

EMPATHY TRAINING FOR LAWYERS AND LAW STUDENTS

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I. INTRODUCTION

Many lawyers believe that the practice of law demands concentration on the facts of a case and leaves no room for concern about the emotional state of a client. These lawyers seem to approach each case simply as a factual matter, giving at most minimal, and more frequently no attention to the emotions of their client.¹ Most lawyers view the practice of law as a set of legal problems that must be solved like a puzzle, rather than as a vocation which assists people who have problems involving both factual and emotional dimensions.² Their primary orientation is the problem; the person seems incidental.³

During the interviewing and counseling of clients, lawyers generally attack the legal problems impersonally as though the clients were simply names attached to factual patterns purely for identification purposes.⁴ This one dimensional approach of focusing exclusively on

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1. D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING 25 (1977) [hereinafter cited as BINDER & PRICE].

2. Lawyers think of cases as legal problems, not as people with problems. Very, *The Human Element in the Attorney-Client Relationship: The Answer to Malpractice*, 48 PA. B.A.Q. 515, 515-16 (1977).

3. A study of lawyers and law students found that they were substantially "problem oriented" (focusing "primarily or entirely [on] seemingly detachable facts and issues that were analyzable in their own right") rather than "person oriented" (focusing on the client and what the client was experiencing). All groups tended to be problem oriented nearly 100% of the time. T. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE 114-15 (1977).

Another study classified lawyers as "problem oriented," "people oriented" or "money oriented." H. GORMAN, LAWYERS AND MATRIMONIAL CASES 120-32 (1963).

4. See generally J. NOONAN, PERSONS AND MASKS OF THE LAW (1976).

facts⁵ demonstrates that lawyers are oriented to fact and not feeling.⁶ Indeed, many lawyers would consider an interview that touched on a client's emotional state to be both useless and inappropriate.⁷

Because legal concepts generally neglect any aspect of a party's emotional state,⁸ the lawyer's preoccupation with facts seems understandable. What many lawyers fail to understand, however, is that focusing on facts is not the *sine qua non* of effective interviewing.⁹ The client's feelings are important because virtually every legal case has significant emotional components for the client.¹⁰ These emotional components are tied to the fact situation, to the client's relationship with the lawyer and to the client's encounter with the legal system.¹¹ The lawyer who is able to listen with empathy¹² to the client's problems can

5. The lawyer's approach to interviewing calls to mind the words of Sergeant Joe Friday from the old television series *Dragnet*, "All I want is the facts ma'am, just the facts."

6. Thinking and feeling are opposite psychological types as postulated by Carl Jung. See C. JUNG, *PSYCHOLOGICAL TYPES* II 14 (1926). It would be interesting to study lawyers by administering a standard psychological test to determine which of the two types are prominent. The Myers-Briggs indicator is one such test that measures the antithetical traits of Jungian psychology, including thinking and feeling. See LOEVINGER, *Measurement in Clinical Research* in HANDBOOK OF CLINICAL PSYCHOLOGY 78, 86 (B. Wolman ed.) (1965). A study done on law students indicates that law students are likely to be thinking types. Comment, *Personality Differences and Student Survival in Law School*, 19 J. LEGAL EDUC. 460, 465-66 (1967). Seventy-two percent of law students were "thinking" types; while only eleven percent of "thinking" types dropped out of law school, twenty percent of the "feeling" types dropped out.

7. Taking a position quite to the contrary are BINDER & PRICE, *supra* note 1, at 20-37; Schoenfield & Schoenfield, *How to Handle a Client in a State of Stress*, 27 PRAC. LAW. 53 (June 1981) [hereinafter cited as Schoenfield].

8. There are, of course, exceptions. The emotion of fear is a required element for a claim of self-defense. Mental distress is a required element of a claim of intentional infliction of emotional distress. Emotional suffering may be awarded in addition to damages in tort cases. Langhenry, *Personal Injury Law and Emotional Distress*, J. PSYCHOLOGY & LAW 91 (1981).

9. The typical communication patterns of lawyers are considered so poor by people who study communication that they sometimes use lawyers as an example of what not to do. Taking a medical history from a patient through the use of a prepared or an established series of direct questions has been described as a "rapid fire . . . 'Mr. District Attorney' approach," L. BERNSTEIN, R. BERNSTEIN & R. DANA, *INTERVIEWING: A GUIDE FOR HEALTH PROFESSIONALS* 97 (1974).

10. BINDER & PRICE, *supra* note 1, at 21; D. HAMMOND, D. HEPWORTH, & V. SMITH, *IMPROVING THERAPEUTIC COMMUNICATION* 80 (1977) [hereinafter cited as HAMMOND]; Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5, 9 (1975); Mulhare, *How to Handle A New Client—A Psychodynamic Approach*, 21 PRAC. LAW. 17, 24 (Oct. 1975).

11. Clients may be alarmed by the financial impact of a lawsuit, afraid of testifying in court or outraged at the injustice they feel they have suffered. Kelso & Kelso, *Conflict, Emotion, and Legal Ethics*, 10 PAC. L.J. 69, 73 (1979).

12. The concept of empathy is very old, having been traced back to the time of Plato. Gempertz, *The Relation of Empathy to Effective Communication*, 37 JOURNALISM 533 (1960). Empathy was first expressly formulated as *Einfuhlung*, a German word meaning "feeling into." L. BRAMMER, *THE HELPING INTERVIEW* 36 (1979). See F. VISCHER, *AESTHETIK ODER WISSEN-*

strengthen the case, increase the client's satisfaction and improve the business aspects of the lawyer's practice. This article focuses on empathic response that is an interviewing and counseling technique commonly referred to in lay or popular psychological terms as active listening.¹³ Active listening is a listener's response that reflects back to the speaker in different words what the speaker has just said.

Active listening encompasses listening for the content of the client's problem and for the emotional state of the client.¹⁴ In psychological literature generally, and for purposes of this article, an active listening response that only concerns itself with the emotional state of the client will be designated as an empathic response. Lawyers, like other good counselors, need to respond to both the content of their client's statements and to the feelings behind those statements.¹⁵ Although lawyers generally respond to content, clients "may need and want empathy from their lawyers as much as they want legal results."¹⁶ Unfortunately, few law schools offer courses on interviewing and counseling that place a significant emphasis on the emotional needs of the client, and teach the skills needed for dealing with these emotions.¹⁷ Furthermore, although legal interviewing and counseling has been a subject of increasing interest in legal education within the last decade,¹⁸

SCHAFT DES SCHONEN (1946). Although it is sometimes imprecisely defined, Carl Rogers, the founder of client-centered therapy, provides a useful definition: "To sense the Client's private world as if it were your own, but without ever losing the 'as if' quality—this is empathy." C. ROGERS, *ON BECOMING A PERSON* 284 (1961). Empathy implies participating in the other person's world—seeing and understanding the world from the perspective of the client. "[E]mpathy is an understanding *with* the client, rather than a diagnostic or evaluative understanding *of* the client." HAMMOND, *supra* note 10, at 3.

For additional techniques a lawyer can use to convey an understanding of the client's world, see A. KORZYBSKI, *SCIENCE & SANITY* 58-60 (1958); Barkai, *A New Model for Legal Communications: Sensory Experience and Representational Systems*, 29 CLEV. ST. L. REV. 575 (1981), which discusses verbally matching the client's visual, auditory, or kinesthetic map of the world, while still remembering that "the map is not territory."

13. BINDER & PRICE, *supra* note 1, at 25; K. HEGLAND, *TRIAL AND PRACTICE SKILLS* 202 (1978). A good active listening response is nonjudgmental and demonstrates the listener is in fact listening carefully. It has the effect of building rapport and encourages the client to continue speaking. It conveys the impression that the listener understands the world from the perspective of the speaker. C. ROGERS, *COUNSELING AND PSYCHOTHERAPY* 131-151 (1942).

