LAWYERS AS COUNSELORS:
A Client-Centered Approach

Second Edition

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AMERICAN CASEBOOK SERIES®

THOMSON WEST
Chapter 1

CLIENT-CENTERED LAWYERING

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John Crampton of Mid-Marine Insurance enthusiastically describes Mid-Marine's potential acquisition of Enterprises Inc., a small aluminum manufacturer. Gary Swartz of the Crestwood Home Owners Association frantically wants to enjoin a Crestwood property owner who, despite deed restrictions, wants to split his lot. Stephanie Belandis, Jacquie Bowman, and Jennifer Van Campen, representatives of the Brighton Tenants Union, cautiously describe their plans to purchase and renovate an abandoned building for use as low-income housing. Alex Combs sadly wonders how his arrest for burglary will affect his job and children. Louise Harris, manager of Blake County Water District, discusses the District's need to raise capital through a new bond issue. Marlene Fox excitedly describes a new record deal that Columbia wants her to sign. Phil Bondchowski, the CEO of Apex Steel, is furious that Apex has been sued for price fixing. Arlene Wagner, executive director of the local NAACP chapter, is concerned about renewing the chapter's lease. Helen Reston angrily relates that she was fired for reporting the company's practice of overcharging on government contracts. Charles Winnegar quietly states that he wants to make a will leaving nothing to his son. Grace Parker dispassionately expresses her desire to sell her $750,000 lakeside vacation house without capital gains liability.

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1. INTRODUCTION

Clients come to lawyers seeking help in solving problems. And as the opening examples suggest, the range of people and problems that you are likely to encounter as a lawyer is enormous. The array embraces differences in size, complexity, emotional content and legal status. Some
problems involve disputes over past events and others focus on planning for the future. Nonetheless, all of the problems have something in common—the clients hope that satisfactory solutions can be achieved with the aid of your lawyerly knowledge, skills and judgment.

Thus, no matter who your client, what the substantive legal issues or whether a situation involves litigation or planning, your principal role as a lawyer will almost always be the same—to help clients achieve satisfactory and effective solutions to problems. The process by which you facilitate the resolution of clients’ problems—that is, the process of counseling—is the subject of this book.

This book sets forth a “client-centered” approach to counseling. The client-centered conception has its source in a perspective that legal problems typically raise both legal and non-legal concerns for clients, that collaboration between attorneys and clients is likely to enhance the effectiveness of problem-solving, and that clients ordinarily are in the best position to make important decisions. The book describes, analyzes and illustrates a variety of strategies and techniques that will enable you to carry out client-centered counseling.

Since the original precursor of this edition was first published over 25 years ago, client-centered counseling has become among the most broadly shared conceptions of lawyering in the country. You can use a client-centered counseling approach “across the board” to facilitate solutions in all legal counseling situations. For example, you can follow client-centered principles:

- In both transactional and litigation matters;
- In complex cases (e.g., securities fraud) and straightforward ones (e.g., collection on a promissory note);
- No matter what substantive legal issues a matter involves (e.g., wrongful termination case, construction defect litigation or stock purchase agreement);
- Regardless of a client’s identity (e.g., individual, corporation, representatives of a loosely-knit community group); and
- When you and a client have a prior professional relationship as well as when you represent a client for the first time.

plex, lawyers use different criteria. Sometimes legal complexity encompasses the notion that the subject matter is intellectually demanding. (For a discussion of the substantive subject areas lawyers in the Chicago, Illinois area perceive as intellectually demanding, see Edward Laumann & John Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 Am.B.Found.Rev. 155, 186-88. Or, the term may mean that the matter involves legal issues for which the substantive law is unclear or in a state of continual flux (see id.) or needs to be modified or perhaps even reversed in order to protect the client. Or, legal complexity may mean that the substantive law involves a number of rules that are unfamiliar to all but those who are specialists in the particular substantive area. For example, even lawyers who have some experience in areas such as securities fraud, anti-trust or murder prosecutions, might well describe such areas as complex because of the number of rules with which one must be familiar in order to handle such cases.
In sum, the strategies and techniques represented by a client-centered approach allow you to fulfill your ethical responsibility to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."\(^1\)

2. WHY SHOULD YOU ADOPT A CLIENT-CENTERED APPROACH?

One traditional image of lawyers portrays them as professionals who control the choices that clients make by convincing clients as to what is in their best interests.\(^2\) Underlying this image is an attitude that objectively "best" solutions to legal problems exist and that by dint of training, experience and superior judgment, a lawyer's role is to develop these solutions. The traditional image generally regards clients as unsuited to the task of legal problem-solving, and usually satisfied to leave decision-making to lawyers.

