term, now leave at the end of their second term with a reinforced perspective of the importance of getting to know and understand their clients.

CONCLUSION

The Clinic strives to be a client-centered clinic that implements the principles of Therapeutic Jurisprudence and Preventative Law. From the beginning stages of the intake to the ending stages of implementation, the interns focus on the needs, fears, and preferences of the clients to help create therapeutic consequences. The techniques that are utilized during the interview and implementation focus on the greater goals of holistic counseling for the clients and therapeutic outcomes. As the principles of Therapeutic Jurisprudence and Preventative Law are utilized, the interns become more knowledgeable with each client on how to create therapeutic consequences for current and future clients. Clients are given a more positive view of attorneys, and the clients' discover their own abilities to generate positive outcomes and prevent anti-therapeutic consequences. The Clinic continues through education and implementation of new ideas to ensure that the clients and interns will experience the therapeutic effects of the client-centered approach.

