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Thomas L. Shaffer

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"ESTATE PLANNING" GAMES*

Thomas L. Shaffer**

This paper fits somehow into several years of research and conjecture on legal counseling—the study of what takes place in the law office, in one-on-one relationships between professional and client.¹ Most of my work has been in what is called the "estate planning" field—partly because it is an emotionally elaborate professional activity that takes place in the office, and not in courts or meetings or committees; and partly because it is my primary teaching interest, the field of legal endeavor I know most about.²

The central discoveries of those who study legal counseling are (1) that decisions made in the law office are legal decisions, in every sense of the word, as much as decisions of the Supreme Court are legal decisions,³ (2) but that these decisions vary depending on the attitudes, personality, and hang-ups of the counselor.⁴

In other words, one decision made by one client in a lawyer's office is probably a more final and important piece of law in his life and the lives of those he loves than anything the Internal Revenue Service has ever done. And one of the most relevant facts in this law-office decision is the peculiar psychic make-up of his lawyer.

Those discoveries can be analyzed in many more or less helpful ways, using analogies from concepts developed in behavioral science. Take, for example, the division of mankind into thinkers, fighters and lovers: Some professionals are thinkers; some are fighters; and some are lovers. A thinker will tend toward the incredibly complex schemes you see written about in *The Journal of Taxation*. A lover will tend toward decisions for his client which he thinks will keep everybody happy; he will pour almost any kind of oil on almost any kind of troubled waters. A fighter is, whether he realizes it or not, in competition with his client. He tends to have to push his client around. His style is assertive, even coercive, and often paternal.⁵

* This is based on a talk given to the Thirteenth Annual Arizona Tax Institute, December 2, 1971, in Phoenix.

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1 See T. SHAFFER, DEATH, PROPERTY AND LAWYERS (1970); T. SHAFFER, PLANNING AND DRAFTING WILLS AND TRUSTS ch. 1 (1972); Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376 (1970); Shaffer, *Three Models for the "Estate Planning" Counselor*, to be published in the proceedings of the 1972 Estate Planning Institute, University of Miami.

2 T. SHAFFER, 1971 LEGAL COUNSELING HANDBOOK (Draft ms. 1971), attempts to begin on other areas of consideration. The phrase "estate planning" is, in my opinion, a pre-tentious abomination, but it seems to describe and communicate; I compromise by putting it in quotation marks.

3 See Brown, *The Case of the Relived Facts*, 48 CAL. L. REV. 448 (1960); Brown, *Theories and Practices in the Legal Profession*, 19 U. FLA. L. REV. 447 (1966); Brown & Shaffer, *Toward a Jurisprudence for the Law Office*, to be published in the 1972 AMER. J. OF JURIS.

4 Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PENN. L. REV. 972 (1961).

5 *Id.*; Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CINCINNATI L. REV. 93 (1969). A friend, who is an otherwise perceptive

Paternal professional attitudes, which may be the most common among lawyers, have, for one anti-social and dysfunctional example, made our field of the law sexist. We are, almost to a man, blatant male chauvinists. Wills and trusts for the wealthy provide trust "protection" for widows, but not for widowers. They tend to protect daughters from dim-witted investment decisions, but not sons. They tend to provide paternal care for daughters-in-law, but leave sons-in-law to fight it out for themselves. The female prototype in our profession is a cross between Betty Crocker and Nellie Forbush. Her strength is home and hearth; she doesn't know anything about banks. She is all mush in the hands of French provincials and riverboat gamblers. That sexist result would be bad enough if our male (or female) clients chose it, but they usually do not. The whole thing is usually imposed on them by a domineering professional who excuses his being a bully or a chauvinist or both by calling himself an "estate planner."

Another way to analyze our office practice is the system of behavioral analysis proposed by the late social psychiatrist, Dr. Eric Berne, author of *Games People Play*.⁶ His system is called "transactional analysis." His theory was that we occupy patterns of behavior in our relationships with one another, and that these patterns can be broadly generalized into Parent Patterns (the way our parents were), Child Patterns (the way we once were), and Adult Patterns (the way we are able to be now).⁷

When two or more people are relating to one another, the pattern being displayed by each player interacts with the others. The result is sometimes an innocuous "pastime";⁸ one pastime is "General Motors"—people talking at parties about their cars; another is "P.T.A.," where the talk is about children; another is "Martini"; another, involving wives talking about their husbands, is called "Ain't He Awful?" Others are "Who Won?" "Have You Ever Been There?" and "Balance Sheet." There are many law-office pastimes which lawyers and clients play. They include "The Client I Once Had," "My Day in Court," "The Trouble with the Supreme Court," and "Internal Revenue Code." The lawyer almost always dominates them and charges for them.