Client-centeredness challenges the traditional image's attitude towards both legal problems and clients. The subsections below elaborate briefly on the client-centered conception of clients, legal problems and their solutions and in so doing provide the primary justifications for the client-centered approach.

A. CLIENTS ARE AUTONOMOUS "OWNERS" OF THEIR PROBLEMS

Underlying client-centeredness is the philosophy that clients are autonomous and therefore deserving of making important decisions that lead to resolution of their legal problems. Whether a client is a labor organization involved in negotiations for a new contract, a parent with an abusive spouse, a young couple who want an estate plan that will protect their young children or a developer seeking permission to demolish an existing building, clients do not give up the right to shape their destinies simply because they seek the help of lawyers. As unique social actors, they deserve to be made aware of relevant concerns and potential solutions and to determine for themselves which solutions best respond to the financial, social, psychological, moral and other ramifications that may arise from adopting particular solutions to legal problems. After all, clients and not lawyers live with decisions' consequences. For example, if a plaintiff in a wrongful termination matter decides to accept a sum of money in settlement rather than pursue reinstatement through trial, it is the plaintiff and not the lawyer whose future life the decision helps to shape. Thus, the starting point of client-centeredness is that respect for clients' autonomy means that decisions about solutions to clients' legal problems are for clients to make.

3. For a well-analyzed description and critique of this traditional image, see Doug-
As you undoubtedly know, both litigation and transactional matters typically require the making of numerous decisions as the matters progress from beginning to end. Your lawyer-client relationships would quickly become unwieldy if you had to consult with clients every time a decision had to be made. Therefore as a client-centered lawyer you'll need to exercise judgment about when to involve clients in decision-making, and a later chapter furnishes a guide to that judgment.4

B. CLIENTS ARE GENERALLY IN A BETTER POSITION THAN LAWYERS TO IDENTIFY AND ASSESS THE IMPORTANCE OF SOLUTIONS' NON-LEGAL CONSEQUENCES

Clients consult lawyers rather than other helping professionals when they recognize that problems have important legal dimensions. For example, people who want to leave property to relatives and friends while minimizing the impact of taxes and other expenses will go to a lawyer because they realize that if their wishes are to be carried out, their estate planning documents must comply with legal requirements. Similarly, manufacturers who want to sell merchandise to retailers will go to a lawyer because they want the protection of legally enforceable contracts should the retailers fail to meet their obligations. And of course, people whose disputes cannot be otherwise resolved will consult a lawyer who can draft the pleadings and motions and carry out the other tasks that protect their legal rights. Ordinarily, lawyers are no doubt in a better position than clients to evaluate legal consequences such as the ramifications of estate planning documents, contracts and litigation processes.

However, a second justification for client-centeredness emanates from the reality that the satisfactoriness of solutions often depends on how well they respond to clients' concerns about non-legal consequences. Significant non-legal ramifications are typically embedded in solutions to legal problems.6 The following examples illustrate how concerns about non-legal consequences are apt to be part and parcel of deciding what course of action should be followed to resolve legal problems:

Your client who is considering a settlement offer may not only be concerned about the value of the settlement compared to the likely outcome of trial, but also may worry that accepting the offer will result in a lost opportunity to pursue future financial goals; a loss of face among friends and relatives to whom the client had repeatedly made promises to “see this case all the way through to trial” or create feelings akin to “buyer's remorse.”

Your client may be a business executive who is considering sacking a long-time and popular employee. The executive's legal concerns may

5. Indeed, so common are non-legal concerns that had Sir Isaac Newton been a lawyer rather than a physicist, his Third Law would probably have read, “For every solution, there are both legal and non-legal consequences.”
center on the likelihood that the "waiver of claims" document that the employee will be asked to sign in order to receive a severance package will be effective for barring an age discrimination lawsuit that the employee might want to institute. At the same time, the executive may fear that firing the employee will hurt company morale and cut into overall productivity.