14. BINDER & PRICE, *supra* note 1, at 21.

15. BINDER & PRICE, *supra* note 1, at 178, 180; G. EGAN, *THE SKILLED HELPER* 87 (1975).

16. Smith & Nester, *Lawyers, Clients and Communication Skill*, 1977 B.Y.U. L. REV. 275, 281.

17. This assumption is based on the sparse showing of the subject in legal literature, e.g., BINDER & PRICE, *supra* note 1, at 20 and Schoenfield, *supra* note 7.

18. In the past ten years many articles have appeared in legal periodicals on the subject of interviewing and counseling. The first law textbook to have a significant focus on interviewing was H. FREEMAN & H. WEIHOFEN, *CLINICAL LAW TRAINING* (1972). Two books that stress inter-

little is known about the improvements in students' skills after training.¹⁹

This article will describe a systematically designed training program intended to assist lawyers and law students in developing empathic communication skills that will facilitate initial rapport between them and their clients.²⁰ The program empirically demonstrates that with only four hours of training lawyers and law students can learn to respond empathetically to clients. This article also advances arguments

viewing and counseling are G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* (1978) and K. HEGLAND, *supra* note 13. Complete books now appear on the subject. See BINDER & PRICE, *supra* note 1; T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1976); A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976).

Furthermore, 1983 will mark the fifteenth annual Client Counseling Competition among law schools. In 1981, 126 American and Canadian schools entered this national competition. Further indication of the increased interest in interviewing and counseling is the increase in law school clinical programs. In 1970-1971, 204 programs existed in 100 law schools; by 1977-1978, 470 programs existed in 131 law schools. COUNSEL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, *SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1977-1978*, at xviii (1978). By 1977-1978, 312 programs provided training in interviewing and 245 in counseling. *Id.* at xiv. Just three years earlier, only 225 programs taught interviewing and 185 taught counseling. COUNSEL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, *SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1974-1975*, at ix (1975).

19. Most courses on interviewing and counseling do not give written examinations and none have reported empirical data measuring skills before and after training. Alderman, Evans, & Wilder, *Assessing Clinical Skills in Legal Education: Simulation Exercises in Client Interviewing*, 41 *EDUC. & PSYCHOLOGICAL MEASUREMENT* 1115 (1981) reported that students with clinical experience performed better on written simulation interviewing exercises than those without clinical experience. The report, however, did not indicate what, if any, training the clinical students had in interviewing. Professor John Barkai of the University of Hawaii Law School has coordinated a clearinghouse for written examinations in lawyering skills for the American Association of Law Schools Section on Clinical Legal Education.

20. Analytic researchers and teachers of empathic communication utilize a two level classification. At the first level, the lawyer responds to what the client has explicitly stated, but goes no further than what has been clearly stated. This is the level considered necessary for rapport building, and is the level for which the law students were trained in the experiment described in this article. At the second, higher level, the lawyer also responds to what the client implied, hinted at, left unstated, did not express clearly, or stated nonverbally. When numerical scales are used to measure empathy, the first level is considered the middle of the scale, *i.e.*, three on a five point scale and five on a nine point scale. The second level is considered the high end of the scale, *i.e.*, the five on the five point scale, the nine on the nine point scale.

Researchers have given these levels various names: the "interchangeable" level and the "additive" level. R. CARKHUFF, *HELPING AND HUMAN RELATIONS* 237 (1969); "primary-level accurate empathy" and "advanced accurate empathy," G. EGAN, *supra* note 15; "reciprocal responses" and "additive responses," HAMMOND, *supra* note 10.

Accurate empathy at the primary level is a response to what the client clearly has said and can be considered part of Stage 1 of a helper's skills. Accurate empathy at the advanced level not only considers what the client has actually said, but also what is implied, hinted at and said nonverbally. G. EGAN, *supra* note 15, at 34-36.

that explain why empathetic responses are important for lawyers, and reviews the literature on empathy training in other disciplines.

A unique aspect of the empathic communication skills training program described in this article is the empirical testing of those skills. Legal education is almost totally without a process for testing the effectiveness of teaching.²¹ Law professors use what they probably consider time-tested teaching methods. The professors either employ the methods that were used on them or employ other methods that are based on an intuitive feeling about their effectiveness. This article not only describes a teaching method, but also empirically demonstrates the effectiveness of that method.

II. THE EMOTIONAL ELEMENT OF A CLIENT'S PROBLEM

Whenever a client presents a legal problem to a lawyer, emotional components to that problem are sure to exist. A potential plaintiff does not go to a lawyer when he *thinks* he has a cause of action; he goes when he *feels* he has been damaged, cheated, taken advantage of, wronged, treated unfairly or physically injured. A defendant does not appear at a lawyer's office merely with a legal document that makes him an involuntary party to a lawsuit; he arrives with a feeling that someone wants his money or liberty. He feels unjustly accused, harassed, tormented or perhaps even that he is in the wrong. A potential plaintiff and defendant might feel embarrassed about the situation they are in or perhaps even degraded for allowing themselves to get into the situation.

Even the client who may feel no emotion about the prior events that brought him into the lawyer's office is likely to have an emotional response about seeing a lawyer or going to court. Most people are probably less eager to see a lawyer than to see a doctor. A potential client may feel that a lawyer will take advantage of him.²² A client, who because of his poverty cannot choose his lawyer, often has little faith in "his" attorney. A legal aid lawyer would certainly not be a client's first choice if he had a real choice.²³ Many indigent defendants

21. One exception is Kimball & Farmer, *Comparative Results of Teaching Evidence Three Ways*, 30 J. LEGAL EDUC. 196 (1976).

22. "Nation's Lawyers are under attack for high fees or low performance." The Sunday Star-Bulletin & Advertiser (Honolulu) Nov. 1, 1981, at A-2, col. 3 (citing dishonesty as the number one charge against lawyers).

For other sources of popular dissatisfaction with lawyers, including unsociability, superficiality, obsolescence and amorality, see Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223, 282-283 (1981).

23. "Empathic communication is critical in working with involuntary or captive clients and

do not believe public defenders work for their defense.²⁴ Even a business or corporate client who may not "distrust" its lawyers may be embarrassed because it has encountered a problem that it cannot handle internally, or because the problem has been caused by an oversight or mistake.

Another source of a client's emotion results from anticipating the consequences of a lawsuit. A client may be concerned that he (and his family and friends) may get unwanted publicity if a suit is filed and the case goes to court. The possibility of having to testify in a public court and being subject to cross-examination may put fear into the heart of otherwise competent and capable individuals.²⁵ Once a lawyer recognizes that there are emotional components to a particular client's problem, he can more fully understand the needs of the client and provide services accordingly.

III. BENEFITS OF EMPATHIC COMMUNICATION

Assuming that a client's problem has emotional components, the next logical inquiry is whether it will be beneficial to a lawyer if he responds to the emotional components of the client's problem. The answer is that empathy skills can improve nearly all aspects of lawyering by facilitating rapport, increasing factual disclosure and improving client satisfaction.

Before discussing specifically what empathy skills can do for law-

with those who have been pressured, often by ultimatum, into seeing a professional." HAMMOND, *supra* note 10, at 33.