The result of interaction among people may be adult—candid, no-nonsense, here and now, really honest communication. The more troublesome kind of interaction is what Dr. Berne called the "game." Games seem usually to involve, on the part of one or more players, the use of parent or child behavior patterns; they seem usually to involve manifest and ulterior levels of transaction simultane-

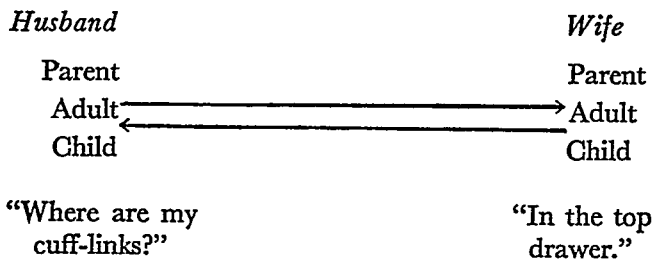
and resourceful expert in this field, seems to admit this behavioral configuration when he calls his interview style "tell and sell."

6 E. BERNE, *GAMES PEOPLE PLAY* (1965) [hereinafter cited as *GAMES PEOPLE PLAY*]. A deeper background to the theory is in E. BERNE, *TRANSACTIONAL ANALYSIS IN PSYCHOTHERAPY* (1961). I have attempted its use in a different legal context in *The Law and Order Game*, *TRANSACTIONAL ANALYSIS BULLETIN* 41 (April 1970). A broad social-science use of the theory is now being prepared—W. POINDEXTER & K. LA VIOLETTE, *GAMES EMPLOYEES PLAY*.

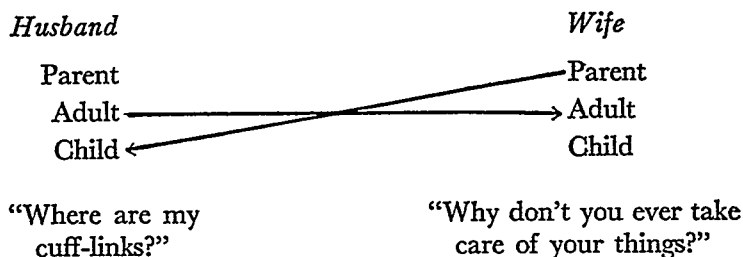
7 *GAMES PEOPLE PLAY* ch. I. The adult can be active in a direct ("do as I do") way, or an indirect ("do as I say") way. The child can be active as natural—spontaneous, playful—or as adapted, that is modified because of parental influence. *Id.* at 26.

8 *Id.* at 41: "[S]emi-ritualistic, simple, complementary transactions arranged around a single field of material, whose primary object is to structure an interval of time." Players benefit most from pastimes if they are well adapted to the ritualistic milieu in which pastimes occur.

ously, and they are almost always dishonest. (Dishonest, at least, as manipulative, if not dishonest with malice.) An example is the wife-husband game involving lost cuff-links. Husband says "Where are my cuff-links?" Wife's answer may be adult (no game): "In the top drawer."



It may, though, initiate a crossed transaction:



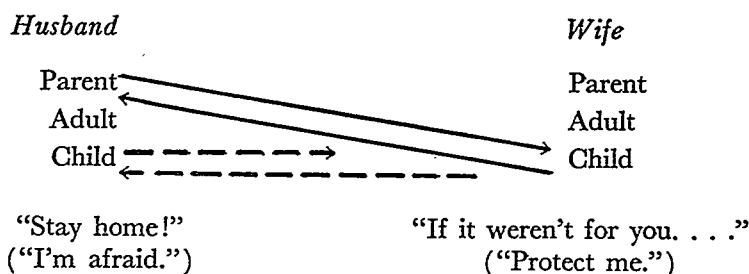
Crossed transactions either terminate communication or provoke realignment. If communication is realigned in this example, it may be on an adult-adult transactional level, which could become a discussion of where the cuff-links are, but might also be a discussion of the wife's need to mother her husband. The more likely, and more somber, realignment is on a parent-child line, and each reader has heard or experienced enough about parent-child games played by husbands and wives to write that dialogue for himself.

The familiar games are those that work; those that keep themselves going. But there are games that get crossed up and cut off all communication; "Uproar" is their genre.