Your client may be a developer whose plans to build a new housing subdivision will require the moving of a grove of old trees. The developer's legal concerns may center on the conditions that the developer may have to satisfy to comply with environmental regulations. However, your client may also be concerned about financial costs that will result from the conditions that the county may impose before approving the subdivision. Additionally, your client may be worried about the negative publicity that removal of the trees is likely to create, the economic impact of the publicity about the project on the value of the client's company, and the client's own reluctance to destroy the trees.

The significance and frequency of non-legal ramifications that necessarily attach to potential solutions to legal problems affects your approach to counseling because clients are almost always in a better position than you to identify non-legal consequences. This is especially likely to be true because clients with similar legal problems may have very different non-legal concerns. That is, two clients' matters may concern the same legal issues, but their legal problems may be very different because of differences in the clients' circumstances, personalities and values.

For example, you may represent two different manufacturers who allegedly provided non-conforming goods to retailers and thereby materially breached contracts. However, these clients' legal problems may be very different. One manufacturer may be a modestly capitalized "start up" making "niche market" products that is anxious to do future business with the retailer while the other manufacturer is a long-established company that is phasing out of the product line in question and does not anticipate further business with the retailer. These clients are apt to evaluate potential solutions to their problems very differently. Such variations from one matter to another are common, with the consequence that objectively "best" or "one size fits all" solutions rarely exist.

Moreover, clients are typically in a better position than lawyers to assess the importance of the potential non-legal consequences of proposed solutions. For instance, the business executive faced with the decision to fire an employee will undoubtedly be in a better position than you to assess the importance of the harm to company morale and the effect of that harm on the company's operations when it comes time to decide whether to actually fire the employee.

In sum, clients are typically in the best position to identify non-legal consequences and assess their importance. Because such consequences
significantly affect the determination of what solutions are most satisfactory, it makes sense for clients to play an active role in developing and analyzing potential solutions and to have the final say in deciding what course(s) of action to choose when trying to resolve legal problems.

C. CLIENTS ARE NORMALLY IN A BETTER POSITION THAN LAWYERS TO DETERMINE WHAT RISKS ARE WORTH TAKING

A third primary justification for client-centered counseling emanates from the fact that decisions in legal matters (as in most other aspects of life) are almost always made under conditions of uncertainty. That is, decisions almost always give rise to risks that potential consequences will not occur as predicted and that unforeseen consequences will instead result. Like decisions about which team will win the Super Bowl or whether to take a raincoat on a trip to Chicago, deciding what course of action to follow to resolve legal matters almost always entails taking a risk. For example, neither you nor clients can know for certain whether a client who settles a lawsuit will suffer "buyer's remorse," what the costs of complying with environmental requirements will be, or the extent to which firing a popular employee will harm employee morale.

However, as a few minutes observing the action at a Las Vegas blackjack table will verify, people vary enormously in their willingness to take risks. Some people are by dint of their personalities more willing to take risks than are other people. Moreover, risk-taking is often situation-al; people may take risks in some situations that they would be unwilling to take in others. For example, clients' readiness to take risks may be influenced by the importance they attach to the gains they foresee if their predictions are correct or to the losses they fear will ensue if their predictions are wrong.

Hence when it comes to making decisions about what solutions are most likely to be satisfactory, it makes sense to conclude that as "owners" of legal problems, clients deserve the right to determine how great a risk they are willing to run with respect to possible outcomes. Hence, clients should ordinarily be the primary decision-makers with respect to important matters.

For example, assume that your client is a computer company that plans to hire a highly experienced programmer to lead the development of a new line of software products. The company wants the programmer to agree to a highly restrictive non-competition clause, predicting that it will prevent the programmer from going elsewhere before the project is completed. The risks of insisting on such a restrictive form of non-competition clause include (a) the programmer may walk away from the deal and (b) the programmer may agree to the deal but go elsewhere without penalty because a court will regard the non-competition clause as too restrictive to enforce. You may regard these risks as not worth taking and therefore opt for a milder form of non-competition clause. The client, by contrast, may be a risk taker who thinks that the
restrictive form of clause will not be a deal-breaker and will prevent the programmer from quitting in mid-stream.