24. "A state attorney is worse than none." *People v. Losinger*, 331 Mich. 490, 496, 50 N.W. 2d 137, 140 (1951). J. CASPER, *CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE*, EXECUTIVE SUMMARY iii (1978) reported "that nearly half (49 percent) of all public defender clients thought their attorneys were 'on the side of the state.'" See also R. HERMANN, J. BOSTON, & E. SINGLE, *COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA* (1977); Casper, *Did You Have a Lawyer When You Went to Court? No, I had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 4 (1971); Wilkerson, *Public Defenders as Their Clients See Them*, 1 AM. J. CRIM. L. 141 (1972); Comment, *Indigents' Dissatisfaction With Assigned Counsel*, 22 CLEV. ST. L. REV. 157 (1973), reprinted in J. SCHULTZ & J. THAMES, *CRIMINAL JUSTICE SYSTEMS REVIEW* 608 (1974).

To the extent that a rapport with clients is an important element in establishing an adequate defense or in providing a working environment in which the public defender can spend his time with those who are friendly and amicable rather than distrustful and cynical, this client distrust presents a challenge both to the attorneys and to the criminal justice system as a whole.

J. CASPER, *CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE* 81 (1978).

25. Are there any lawyers who do not remember how nervous they were the first time they had to appear in court as a lawyer? Consider the law graduate who has just taken the bar examination and is awaiting the results, and make the analogy to a client who is a party to a lawsuit and is awaiting the disposition. Is it even possible for the client not to have an emotional response to a legal problem? It has been suggested that man may be incapable of viewing facts without emotion. P. RHINELANDER, *IS MAN COMPREHENSIBLE TO MAN?* 48 (1973).

yers, it will be useful to review what other professions have learned about empathic communication. The ministry, social work, psychiatry, counseling, teaching, psychology and law have all been labelled "helping professions."²⁶ In these professions the relationship between the client and the professional is considered to be a critical element. Central to the helping relationship is the verbal communication between the professional and the client. Psychotherapy is the profession that has been subjected to the most research on the nature of the verbal components of the professional-client relationship.²⁷ This research has clearly demonstrated that in the therapeutic relationship the core conditions of empathy, respect and genuineness, are related to a positive outcome, and that it is the person in the helping role who creates these core conditions.²⁸ Rapport, or a mutual trust, is also central to a good client-professional relationship,²⁹ and the most basic of the conditions in creating this rapport is empathy.³⁰

Although lawyers do not attempt to help their clients by charging them as do therapists, good lawyering resembles good therapy to the extent that both require rapport between the professional and the client. Although initially lawyers may be wary of the use of therapeutic techniques in law, lawyers can learn from therapists about establishing rapport. The vast amount of research and analysis that has been done in the field of psychotherapy on empathic communication and on the teaching of empathy skills proves useful in teaching lawyers about empathy skills.³¹

26. L. BRAMMER, *supra* note 12, at 12; G. EGAN, *supra* note 15, at 17. A longer, more specific list of other paraprofessional, volunteer and everyday helpers is found in *id.* at 8.

27. A 1952 research study concluding that patients treated with psychotherapy fared no better, and did worse in some instances, than those who received no professional treatment at all. The study stimulated much needed research into the empirical relationship between the nature and outcome of therapy. Eysenck, *The Effects of Psychotherapy: An Evaluation*, 16 J. CONSULTING PSYCHOLOGY 319 (1952). Since then, there has been a continuous, strong flow of research.

28. R. CARKHUFF & B. BERENSON, *BEYOND COUNSELING AND THERAPY* (1967); Truax & Mitchell, *Research on Certain Therapist Interpersonal Skills in Relation to Process and Outcome*, in *HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE* 299 (A. Bergin & S. Garfield, eds. 1971); Lambert, DeJulio & Stein, *Therapist Interpersonal Skills: Process, Outcome, Methodological Considerations, and Recommendations for Future Research*, 85 PSYCHOLOGY BULL. 467 (1978) [hereinafter cited as Lambert].

29. BINDER & PRICE, *supra* note 1, at 25.

30. Rapport is a primary objective of the early phase of interviewing and counseling. HAMMOND, *supra* note 10, at 31. Empathy "helps dramatically" to establish rapport, G. EGAN, *supra* note 15, at 78. 1-2 R. CARKHUFF, *HELPING AND HUMAN RELATIONS—PRIMER FOR LAY AND PROFESSIONAL HELPERS* (1969).

31. It is worth emphasizing that it is not being suggested that lawyers develop and use empathic communication skills appropriate for creating psychotherapeutic change. The field of psychotherapy recognizes two levels of empathy: First there is "primary empathy," which is directed

Medical interviewing presents a parallel to legal interviewing. As in law, the medical profession has shown a growing interest in interviewing during the past decade. Both fields, however, tend to emphasize the elicitation of hard facts from the client. Lawyers seek the facts concerning the legal dispute; doctors seek facts concerning patient histories and present symptoms. More recently, the medical profession has expanded its interest from the mere extraction of facts to recognition of, and communication centering on the emotional state of the patient.³² In an attempt to increase patient satisfaction and patient compliance with doctors' treatments, and to decrease the volume of malpractice claims, the medical profession has begun to place emphasis on empathic communication skills. Medical schools are teaching these skills as part of systematic courses on medical interviewing.

When empathic listening skills are used in the legal profession they can improve a lawyer's performance as an advocate, a business person and a counselor. Additionally, empathic listening by an indi-

at building rapport, second there is "advanced accurate empathy", which is directed at psychotherapeutic change. Lawyers should only concern themselves with the lower level of "primary empathy," which is necessary for building rapport. This primary level of empathy can be taught as a listening skill to lay and professional people to help them become more effective in dealing with other people.

R. HATCH, AN EVALUATION OF A FORCED-CHOICE DIFFERENTIAL ACCURACY APPROACH TO THE MEASUREMENT OF SUPERVISORY EMPATHY (1962). Berenson, Carkhuff & Myrus, *The Interpersonal Functions and Training of College Students*, 13 J. COUNSELING PSYCHOLOGY 4 (1966) (training undergraduate dormitory counselors); Bernstein, Brophy, McCarthy & Roepe, *Teaching Nurse-Patient Relationships: An Experimental Study*, 3 NURS. RES. 80 (1954) (training nurses); Canfield, Eley, Rollman, Schur, *A Laboratory Training Model for the Development of Effective Interpersonal Communications in Social Work*, 11 J. EDUC. SOC. WORK 45 (1975); Foa, *Some Correlates of the Empathy of the Workers with the Foreman*, 44 J. APP. PSYCHIATRY 6 (1960); Kaufman & Miller, *Analogy, Empathy, and Therapy*, 21 SOC. WORK 69 (Jan. 1976); Keef, *Empathy: The Critical Skill* 21 SOC. WORK 10 (Jan. 1976); Mayo, *Teaching Communication/Interviewing Skills to Urban Undergraduate Social Work Students*, 15 J. EDUC. SOC. WORK 66 (1979); Morgan, *A Model of the Empathic Process for Teachers of Emotionally Disturbed Children*, 49 AMER. J. ORTHOPSYCHOLOGY 466 (1979); see Oxley, *The Methods Lab—An Experiment in Experiential Classroom Learning*, 21 SOC. WORK EDUC. REP. 60 (1973); Truax & Tatum, *An Extension from Effective Psychotherapeutic Model to Constructive Personality Change in Preschool Children*, 42 CHILDHOOD EDUC. 456 (1966) (teacher training); Wells, *Training in Facilitative Skills*, 20 SOC. WORK 242 (1975); Wells & Miller, *Developing Relationship Skills in Social Work Students*, 21 SOC. WORK EDUC. REP. (1973).