A game that often works in the office practice of our profession is what I call "I'm in Charge Here." It is a parent-child game. The professional is parent, the client is child. The professional behaves as if he is licensed to push people around. If the game is played over an extended period, the client is a person who accepts being pushed around by a lawyer, insurance man or accountant, probably because he has been pushed around all his life by parental people. What is probably really happening is that the pushee feels that he needs to be protected from the hard facts of death and how he feels about the people who are close to him, and the pusher is afraid to deal with such mushy facts as feelings—his own and his client's.

Berne's prototypical game "If It Weren't For You" is analogous. In that

game, wife has chosen a husband who will protect her from anxiety-producing social relationships, and husband has selected a wife he can push around because he, too, fears abrasive contact with the outside world. At an apparent level, husband tells wife to stay home, and wife complains that her husband's domination stunts her social life. But the real, psychological, ulterior dialogue is entirely different:



Another way to look at this is to notice that most of us are told, most of our lives, that what we think or say or want or need is either bad or stupid or both. Freedom to choose, without guilt, is rare. It is easier, and more familiar, to be either pusher or pushee.⁹

I wrote a little dialogue to illustrate the game of "I'm in Charge Here," based on a client I had, whom I call here Charles March. The lawyer's name is Desmond Dominant:

Scene One: Desmond

DD: Good morning, Mr. March, What can I do for you?

M: Well, I think I probably need a will.

DD: Do you have one now?

M: No.

DD: Have you or your wife ever had a will?

M: No.

DD: You're sure?

M: Yes. I'm sure.

9 E. H. PORTER, JR., AN INTRODUCTION TO THERAPEUTIC COUNSELING 45-46 (1950): Self-evaluative attitudes are . . . attitudes regarding the worth, competence, capability, guilt, adequacy or other such evaluation of one's self as a person. Such attitudes may be consciously held or denied to consciousness. Against the recognition of unconsciously held negative self-evaluations the individual may defend himself and he may strive for the enhancement of positive self-evaluations.

These self-evaluations do not come with the physiology of the newborn child: they seem quite clearly to be learned. Nor are these self-evaluative attitudes learned in a formal learning situation, by having a smiling teacher face a class of eager pupils to say, "Now today, children, we will have our beginning lesson in how to feel worthless. Please do not become confused and learn to feel guilty as that comes in the higher grades. . . ." No, self-evaluative attitudes are learned, but not in such a way. It seems more likely that the learning is indirect and as a coincidental part of everyday situations.

DD: You're right. You need a will.

M: Okay, What should I do?

DD: Do you have a wife and children?

M: Wife and sister. No children.

DD: How old are you?

M: Seventy-eight.

DD: How old are they?

M: Wife is 74, sister, 68.

DD: Sister married?

M: No.

DD: What are your assets?

M: Here's a list.

DD: Well, I see about a hundred thousand dollars worth of commercial real estate in this county, you own your home and car, and have two hundred thousand in securities. I will figure out what you need.

M: That's why I'm here.

DD: I suppose you want to take care of your wife and sister?

M: Sure. They are both dependent on me.

DD: Then what?

M: I don't understand.

DD: Well, what if they're dead?

M: Then I would like my property to go to the public library, where my wife has worked for thirty years.

DD: Okay. Now, it also seems to me that you have too much money to just take care of these ladies. And just giving a lot of money to elderly ladies is a mistake anyhow. I think you should provide *income* for them and, after they're dead, give the money to the library.

M: Never thought of that.

DD: Of course not. That's why I'm here. The beauty is that you'll save lots of taxes. I estimate, roughly, that this plan will save you \$40,000.

M: That's amazing!

DD: Well, I tell you what we'll do, Mr. March. We'll put all this stuff in a trust to pay income to your wife for the rest of her life and then your sister for the rest of her life, and then to the library. Won't cost you a dime in death taxes. Tight as a drum.

M: Do you think there will be enough money there to take care of my wife?

DD: Sure. Income from about three hundred thousand—say, \$15,000 a year. That's enough, isn't it?

M: Well, I guess so.

DD: Sure it's enough. I know that from lots of clients I've had. Now, let's talk about an executor and trustee. I think we should. . . .

* * * *

I admit that Desmond's game, "I'm in Charge Here," has a lot going for it. Most games are successful; they pay off.¹⁰ Desmond can dispose of clients in an average interview time of half an hour. As a matter of fact, any successful professional style has a lot going for it, which fact often keeps the professional from looking at the consequences of his style.¹¹

But, Desmond didn't get to know much about March's feelings. And in our profession, feelings are facts. Feelings count.¹² Desmond doesn't know how March feels about his loved ones, or about the public library, or, for that matter, about taxes. Notice how his lawyer *assumed* the client would not want to *give* anything to women, but would merely want to take care of them. Desmond is a "male chauvinist pig," which is no surprise and may not even be the worst of his personality problems.