32. Carroll & Monroe, *Teaching Medical Interviewing: A Critique of Educational Research and Practice*, 54 J. MED. EDUC. 498 (1979) (conclusions based on the review of 73 studies on the teaching of medical interviewing); Fine & Therrien, *Empathy in the Doctor-Patient Relationship: Skill Training for Medical Students*, 52 J. MED. EDUC. 752 (1977) [hereinafter cited as Fine]; Korsch & Negrele, *Doctor-Patient Communication*, 227 SCI. AM. 66 (Aug. 1972); Pacoe, Naar, Guyett, & Wells, *Training Medical Students in Interpersonal Relationship Skills*, 51 J. MED. EDUC. 743 (1976); Ward & Stein, *Reducing Emotional Distance: A New Method to Teach Interviewing Skills*, 50 J. MED. EDUC. 605 (1975).

vidual lawyer can benefit the image of the legal profession as a whole. The key to all these gains is the rapport that is built through empathic listening.

Lawyers are advocates and are trained to do all that is ethically permissible to improve a client's case. Cases generally can be improved by learning and developing more facts, because facts are the building blocks of legal cases. The more facts a lawyer knows, the better he is able to prepare a client's case. The greater the rapport and trust between the lawyer and a client, the more likely that a client will provide the lawyer with all the known facts.

Lawyers have a rather curious method of building rapport and trust with their clients. They explain to the client a rule of law called the lawyer-client privilege,³³ and think that this privilege will free the client to divulge critical, confidential and frequently embarrassing facts. While the lawyer-client privilege may make good sense from the lawyer's perspective, it makes less sense to the client who has not taken a course in evidence or professional responsibility. People divulge potentially damaging or embarrassing information because they trust the person they are talking to, not because the lawyer-client privilege allows them to do so. Merely because the lawyer cites a privilege of *his* profession does not necessarily make him any more trustworthy from the client's perspective.

While a client is likely to trust a lawyer to some degree, he is more likely to trust his personal friends. People have rapport with their friends. Friends seem to see the world from the same perspective. Friends respond to personal concerns. When lawyers use empathic communication skills they appear to see the world from the same perspective as the client; they respond to the client's personal concerns. Lawyers build rapport and trust with empathic communication and clients then become willing to provide more information.

Perhaps the best method of developing rapport is by the lawyer's demonstrated competence over the long run.³⁴ The problem for lawyers, however, is establishing rapport in the first interview. This problem is especially acute for the lawyer in the legal aid and the public

33. All jurisdictions have a rule called the lawyer-client privilege that protects private communications between a lawyer and client made pursuant to professional consultation. The rule prevents the lawyer from disclosing the information from the client without the client's consent. R. LEMPERT & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 616-62 (1978) presents a detailed analysis of the privilege question. For one state's treatment, see Bowman, *The Hawaii Rules of Evidence*, 2 HAWAII L. REV. 431, 449-51 (1980-1981).

34. "[T]he foremost requirement for ethical practice of any profession is competence." HAMMOND, *supra* note 10, at 1.

defender offices, for whom the initial interview is often, unfortunately, the only interview before the court hearing. These lawyers often find that empathic communication is a necessity. They and other lawyers are likely to discover that empathic communication saves time rather than wastes time. The few minutes spent in empathic communication are likely to produce a wealth of information that could not be discovered even by spending additional time with the client.

Empathic communication by lawyers may also lead to the surprising discovery, from the client's perspective, that the lawyer will provide the greatest assistance by not pressing the client's case to the maximum. Lawyers generally assume that clients want to enforce their legal rights to the maximum, and take one hundred percent if it is available. But contrary to this winner-take-all philosophy, some clients would prefer a compromise settlement that allows the opposing party to retain some benefit and some dignity. Such settlements may be the preferred result where the parties involved will have a continuing relationship because they are family members or neighbors, or where the parties contemplate a continued business relationship or fear bad public relations.

Lawyers also operate businesses, and empathic communication makes good business sense. In the marketing of legal services, the first interview has changed considerably within the last decade. "Free Initial Interview" means that a client knows it will be his choice whether to hire the lawyer, and that this decision will not have to be made until after the interview has taken place, and the client has evaluated the lawyer. Empathic communication that increases rapport will also increase the chances that the client will want to hire the lawyer.

Rapport and improved personal relations pay off in another business sense. Although lawyers are well aware that most legal cases end in negotiated, compromised settlements,³⁵ clients not acquainted with the legal system will often receive less than they had expected, or will give up more than they anticipated when the case is settled. Even the big-winner plaintiff in a civil case may see "his" award diminished by high legal expenses and a twenty-five to forty percent contingent fee. To a certain degree every client is likely to be somewhat dissatisfied with the results in his case. If rapport between the lawyer and client remains good, however, the client is more likely to be satisfied with the

35. Eighty-five percent or more of all criminal and civil cases are settled without trials. R. FIGG, *CIVIL TRIAL MANUAL* 319 (1974); ABA PROJECTS ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO PLEAS OF GUILTY* 1-2 (App. Draft (1968)); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: THE COURTS* 9 (1967).

lawyer's performance. Satisfied clients bring lawyers repeat business and send referrals. Satisfied clients do not file grievance claims or institute spurious malpractice claims against their lawyers.³⁶ Unwarranted medical malpractice suits are a professional hazard that doctors blame lawyers for creating. Malpractice suits with lawyers as the defendants, however, are increasing in number. Just as doctors have considered rapport building with clients as a way of heading off some of these potential suits,³⁷ it is reasonable for lawyers to also attempt to prevent malpractice claims by building better rapport with their clients.³⁸

Empathic communication also can be useful to the lawyer who has a sincere personal desire to help clients through counseling. Many lawyers print "attorney and counselor" on their business cards. Lawyers are often thought of by the community as knowledgeable people who can offer advice on economic and social problems. Indeed, lawyers should be counselors in the broad sense of helping clients choose between various possible alternatives. Only through good counseling, that allows the client to express feeling, can the lawyer adequately assist the client in evaluating the social, economic and personal consequences of available solutions to legal problems.³⁹

Additionally, when lawyers begin to treat their clients more as people than as fact situations, perhaps the image of the legal profession will improve. Watergate remains a harsh reminder that some lawyers do not have high ethical and moral values.⁴⁰ But public confidence in lawyers has fallen not only because of Watergate, but also because

36. Smith & Nester, *supra* note 16, at 275-6. See also J. SMITH, PREVENTING LEGAL MALPRACTICE 2 (1981); Very, *supra* note 2 at 523; Smith & Nester, *supra*, note 16, at 278-283.

37. Part of the rapport breakdown comes from lack of showing concern for a patient's emotional needs. Ribicoff, *Medical Malpractice: the Patient v. the Physician*, 6 TRIAL 10, 11 (Feb./Mar. 1970).

38. "[R]apport . . . can greatly assist in preventing malpractice" claims. R. MALLEEN & V. LEVIT, LEGAL MALPRACTICE 37 (1977). See also J. SMITH, PREVENTING LEGAL MALPRACTICE 18 (1981). Even if there are no grounds for malpractice, dissatisfied clients can make fee collection exceedingly difficult and unpleasant. "If there had been a greater degree of communication between lawyer and client, or clients, this matter may never have resulted in litigation." Rolfstad, Winkjer, Suess, McKennett & Kaiser v. Hanson, 221 N.W.2d 734, 738 (N.D. 1974) (suit for attorney's fees).

39. Some attorneys do counsel their clients on "nonlegal issues," particularly in the areas of physical, emotional, financial, family and work demands. Such counseling produces better legal results. D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 76-77 (1974).

40. Watergate and the subsequent criticisms of lawyers is the most recent, major criticism of the legal profession, a profession that has been in existence nearly 400 years. Himmelstein, *Reassessing Law Schooling: An Inquiry Into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514, 517-521 (1978). Criticism of the legal profession has long been a part of drama and literature. "The first thing we do, let's kill all the lawyers," W. Shakespeare, HENRY IV, Part 2, act iv, scene ii.

many lawyers respond to their clients in a cold, calculating and deceitful manner.⁴¹ A limited amount of empathic communication on the part of lawyers might go a long way toward improving the public's confidence in the legal profession.