March won't get much emotional satisfaction out of his work with Desmond. I think March's emotional satisfaction is centrally important. As a matter of fact, emotional satisfaction is March's only reason for being in the office. *He* isn't going to save any taxes; dead men don't pay taxes. The benefit of this office encounter, for March, is either psychological or nothing at all.¹³

March may not accept the domination. He may say, in effect, "No! I don't want to do what you suggest. Suggest something else." Desmond will probably respond to that with some variant of the basic game plan. He will probably answer, in effect, "Sit down and shut up." The client's response to that will be any one of three things—he may give in, he may blow up, or he may leave. If he gives in, the game will return to its prototypical security, Desmond will

10 GAMES PEOPLE PLAY at 61: "[T]he essential feature of a game is its culmination, or payoff. The principal function of the preliminary moves is to set up the situation for this payoff. . . ."

11 One way to put this is to note that conceptual systems which work, whatever their faults and adverse consequences, tend to resist change. Their relative success gives them a certain *competence value*—a way of making one effective "After all, the conceptual systems we have were developed because we needed some way of making sense of the world . . . of planning what kinds of action . . . accomplish some desired result." READING BOOK, LABORATORIES IN HUMAN RELATIONS TRAINING 11-14 (N.T.L. Institute for Applied Behavioral Science, 1969 ed.). Competence value is counterbalanced, under this theory, by a need to know. "Consequences of style" is the objective of an intra-personal need to know; knowledge of the consequences of style tends to effect a change in style, because it exposes competence value to reality.

12 Brown & Shaffer, note 3 *supra*:

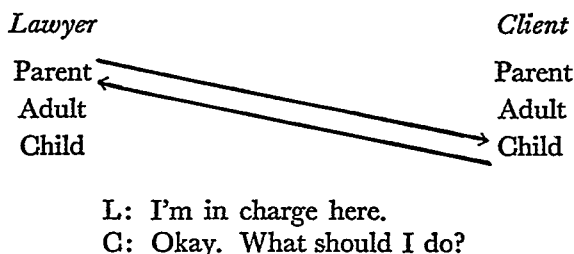
[T]he consideration of the client's emotional equipment as a fact which influences the direction of decision in the law office is an awesome demand on a lawyer's talents. But a decision which ignores this fact, or misperceives it, or cooperates with the client in ignoring it, is likely to be a bad decision. And by "bad" I mean that it will work less well—have worse consequences—than it would if the fact had been taken into account.

13 T. SHAFFER, DEATH, PROPERTY, AND LAWYERS 141-42 (1971):

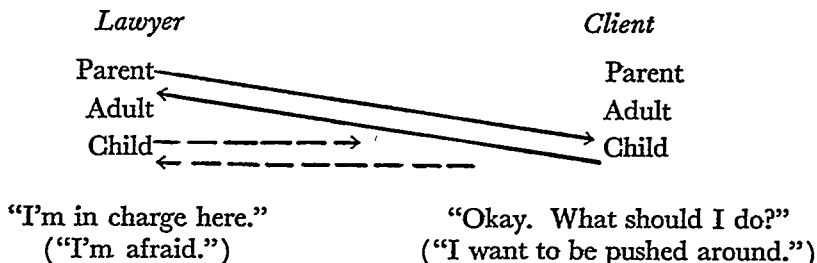
The more modern research in thanatology results in a wedding of concepts—a link between the ancient idea of fearful death (expressed most often in our culture by regarding death as a catastrophe, an accident), and a world of modern devices for pretending there is no such thing as death. From the idea of death as fearful, of death as unmentionable, comes anxiety. Death is a suppressed idea and therefore a primary source of psychological disorder. . . . The answer for neurosis is therapy, which is a pretentious word for care and concern. And everyday neurosis, the kind we all have, is most likely to be answered outside expressly therapeutic relationships. It is most likely to be aired and dealt with realistically in a sort of everyday psychotherapy—the sort that good lawyers have been performing for their clients for centuries.

get his protection-from-reality payoff, and March will continue to be pushed around, which is somehow what he wants.