Some lawyers consider empathic communication to be inappropriate, manipulative, uncomfortable and inefficient. They worry that they may become too deeply involved in their client's emotional problems. Lawyers protest that they are not trained to do emotional counseling. Only the last of these criticisms is valid. That lack of training is exactly what the program as described in this article is designed to remedy.

Empathic communication is appropriate. Any legal problem contains emotional components for the client. Allowing and encouraging the client to discuss the emotional components of his legal problem will make the legal experience more satisfying for the client and will improve the case.⁴² Empathic communication is not manipulative in the sense that the client is being forced to do something against his will. The lawyer is employing an interviewing technique for the valid purpose of improving the lawyer-client relationship and improving the case. This interview technique is no more incorrect than the technique of asking leading questions on cross-examination,⁴³ and is far less likely to distort the information given by the client. Empathic communication is not inefficient. The few minutes spent using empathic communication results in release of a client's emotions and therefore enables the client to talk more freely about the facts of the case.⁴⁴

41. Carl Sandburg once wrote: "Why is there always a secret singing when a lawyer cashes in? Why does a hearse horse snicker hauling a lawyer away?" C. SANDBURG, *The Lawyers Know Too Much*, SMOKE AND STEEL 85 (1920). The main purpose in M. BLOOM, *THE TROUBLE WITH LAWYERS* (1968) is "to show how the American middle class is victimized by the American legal profession." *Id.* at 9. The book cites numerous examples of unethical lawyer conduct.

42. Emphasis should be placed on "allowing" the client the choice. The lawyer should not demand that the client discuss his feelings; the lawyer is reflecting back feelings that the client has raised. The client is free to discuss these feelings or to continue discussing the content of the legal problem.

43. One noted lecturer refers to the tactic of asking only leading questions on cross examination as one of the ten commandments of cross examination. I. YOUNGER, *THE ART OF CROSS EXAMINATION* 22 (1976).

44. Schoenfeld, *supra* note 7, at 55. The medical analogy is that patients preoccupied with emotions are unable to listen to the doctor or her advice, Fine, *supra* note 32, at 753. Empathic communication tends to reduce threat and lower defenses thereby permitting more thorough exploration of the client's problems. HAMMOND, *supra* note 10, at 32. Clients talk more and give out more useful information after empathic responses by an interviewer. Staples & Sloan, *Truax Factors, Speech Characteristics, and Therapeutic Outcome*, 163 J. NERVOUS & MENTAL DISEASE 135-140 (1976). Truax, *Length of Therapist Response, Accurate Empathy, and Patient Improvement*, 26 J. CLINICAL PSYCHOLOGY 539 (1970). See also T. GORDON, *T.E.T. TEACHER EFFECTIVENESS TRAINING* 73 (1974).

It is true that a few clients may become quite emotional if empathic communication is used.⁴⁵ Usually, the empathic communication causes the client to become slightly emotional but certainly not so emotional that the attorney cannot handle the situation. In their personal lives attorneys encounter people who are angry or sad. They also examine witnesses in court, and are forced to confront witnesses who are emotional. Lawyers need not avoid emotion in their offices. Further, empathy skills are taught partially by teaching not what is an empathetic response, but what is often termed a "roadblock"⁴⁶ to communication. By knowing the roadblocks, lawyers can employ them when they feel it is necessary to stop or prevent the emotional outburst of a client.

Students often report that even when they are able to make appropriate empathetic responses they find that they feel uncomfortable doing so. Lack of comfort in using empathic communication may only mean lack of experience.⁴⁷ Students are often uncomfortable during their first client interview; lawyers are uncomfortable during their first trial. Many people are nervous when they do new things. It is important not to confuse comfort and competence. Just because a situation is uncomfortable for a lawyer does not mean that the lawyer is not doing his job competently and effectively.⁴⁸

45. "We should never avoid what an individual implicitly feels because we fear he cannot take it. He is already taking it! The question is: Will you enable him to live it with you or only alone?" Gendlin, *Existentialism and Experiential Psychotherapy*, in J. HART & T. TOMLINSON, *NEW DIRECTIONS IN CLIENT-CENTERED THERAPY* 91 (1970).

Occasionally, neophyte counselors hesitate to elicit and acknowledge such powerful, underlying, negative client feelings as despair, inadequacy, or rage, for fear that exploration will only intensify the feelings. However, our experience suggests that such uneasiness is more often related to the counselor's difficulty or discomfort in responding emotionally than to any real hazard for the client.

HAMMOND, *supra* note 10, at 4.

46. T. GORDON, *supra* note 44, at 48-49. T. GORDON, *EFFECTIVENESS TRAINING* 41-44 (1970); T. GORDON, *LEADER EFFECTIVENESS TRAINING L.E.T.* 60-62 (1977). Thomas Gordon has categorized 12 types of "roadblocks" to communication: (1) ordering, directing, commanding (2) warning, admonishing, threatening (3) moralizing, preaching, imploring (4) advising, giving suggestions or solutions (5) persuading with logic, lecturing, arguing (6) judging, criticizing, disagreeing, blaming (7) praising, agreeing, evaluating positively, buttering up (8) name calling, ridiculing, shaming (9) interpreting, analyzing, diagnosing (10) reassuring, sympathizing, consoling, supporting (11) probing, questioning interrogating and (12) distracting, diverting, kidding. *Id.* See also HAMMOND, *supra* note 10, at 66-79.

47. BINDER & PRICE, *supra* note 1, at 32. K. HEGLAND, *supra* note 13, at 203.

48. L. BERNSTEIN, R. BERNSTEIN & R. DANA, *INTERVIEWING: A GUIDE FOR HEALTH PROFESSIONALS* 121-123 (2d ed. 1974).

IV. THE EMPATHY SKILLS EXPERIMENT

A. *The Focus and Hypotheses*

During the spring semester of 1979, the clinical legal education program at the University of Hawaii School of Law included in its regular classroom component, a systematically planned and evaluated training program to teach and test the development of empathy skills in third-year law students.⁴⁹ The program was designed to test two hypotheses. The first hypothesis was that students with empathy skills training would respond to client statements with increased empathy. The second hypothesis was that students with empathy skill training would focus on a person with a legal problem, rather than on a factual legal problem absent any human dimension.

B. *The Subjects*

Twenty third-year students who were enrolled in the Litigation Workshop Clinical Program and who were engaged in client representation were given four hours of empathy skills training as part of their regular classroom work for the clinical program. Nine other third-year students who were enrolled in a trial practice class were used as a control group and given no empathy skills training.

C. *The Training Program*

The training program consisted of four one-hour class meetings at biweekly intervals, and was comprised of didactic presentations,⁵⁰ class discussions, and simulation and role-play exercises. During the first class, a rationale for the use of empathic communication in legal interviewing was presented, and the discussion that followed included information about empathy skills training in other professional fields. Information was presented about responses that have been found to increase trust and openness.⁵¹

49. For example, silence is often a very effective interviewing technique even though lawyers, who feel they should be talking, are uncomfortable with the silence. Other skills of interviewing were taught in general classes on interviewing. Empathy, however, was taught separately. To teach a single skill at a time is called microcounseling. A. IVEY & J. AUTHIER, *MICROCOUNSELING: INNOVATIONS IN INTERVIEWING TRAINING* (1978).

50. Empathic communication requires two discrete skills: (1) a discrimination ability, largely cognitive, which is the recognition of the client's feelings, and (2) a communication ability, basically interpersonal, which is the professional's response back to the client. The discrimination ability can be taught through didactic procedures; the communication ability requires supervised experience or some form of experiential training. B. POPE, *THE MENTAL HEALTH INTERVIEW* 344, 352 (1979).

51. See *infra* note 62.

The experimental component of the training consisted of two kinds of role-playing. First, the trainer played the role of the client, while students played the role of the lawyer and took turns responding to each client statement. Feedback from the teacher was used to shape responses into empathic responses. Second, students rotated in the role of lawyer, client and evaluator in specific interview situations provided by the trainer. Some of the role-play was performed in front of the whole class; other role-play was conducted in groups of two or three students working simultaneously. In addition, each student was encouraged to practice the empathic listening between class sessions with clients, family and friends. Out of class experiences were discussed and critiqued at the next class.⁵²

D. The Testing Procedures

Before and after the four hours of training, tests were administered to the students who received the training and to the students in the control group. These tests consisted of three audiotaped role-played statements of client problems.⁵³ All statements were considered typical

52. All training was conducted jointly by the authors who had eleven and five years of experience, respectively, teaching interview skills training courses. One trainer had previously worked in the field of guidance counseling and psychotherapy but had no formal legal training; the other had experience in law practice and in the teaching of legal interviewing and counseling, but had no formal training in psychotherapy.

53. The client problem included a consumer complaint, a domestic relations problem, and a criminal case. The statements were:

(1) I bought a car from Sam's used car lot two months ago for \$1,500 and Sam arranged the financing. A couple of weeks ago the car's engine blew up and the car is now just a worthless piece of junk. Sam had told me that the car was in good shape. It had recently been checked and tuned up and should run for at least another five years. Now this bank claims I owe it \$1,400 for the car. I want to fight them. It's not fair to make me pay for that car. It's not even a car any more.

(2) Two days ago the most embarrassing thing in my life happened to me. I went to my local drug store to pick up a few items. Because my hands were full of other items, I stuck a tube of toothpaste in my jacket pocket until I got to the cash register. Well, I paid for everything, but forgot the toothpaste. It was still in my pocket as I was going out the door. Before I even went out of the store, a uniform security guard came up to me and said out loud, "you're under arrest." He did that in front of my neighbors and everyone. It was dreadful. I've got a court date next Tuesday and I know I need a lawyer. That's why I'm here.

(3) My husband and I have been legally separated for five months and he's really flipped. He spent a lot of money to rent another house and has moved in with this terrible woman and her three children. They are really awful. When I call there, I can hardly understand them. They certainly don't speak standard English. What's worse, he wants to take our daughters over there on his weekends when he has visitation periods. I'm not about to allow my kids to be around people like that. I know they sit around drinking all day and ignoring the kids. I think they are using drugs, too. I mean their value system is something I really can't approve of. My daughters are eight and ten and they know their father isn't married to that woman. Imagine what those kids are thinking. How can I keep him from taking my daughters to that house?

of initial problem statements made to lawyers. When each audiotaped problem was presented,⁵⁴ students were asked to write the exact words they would say to the client in response.⁵⁵ At the end of the training program, the test responses were typed and coded so that raters could not distinguish pretraining tests and experimentally-controlled designations.⁵⁶ Post-training test scores were subject to an analysis of variance comparing the experimental and control groups on the criterion measure of empathy.

E. Rating Responses for Empathy

Both the pretraining and post-training test responses of each student were measured on the seven level, modified Truax Accurate Empathy scale.⁵⁷ The following are descriptions of each level and examples of student responses rated at each level.

54. Nonverbal communications such as auditory and visual cues could provide other important information about the client's feelings. BINDER & PRICE, *supra* note 1, at 28-29. The nature of an emotion is communicated nonverbally primarily by head cues; intensity of an emotion is communicated both by head and body cues. Ekman & Friesen, *Head and Body Cues in the Judgment of Emotion: A Reformulation*, 24 PERCEPTUAL AND MOTOR SKILLS 711 (1967).

The use of audiotapes obviously eliminated visual input, but the students could still pick out auditory information such as intonation, pitch, rate of speech and pauses in the conversation.

55. Responding empathically does not require face-to-face contact. One study found no difference in the helper's ability to contact empathy whether face-to-face or over the telephone. Dille, Lee & Verrill, *Is Empathy Ear-to-Ear or Face-to-Face?*, 50 PERSONNEL & GUIDANCE 188 (1971).

It has been demonstrated that written responses are an accurate method of judging the normally verbal empathy response. M. Therrien, *An Experimental Investigation of the Relationship Between Written and Verbal Indicators of Empathy* (1974) (Unpublished Master's Project on file at the University of Hawaii, Hamilton Library).

56. Two experienced raters (inter rater reliability $r = .93$) graded responses on the Truax Accurate Empathy Scale, a nine-point scale extensively validated in psychotherapy research. Truax & Mitchell, *Research on Certain Therapist Interpersonal Skills in Relations to Process and Outcome*, in HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE 299 (A. BERGIN & S. GARFIELD, eds. 1971).

On this scale, level one indicates lack of empathy; that is feelings are essentially ignored. Level five is considered minimally facilitative; meaning that at this level the lawyer's response demonstrates an accurate understanding of the client's feelings and concerns. Level nine is described as the most empathic level where a high degree of empathetic skills is demonstrated in responding to affective client statements. Responses below level five have been found to have a deteriorative effect on the professional-client relationship, while those about level five have a facilitative effect. C. TRUAX & R. CARKHUFF, *TOWARD EFFECTIVE COUNSELING AND PSYCHOTHERAPY: TRAINING AND PRACTICE* (1967).

The Truax scale was modified in this study by making the wording appropriate to the legal setting and by telescoping levels seven, eight, and nine into level seven, since responses in an initial legal interview would not require the depth of the empathy necessary in a therapeutic relationship. The raters also judged whether the student's response was primarily a discussion of the legal problem or directed to the client's concerns about the legal problem.

57. See *supra* note 56.

- Client Statement:** Two days ago the most embarrassing thing in my life happened to me. I went to my local drug store to pick up a few items and because my hands were almost full, I stuck a tube of toothpaste in my jacket pocket until I got to the cash register. Well, I paid for everything, but forgot the toothpaste. It was still in my pocket as I was going out the door. Before I even went out of the store into the street, a uniform security guard came up to me and said out loud, "you're under arrest." He did that in front of my neighbors and everyone. It was dreadful. I've got a court date next Tuesday and I know I need a lawyer. That's why I'm here.
- Level One:** At this point the lawyer seems completely unaware of even the most conspicuous of client's feelings. His responses are not appropriate to the mood and content of the client's statements. There is no determinable quality of empathy and, hence, no accuracy whatsoever. The lawyer may be disinterested or actively offering advice, but is not communicating awareness of the client's feelings.
- Example:** "The arrest was legal so we may have to place you at the mercy of the court and plead no contest."
- Level Two:** The lawyer shows an almost negligible degree of accuracy in his responses. His response may block off client. Level Two is distinguishable from Level Three in that the lawyer ignores feelings rather than displaying an inability to understand them.
- Examples:** "Did you say you were still inside the store when the guard spoke to you?"
"You say you paid for your other purchases at the register and that someone stopped you before you got out to the street. Where exactly was it that you were stopped?"
- Level Three:** The lawyer's response conveys slight evidence of feelings that are only somewhat appropriate to client's experience. He shows an inability to understand client's meaning, in contrast to lower levels where feelings are ignored. The lawyer's response subtracts noticeable affect from the client's message.
- Examples:** "I can appreciate your embarrassment being publicly accused of shoplifting. While shoplifting is a major problem for businesses, what happened to you could have happened to anybody. We all have momentary lapses of attention that can present us with difficulties. My efforts will

be directed at convincing the drugstore that your situation falls into that category.”