I might diagram these various stages in "I'm in Charge Here" this way: The first transaction was from lawyer to client, and, in transactional terms, from parent to child: "I'm in charge here." The client may sooner or later agree to be dominated. Dr. Berne might have diagrammed that transaction like this:



But that is only an apparent-level diagram and does not suggest what the psychological payoff is for the two players—one of whom is afraid and the other sort of politely masochistic. If the full game is diagrammed, at both levels:¹⁴



The second possible transaction threatened to end the game. It put the lawyer to a choice. It was initiated by an adult response to the lawyer's dominance. The client's adult response was: "I do not like what you are suggesting." This transaction crossed the lawyer's parent-child transaction. It said, in effect, "I don't want to play your way. It's my life, my property, my family you are talking about. I want to be fully a part of that process." It said psychologically, "I don't want to be pushed around." It diagrams like this:

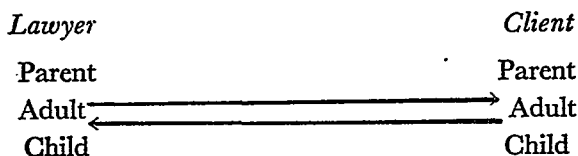
¹⁴ GAMES PEOPLE PLAY at 50-51. I am not sure Dr. Berne would have accepted the word "masochistic" in this context. The semantics may be unimportant. What I am suggesting is a lawyer-client parallel to the wife who wants to be pushed around; "her married life had proved one thing to her that she had always maintained: that all men were mean and tyrannical."



L: I'm in charge here.

C: I don't like it.

At that point either communication stops or the transactions are realigned. Dominant, the lawyer, might accept the client's offer to make the relationship an adult relationship. In Bernian terms, he will then agree to realignment. The result is a no-game transaction:



C: I don't like it.

L: Okay. Let's talk about that.

I feel sorry for the Desmond Dominants in our profession. Desmond thinks he has it all figured out. And he is not admitting to himself that, for some reason, he is afraid to figure it out. He does not want people to be an adventure for him; he wants to regard them as all more or less alike. He may give March a bad will, which is an anti-social way to practice law. Or March may leave in a huff, which would probably be good for both March and Dominant. But, by and large, Dominant is his own worst enemy.

* * * *

Another "estate planning" game is the one I call "Whatever You Want." It is played with yawns. It is social interaction at the level of torpor. I illustrate this game in another and shorter little scene involving a lawyer I call Elmer Easy, and the same client, Charles March:

Scene Two: Elmer

(March has been introduced and has explained his family situation and his property.)

Elmer: So now you want a will?

March: Right. I want to give my property to my wife, and if she goes before me to my sister, and if they both die before me, to the public library.

Elmer: Anything else?

March: No, I guess not.

Elmer: Okay, Mr. March. I can do that for you. It will cost you thirty-five dollars for both wills and I will have them ready day after tomorrow. Good-bye.¹⁵

* * * *

Elmer's game is the game a real lawyer in March's case played, and it is more subtle than it first appears. March brought me two wills drawn by Elmer Easy; he brought them two months after he saw Elmer. March had heard something on television about the estate tax. March's wills from Elmer were not tax-sophisticated because Elmer is one of those lawyers who regards Washington, D.C. as a foreign capital. I was able to demonstrate to March within about five minutes that a new set of wills would save him from \$16,000 to \$52,000, depending on what he wanted to do and on the order in which he and his loved ones die. That kind of treatment at the hands of a law professor makes Elmer look pretty bad.

The problem with Elmer is that he plays a dreary counseling game. Elmer's game is "Whatever You Want." It is a parent-child game, as Desmond's was, but the difference here is that the client is parent and the lawyer is child. At an apparent level, that game might diagram like this:



C (apparently): This is what I want.

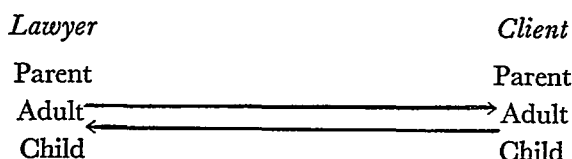
L (apparently): Whatever you want.

But "Whatever You Want" is a subtle game. Like all games, it involves another and more important, sub-surface level, what Dr. Berne called the level of "ulterior transaction." It is at the ulterior level that payoff occurs. At that level, the game looks entirely different. What Elmer is really saying to his client is "I don't give a damn," and what he is saying to himself is "I don't much like this kind of law practice. I would rather be doing something else. But this beats working." And March is probably just as apathetic, which may sound inconsistent with the fact that it is his family and his property at stake—until you

¹⁵ A group of my students worked with a young husband and father whose will gave his "estate" to his wife's parents if his wife predeceased him; the client after some information, decided a trust arrangement for orphaned children would be better. The old will, the client said, was one he "made out in about fifteen minutes one day." The lawyer who drafted it said it "took care of" the client's infant son. What it didn't take care of was the death or cupidity of the client's wife's parents, or the birth of other children; both things happened. T. SHAFFER, *supra* note 13, at 133-34.

recall the fact that most wills clients do not regard will-making as an intelligent act; they regard it as a ritual. It is only after some exposure to the counseling process that clients begin to experience solid psychological benefit from will-making.