“That’s a terrible thing to happen to anybody. Who exactly was with you at this time?”

Level Four: At this level the lawyer usually responds accurately to client’s most obvious feelings, but the total message does not convey the importance of the feelings; he tones down the feelings, or may tend to add a phrase or sentence to the message to make the total effect of the response less than interchangeable with the expressed feelings of the client. Sensitivity and awareness do exist in the lawyer, but he is not entirely “with” the client in the current situation or experience. The desire and effort to understand are both present, but the accuracy is low.

Examples: “Yes, it certainly was awful of the security guard to do that. I can easily understand why you would be embarrassed. I would be too. But now I need to know more about what really happened. Can you give me more details?”

“You felt angry at what you believe to be an unjustified accusation by the security guard. Was there anyone around you in the store to whom you may have mentioned in passing that you had no more room in your arms, so you were going to put the toothpaste in your pocket?”

Level Five: Here the lawyer’s responses are essentially interchangeable with the expressed feelings of client in that they express essentially the same affect and meaning. They neither add nor detract from the meaning of the experience. Level Five constitutes the minimal level of facilitative interpersonal functioning.

Examples: “You sure had an embarrassing experience. Let’s talk about it a little bit more.”

“You picked up the toothpaste and intended to pay for it, but then forgot to do so. Then the guard embarrassed you by arresting you in front of all your friends and neighbors, and you are upset by this, is that right?”

Level Six: The lawyer recognizes most of client’s present feelings, including those that are not readily apparent. He may not respond to the accurate intensity of the less apparent feelings. The response does not have the spontaneity of a Level Seven response.

Examples: “After a simple mistake, you’re now faced with an embar-

raising arrest and charge for taking something from the store."

"You need a lawyer for something that you really feel you had no intent doing. You're felt really terrible and embarrassed, especially in front of your neighbors for having been accused of shoplifting when it was an honest mistake."

Level Seven: At the highest level the lawyer responds accurately to client's present feelings and adds to meaning; is "with client-tuned in to client's wave length." The lawyer shows awareness of the precise intensity of most of the emotions.

Examples: "You must have been mortified when the security guard arrested you in front of everyone for not paying for the tube of toothpaste that you had forgotten you had in your pocket."

"God, you must have felt awfully embarrassed. In front of your neighbors too!"

While the experimental group generally showed significant progress in the ability to respond empathically, certain individuals showed exceptional progress. The responses of two students are highlighted below. Their pretraining and post-training test responses are listed for the three test statements.⁵⁸

The pretraining test responses totally ignored any feelings the client had expressed but were essentially demands for factual information that the students had determined was relevant. At times the students' questions sought information that was not even closely related to the problem the client has expressed. The students immediately attempted to extract information in their interview of the client to test the case or for filing legal pleadings. Apparently the students either ignored, avoided or simply failed to recognize the feelings expressed by the client.

In contrast, post-training test responses focused on the feelings expressed in the client's initial statement. The students responded to the client by reflecting the feelings expressed by the client. The students also responded to the content of the client's statement, but only as a framework for understanding and describing how the feelings had arisen. The students, who were functioning at a minimally facilitative level of empathy (Level Five or above), did not combine feeling statements with requests for more factual information as was typically seen in Levels Two, Three, and Four, but instead responded only to the cli-

58. See *supra* note 53.

ent's feelings. The client then had the choice of whether to further discuss their feelings or push on to the facts. Two examples of pre-training and post-training test responses to the previous client statement were as follows:⁵⁹

Student A Pretest

"I'd like to know exactly what you were carrying and how you happened to put the toothpaste in your pocket." (Rated Level One)

Student A Post-test

"You were really embarrassed because people who knew you saw the incident in Long's where the security guard accused you of shoplifting." (Rated Level Five)

Student B Pretest

"What happened to the toothpaste? Who were the friends that were there that day?" (Rated Level One)

Student B Post-test

"So you are upset that the security guard embarrassed you in front of your friends for something which you had no intention of doing and now you will have to go to court for it and you

59. Pretraining and post-training responses to those client statements set forth in *supra* note 53 were as follows:

Client 1 - Cheated Car Buyer.

Student A Pretest

"Can you give me some more information? What was the address of the car lot? Do you have copies of everything you signed?" (Rated Level One)

Student A Post-test

"You think it's really unfair that the bank is expecting you to pay for the car since it broke down in only two months - especially since when you bought it you were told it was in good shape." (Rated Level Six)

Student B Pretest

"Do you have the papers regarding this transaction? How much did you pay for the car? Did the bank send you only documents?" (Rated Level One)

Student B Post-test

"It seems like Sam got you into this financial problem with the bank and you believe it's unfair that you have to pay for a car that doesn't even work any more, as it is supposed to, as was represented by Sam." (Rated Level Five)

Client 3 - Distraught Spouse.

Student A Pretest

"Are you planning to divorce? What is the other woman's name?" (Rated Level One)

Student A Post-test

"You are upset that your husband is living with someone else and intentionally exposing your daughters to his new living situation - which you suspect includes quite a bit of drinking and possibly drug use." (Rated Level Seven)

Student B Pretest

"Where and when did the marriage take place?" (Rated Level One)

Student B Post-test

"You have been separated from your husband and you don't approve of your young daughters visiting their father because you believe that he is engaging in immoral acts and possibly illegal actions too and you are worried that his actions might affect your young daughters and you want to stop him from taking them in the future." (Rated Level Five)

believe you need a lawyer for your court appointment.” (Rated Level Five)

F. Role-Playing as a Teaching Tool.

Although the training program included lectures, discussions and role-plays, the heart of the program was the experimental role-plays. Students were required to respond empathically to client statements. The student responses actually required the student to perform two functions. First, the student had to listen carefully to the client's statement to determine what feelings, if any, were being expressed by the client. Second, the student had to formulate and verbalize an appropriate empathic response.⁶⁰

Some of the exercises were done in front of the whole class. An instructor would read statements from a prepared script⁶¹ and individual students would be asked to make an empathic response. The responses were then commented on and critiqued by the other instructor. Students were asked to modify and improve the given response. In this way, the whole class had an opportunity to observe and participate in the formulation of empathic responses, which received immediate feedback.⁶² In addition, during each training session the class was divided

60. In this training, the two tasks of determination and verbalization were combined. In subsequent semesters, these two tasks were separated. Some exercises require the determination or identification of expressed feelings; others require the formulation and verbalization of the response. In addition, subsequent semester training also includes, and in fact begins with active listening for content. Students generally find it easier and more comfortable to work with content rather than feelings. Furthermore, although we like to stress the importance of active listening for feelings (empathic responses), we recognize that active listening for content is an equally important listening skill, and one that the students can use much more often than active listening for feelings.

61. The scripts used early in the training were from nonlegal settings. Later scripts focused on legal problems. Scripts of between 10 to 20 statements that are classified as Landlord-Tenant, Junior Executive Contract, Prosecutor and Victim, Spouse Death and Will and injury and Collection Agency, are available upon request from John Barkai, at the University of Hawaii Law School.

62. An excerpt from a recording of one of the early classroom role-plays done in front of the whole class follows:

Setting: A man (who we will call the client) sits down next to you on an airplane.

Client: "This is one trip I sure hate to take."

Student 1: "Oh, why is that?"

Instructor: Using questions is a roadblock. You are switching your agenda—finding out why. The client already knows "why." He may or may not talk about that. Try to respond to the feeling.

Student 2: "You're not looking forward to this trip"

Instructor: That's right, but it's stronger than "not looking forward to" it. The client used "hate." Can you make it stronger?

Student 3: "You just don't want to make this trip."

Instructor: OK, or you could say "you really don't want to make this trip." "Really" signifies the intensity. Try to match the intensity of the feeling. You want

into small groups that practiced empathic responses privately.