If you put Elmer's kind of professional together with March's kind of client, and look at their game at an ulterior level, the game might diagram like this:



L (ulterior level): I don't give a damn.

C (ulterior level): Then let's get it over with.

The result of Elmer's game may be poor wills, and no psychological benefit for his client. That was the case with the client I base this example on. The result may also be a kind of passive competition between professional and client, the thrust of which is that the client proves—as the client did here—that his lawyer is not very competent. He confirms his suspicion that the wills business is mostly black magic; that it has very little logical, intelligent content.¹⁶ In either event, my sadness is for Elmer, not for March. Elmer misses the interpersonal boat as much as Desmond did. March would have been a great man to know. I know that is true because I got to know March, and the experience was priceless. March was and is a completely unique personal experience in my life. March also presented an interesting, engrossing professional challenge. I ended up drafting a combination marital-deduction, charitable-remainder testamentary trust for him, then re-interviewed him after the Tax Reform Act of 1969 made it impossible to save a charitable deduction and at the same time adequately protect the women in March's life.

* * * *

Another kind of "estate planning" game is the one I call "I Know What You Want." It is the legal profession's version of Dr. Freud sitting at the end of the couch telling his patient what makes the patient tick. It is an interpretive game, and therefore less brutal than "I'm in Charge Here." My drama for this game begins after the lawyer, whom I call Ingraham Interpreter, has gathered all of the financial data and has learned what March wants to do:

16 Shaffer, *supra* note 1 (Miami), explicating the hypothesis of J. DAVIS, *THE INTERVIEW AS ARENA* (1971):

The counseling interview is a wrestling match. "Combat," Davis says, "occurs in all social relationships as the participants jockey for advantageous positions." * * * [Davis'] conclusion . . . is that people compete everywhere and anywhere, even that they insist on competing when the payoff from collaboration is higher than competitive payoff.

Scene Three: Ingraham

- I: Well, Mr. March, it seems to me that you want a marital-deduction trust for your wife and a charitable-deduction trust for your wife and sister. That would be, basically, a matter of dividing your property in two, half for your wife for life and then as she might appoint, half for your wife and sister for life and then to the library, with a switchover from the first trust to the second if your wife did not use her power.
- M: That sounds okay to me. What I want is to be sure my wife is taken care of—and my sister—without the burdens of managing my investments.
- I: Yes, to be sure. Well, I can handle that for you. Leave it up to me. I know what you want.
- M: There is one thing.
- I: Yes?
- M: I don't understand this "power of appointment."
- I: Well, it's a lawyer's gimmick I guess. We use it all the time. It's a very common device for tax planning. You needn't worry about it, really. I assume your wife will never use it.
- M: I guess it's not important that I understand it, then.
- I: No, I think not. It's pretty technical. Let's talk about what I believe you want to do as respects the trustee. . . .

* * * *

"I Know What You Want" is an insidious sort of game. It tends to hook the professional, as I guess it hooks psychiatrists, because it *seems* humane. But it is not humane. It neglects to take into account the elementary truth that a healthy, intelligent client is capable of making his own choices, and that the heart of the counseling function is to help him make his choices with *information* and with *freedom*.¹⁷

The power of appointment issue in the Interpreter interview illustrates this, I think. Ingraham tells March, in effect, that a power of appointment is an insignificant technicality. You and I know better than that. So would Ingraham if he were an estate-tax examiner,¹⁸ or a creditor of the powerholder,¹⁹ or some Lothario who want to have Mrs. March's trust corpus at her death.

Ingraham will play out this game by not explaining to Mrs. March what she has, when she executes her will declining to exercise the power. The success of the whole scheme depends on her living the rest of her life in ignorance of her rights, or her property ownership, and in deference to her dead husband's lawyer. She is being treated as a non-person.²⁰ It would probably surprise Ingraham to have the ethics committee of the bar association suggest to him that

17 J. SIMONS & J. REDDY, *THE HUMAN ART OF COUNSELING* (1971); L. TYLER, *THE WORK OF THE COUNSELOR* (3d ed. 1969).

18 INT. REV. CODE OF 1954, § 2041.

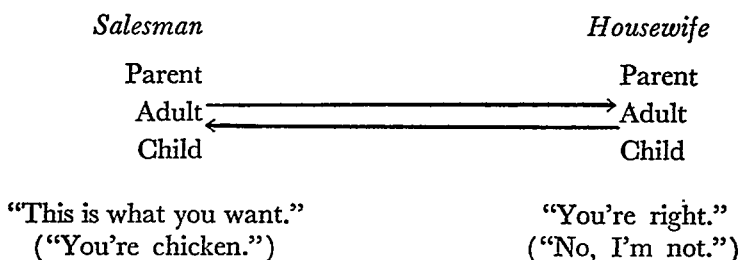
19 L. SIMES, *FUTURE INTERESTS* ch. 13 (2nd ed. 1966).

20 Application of Gault, 387 U.S. 1 (1967), presents a constitutional-law analogy—a case (juvenile offenders) where persons are treated as if their identities were encompassed by others. The woman in "estate planning" is a law-office instance.

Mrs. March is his client, even when she has some interests which are peculiarly her own.²¹

Ingraham's real communication in this game is that he needs to manipulate people into his own pre-designed schemes for their lives. He is reluctant to entrust them with what he knows, and that is why his communication to clients is *interpretive* and not *understanding*, if you can see the difference.²² He says in effect, "I have this all figured out," but as a matter of fact he does not have it all figured out, and his strategy will succeed only so long as his clients are willing to continue to be under his manipulative influence.

"I Know What You Want" resembles Berne's analysis of the housewares salesman and the housewife. In that game the salesman says, "This is what you need, but you can't afford it" and the housewife says, "I'll take it." The apparent transaction is adult-adult, but the real transaction (not shown below) is a manipulative adult's appeal to a child's vanity;²³



It may not be entirely clear that the client's vanity is involved in Ingraham's game as heavily as this analogy suggests, but I find some tentative security in thinking that it is. One way the client's vanity may be involved is the subtle challenge a layman experiences when a professional treats him as knowing some piece of the recondite science. The client is, in effect, saying "I understand" when he does not understand. Another and alternative reason may be that the client is in effect saying "I can afford a lawyer. Why should I have to understand?" This latter and familiar kind of client attitude is a law-office version of "Look Ma, No Hands."

The most likely result of Ingraham's game—and I think a very common result—is a set of documents which clients do not understand, but which Ingraham's office can prepare with some sort of computer. Another possible result is, of course, the client's overt rejection of Ingraham's interpretation. If the client says, "No, you don't have this figured out, because I am not going to subject my wealth and my family to a gimmick I don't even understand," In-

21 Canon Five, especially Ethical Considerations 5-14 through 5-20, AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY (1969).

22 C. ROGERS, CLIENT-CENTERED THERAPY 41 (Houghton-Mifflin ed. 1965). The psychological theory is that understanding produces a safe climate for learning and for choice, and that interpretation tends to threaten, or to imply judgment or both. The objective is that the client begin: "to experience a feeling of safety as he finds that whatever attitude he expresses is understood in almost the same way that he perceives it, and is accepted."

23 GAMES PEOPLE PLAY at 33-34.

graham may have to start treating the client as an adult, which will end the game.

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It is easy for a petulant pedagogue to be judgmental about his brothers at the Bar. What, finally, am I recommending? What do I see as a no-game plan for "estate planners"? A more or less global philosophical answer is that I see the counseling process as one of opening up options; the result of "estate planning" should be that there be more for the client to choose from than when he came to the lawyer and that the client be *able* to choose among his options with increased freedom and increased information. A simpler answer is that I see an ideal counselor in our profession as a companion for his client, rather than a boss like Desmond, or a bureaucrat like Elmer, or a manipulator like Ingraham.²⁴ If Desmond were not a boss, he would not say "I'm in charge here"; he would instead say, in some way, "I really want to know who you are, Charles March." If Elmer were not a bureaucrat, he would say "I want you to know me, Mr. March, and I am therefore going to talk to you about how *I* feel." And if Ingraham were not a manipulator, he would say, as a companion to his client, "You're different, March. You're special. You are unlike any person I have ever drawn a will for before." He would say to himself—"I wonder how this is going to come out"—and that idea would excite him. He would find his client as exciting, as much an adventure, as he finds a good novel or an appealing new song.²⁵

That kind of counseling climate—the companionship kind—is characterized by three aspects of personal style:

First, it is sensitive to the client's world. In the client's world, a professional office is strange and awesome, and, at the same time, *terribly personal*. It is a strange world in which his death, his things, his loved ones, and his immortality, have to be talked about and faced up to. If his feelings are seen as relevant by his counselor, the client will feel free to talk about his feelings.²⁶ In other words, he has to be accepted and understood by his counselor.