Contrary to a real life situation, each in-class client statement was expected to be met with an empathic response. Class discussion stressed that making constant empathic responses was for purposes of training only. True lawyer-client communication would require far fewer empathic responses. To respond empathically to every client comment would be inappropriate.

G. Test Results

On the pretraining test,⁶³ both the experimental and control groups averaged well below the Level Five on the Truax scale, which is considered the minimum level of response necessary to be effective.⁶⁴ The control group functioned below Level Two on the Truax scale in the post-training test, but the experimental group averaged just below Level Five after the four-hour training.

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- to get the depth of the feeling. You are trying to get as accurate as you can with the feedback to let him really know you've gotten the point of what he just said.
- Client: "I'm on my way to Washington to sew up this big deal and I felt on top of everything until about 10 minutes ago."
- Student 4: "So you've got something really important coming up in Washington."
- Instructor: "What's the rest of it though?"
- Student 4: "And you really didn't have a care in the world until recently."
- Instructor: "Can you think of another way to make it a little tighter? What you really want to know is what happened 10 minutes ago, but you're not allowed to ask the question. So you have to put into words your understanding of what he said."
- Student 4: "And you felt great until about 10 minutes ago."
- Instructor: "You were feeling great until about 10 minutes ago when something happened and got you upset." Try to get as much of the content as well as the feeling.
- Client: "When I got down to the plane this morning, I was ready to tackle anything. And lo and behold there stood my boss for the big send off."
- Student 5: "So your boss gave you an unhappy farewell?"
- Instructor: "Who can figure out a way to get that all in."
- Student 6: "You got some bad news?"
- Instructor: "Now that's a guess. It may be correct, but it may be incorrect. You want to get him to tell you about it by letting him know that you're with him now."
- Student 6: "So your boss met you at the plane."
- Instructor: "The information is there but there is a little more that you could put in if you wanted to. You could say 'you were ready to tackle anything until you saw your boss there.' What you said didn't take into account that he was feeling good before, but it did get the rest of it."

63. On the modified seven point Truax Accurate Empathy Scale the pretraining mean score for the experimental group was 2.46 and for the control group it was 2.16.

64. L. BRAMMER, *supra* note 12, at 23.

The posttest experimental group mean of 4.91 was significantly greater ($p \leq 001$) than the 1.39 mean of the control group. The control group actually decreased in empathic response during the time period the experimental group was being trained. Hopefully, this does not indicate that students actually grow less sensitive to human issues during their law school career. Some claim that law school does not desensitize students, but that it really makes very little changes in students. T. SHAFFER & R. REDMONT, *LAWYERS, LAW STUDENTS AND PEOPLE* (1977).

An analysis of tabulations of the student's response emphasis, which focused either on a client's emotional and legal problem or discussed the factual legal problem alone, indicated that on the pretraining test fewer than thirty-five percent of the responses of the experimental group and fifteen percent of the responses of the control group emphasized an understanding that the client had an emotional problem. On the post-training test, ninety-one percent of the responses from the experimental group emphasized an understanding of the client's problem, but only four percent of the control group's responses had that orientation.

H. Discussion of the Findings

Examination of the results indicated that those students involved in the systematically planned empathy training program were significantly able to respond more empathically to clients than students in a control group exposed only to the regular curriculum. The fact that the experimental group also represented real clients while the control group did not, was not considered by the authors to significantly affect the results independent of the in-class training because some of the students in the control group did have contemporaneous experiences in externship programs where they interviewed and counseled clients.

The findings in this study confirm those of previous studies that empathy skills can be recognized, measured and successfully taught.⁶⁵ Unlike many other skill-training programs reported in journals, the empathy skill program itself was not used as a teaching instrument but was used for evaluation only.⁶⁶ By delineating specific types of helpful and harmful responses, the training was shortened significantly from that reported in other studies,⁶⁷ but facilitative levels of empathy were nevertheless obtained. Although the students in this program did not increase their empathy response ability above Level Five (the level determined to be minimally sufficient), their responses were close enough to Level Five and of significant improvement over their pretraining level for the training to be considered successful.

While it would be desirable to have all students able to perform at Level Five and above, it is assumed that additional training time would be necessary to reach these levels. There were many competing inter-

65. Empathy can indeed be taught. B. POPE, *supra* note 50, at 358.

66. Lambert, *supra* note 28, at 474; B. POPE, *supra* note 50, at 536.

67. Carkhuff & Truax, *Training in Counseling and Psychotherapy: An Evaluation of An Integrated Didactic and Experiential Approach*, 29 J. CONSULTING PSYCHOLOGY 333 (1965) (100 hours of training).

ests for class time even with just four training sessions, and it was decided not to devote more time to empathy training at the expense of other classroom subjects. One important area for further study is a determination of the amount of instruction time actually required to show a significant improvement in empathic communications,⁶⁸ and at what point the learning curve begin to plateau and the training for most students reaps diminishing returns. Perhaps with experience the training program could be refined so that Level Five will be reached within the four hour training period. Additionally, other types of training could be used that would increase the empathy level more rapidly, while still keeping the total hours devoted to this skill relatively low.⁶⁹

V. CONCLUSION

Empathic listening skills are valuable to practicing lawyers in establishing rapport with clients.⁷⁰ Rapport is crucial to the professional relationship between a lawyer and his client. It assists in developing cases factually, improves the counseling of clients and increases the efficiency of the lawyer's business. It can also lead to general improvements in the image of the legal profession.

The use of empathetic communication reduces the time it takes to develop rapport, a process that occurs naturally only with prolonged lawyer-client relations. Although empathic listening skills do not come naturally to lawyers,⁷¹ the training program adopted by the clinical legal education program at the University of Hawaii School of Law can teach empathic communication in as little as four hours. This program

68. After 100 hours of training, graduate students approximated the level of therapeutic conditions communicated by experienced psychotherapists. *Id.* at 333.

Some groups have achieved minimally facilitative skill levels in approximately ten hours of training. Anthony, *A Methodological Investigation of the Minimally Facilitative Level of Interpersonal Functioning*, 27 J. CLINICAL PSYCHOLOGY 156 (1971).

69. Such training ideas would include the use of sample transcripts, programmed learning texts and videotape presentation. An excellent programmed learning text for mental health workers is D. EVANS, M. HEARNS, M. UHLEMANN, & A. EVEY, *ESSENTIAL INTERVIEWING* (1979).

70. Empathic communication can, like most anything else, be taken too far and be destructive to the relationship. S. WAHLROOS, *FAMILY COMMUNICATION* 215-16 (1974).

71. In fact, the law school experience may even decrease a person's ability to respond with sensitivity. C. REICH, *THE GREENING OF AMERICA* 151 (1971). The law school is not the only formal training found to decrease empathic responses. Many graduate students become less capable of helping because of the training they receive. R. CARKHUFF & B. BERENSON, *BEYOND COUNSELING AND THERAPY* 7-11 (1967). Further, the experience of practicing law for years offers no assurance that a lawyer will develop empathy skills. Even years of experience in the field of psychotherapy bear no significant relationship to empathy ratings. Pope, Nudler, Norden & McGee, *Changes in Nonprofessional (Novice) Interviewers Over a 3 Year Training Period*, 44 J. CONSULTING & CLINICAL PSYCHOLOGY 819 (1976); Strupp, *The Psychotherapist's Contribution to the Treatment Process*, 3 BEHAVIORAL SCI. 34, 63 (1958).

has shown that with minimal classroom study, empathetic communication skills increase significantly. Although the program was used only for evaluation purposes, it demonstrated that the benefits to be gained through empathetic training would make such a program a worthwhile addition to law school education.