Second, the communication between client and counselor is honest and human. That means the *professional* has to trust the *client*; he has to trust him enough to level with him. If March says to Elmer, "I want a will which will

24 J. SIMONS & J. REIDY, *supra* note 17, at 21-22, distinguish between a *helper* role and a *counselor* role, and recommend the latter:

[The client] has been attracted to you personally and he has sensed that you and he can communicate. He has moreover a good reason to talk to you because he has a recognizable problem which you, seen as counselor, accept as a fair way to get in contact with you. It's all right to come to you with a problem. But put more accurately, it's all right for him, under these circumstances now, to come to you. He has an acceptable reason to be with you and to ask your attention. * * * His problem is his entrance fee into your life. If you remain in a helper role, even while it is the role he thinks he wants you in, you may never reach your client nor bring him lasting help. * * * He is asking you to be the human being who noticed him and seemed able to touch him. He is asking you to be this human self, and precisely as this self, to accept him as he really is. His plea is not small. It demands risk of both of you. To ignore it is the first pitfall of counseling.

25 E. SHOSTROM, *MAN THE MANIPULATOR* (Bantam ed. 1968).

26 Note 12 *supra*; T. SHAFFER, *supra*, note 13, at ch. I; Shaffer, *Men and Things: The Liberal Bias Against Property*, 57 A.B.A.J. 123 (1971).

save taxes. Give the ladies only a fixed percentage of income," Elmer may answer, if he feels like it, "Charles, I don't like that at all. It seems to me you are out to beat Uncle Sam regardless of what that does to the people you love most. I would feel guilty about drafting that document." There is a subtle verbal difference between saying "I don't like that" and saying "That is bad," but there is an enormous behavioral difference between the two. One is open, does not judge, and does not threaten. The other is parental.²⁷ Being open implies being involved, and being involved would be a change for Elmer, you know. He is the lawyer who says to his client "Whatever You Want," and who says in his heart, "I don't give a damn."

Finally, the personal style is one in which the professional has some trust in his own spontaneity. He trusts himself. He is able to live in the present. That is an awesome challenge for us lawyers.²⁸ We are occupationally reluctant to live in the present. Our professional folklore is built on preparation—which is the word we use for living in the future. And our professional security is built on rules, concepts, and categories—which is a way of living in the past.²⁹ Parent and child patterns of behavior in our lives, to return to transactional analysis, are the residues of our past.³⁰

And yet the great creative masters of our profession are men who saw our heritage as an opportunity, not a limitation. "Estate planning," if we must call it that, is creative, I think, not confining. We can leave our clients with broadened horizons. The trust idea, as the chancery barrister said, was born in creative lawyering, in fraud and fear and conscience.³¹ A citizen and his lawyer *can do anything* not plainly nefarious in a trust. It is a fundamentally creative device which has been bearing up well to spontaneity in lawyers for a thousand years.³² Much the same would be said of the once and ever radical idea that a man—a beneficiary, say—can *own* property which he does not and may never possess.

Our work, whatever we call it, ought to be an adventure. And the key to our living the adventure may lie in something Erik Erikson said about psychiatrists.³³ We don't need to learn how to face facts, he said. We need to learn how to face a face.

27 E. PORTER, note 9 *supra*; C. ROGERS, note 22 *supra*. In Berne's analysis, this is the active parent—the one who gives orders. The lawyer in this "ego state" tends to act as his parents, or surrogate parents, acted toward him. T. SHAFFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* ch. VI (1972), discusses a client who puts this personal theory to the test for me; it was hard there not to be my parent.

28 Maslow, *On Self Actualization*, in N.T.L. INSTITUTE, *supra* note 11, at 15.

29 "The life of the law has been experience" is a perfectly valid and useful way to approach *the law*; it may not—usually is not—the way to approach a person. It denies his uniqueness.

30 That seems to be true in the classic Freudian concept of the "archaic" contents of the psyche. GAMES PEOPLE PLAY ch. I makes the point, though, that a person's parent and child play useful parts in his ordering of reality and functioning in it with harmony. The present point is that the parent and the *adapted* child—see *supra* note 7—are brakes on spontaneity.

31 I A. SCOTT, *TRUSTS* § 1 (3d ed. 1967).

32 RESTATEMENT (SECOND) OF TRUSTS § 59 (1959).

33 E. ERIKSON, *YOUNG MAN LUTHER* (1958).