D. CLIENTS ARE CAPABLE OF AND INTERESTED IN PARTICIPATING IN THE COUNSELING PROCESS AND MAKING IMPORTANT DECISIONS

Other justifications for client-centeredness would mean little if clients typically were incapable of making important decisions or rarely were willing to participate in the counseling process. However, quite the opposite is likely to be true. That is, most clients are quite capable of actively participating in the effort to resolve important problems. Moreover, clients typically want to participate in counseling, though of course their level of interest is likely to vary according to such factors as the relative importance of decisions and the time available to decide. At least, it makes sense for the “default” position to be that clients are capable of and desirous of participating in the counseling process until you have information to the contrary.

Of course, not all clients conform to this perspective. Even with respect to important decisions, some clients may not want to participate in the counseling process and others may be unable to “pull the trigger.” Suggestions for responding to such situations in a way that is consistent with client-centeredness are in a later chapter.6

E. ACTIVE LAWYER–CLIENT COLLABORATION PROMOTES EFFECTIVE IMPLEMENTATION OF DECISIONS

Once decisions are made, clients often have to implement them. In such situations, clients’ active participation in the counseling process enhances the likelihood that they will effectively carry out the tasks necessary to implement decisions.

For example, assume that your client is involved in a dispute that the client hopes to resolve through mediation. You will not participate in the mediation, and the client has consulted you so as to go into mediation with an understanding of potential legal rights, solutions and pitfalls. Surely the client’s ability to achieve a satisfactory outcome through mediation is enhanced if you and the client have collaborated in an analysis of potential outcomes and their likely consequences.

3. HALLMARKS OF CLIENT–CENTERED COUNSELING

Lawyer-client conversations are extremely idiosyncratic. Thus, how you approach counseling conversations and the courses those discussions take inevitably vary greatly from one client to another, depending on such factors as the nature of a client’s problems, a client’s prior legal experiences and level of sophistication, the types of and the importance of non-legal concerns, and the decision that has to be made. Neverthe-

less, even as you adjust your style according to individual clients’ needs and concerns, your counseling conversations can exhibit characteristics that you might regard as “hallmarks” of a client-centered approach. The subsections below describe these hallmarks. Ensuing chapters explore strategies and techniques for carrying out counseling in ways that are consistent with these hallmarks.  

A. SEEK OUT POTENTIAL NON-LEGAL CONSEQUENCES

Helping clients develop satisfactory solutions requires you not only to uncover information that is relevant to legal issues, but also to help clients identify non-legal ramifications that are embedded in solutions to their legal problems. Hence, one hallmark of your counseling conversations is to actively encourage clients to identify potential non-legal consequences. With potential non-legal consequences on the table, you can assist clients in evaluating their likely impact on potential solutions. Actively encouraging clients to talk about non-legal concerns is often necessary because clients may not on their own identify and evaluate the non-legal ramifications that may legitimately bear on the problem-solving process. For example, assume that your client is the CEO of a small company that wants to obtain a zoning variance so that the company can expand its operations. The CEO will no doubt understand the importance of providing information that justifies the need for a variance. However, the CEO may not without inquiry on your part talk about such non-legal concerns as the CEO’s need to obtain the variance in order to maintain the confidence of the company’s Board of Directors.

With experience, you will no doubt anticipate possible non-legal ramifications that tend to accompany particular types of legal problems. You may certainly raise such non-legal possibilities in the course of counseling conversations. At the same time, you will also need to encourage clients to identify non-legal concerns that may not be on your “radar screen” because no amount of experience and legal expertise can enable you to fully recognize or evaluate all the non-legal consequences that may attend a given client’s situation.

B. ASK CLIENTS TO SUGGEST POTENTIAL SOLUTIONS

Clients reasonably expect you to develop potential solutions to their legal problems, and client-centered counseling is certainly consistent with your doing so. However, a second hallmark of client-centered counseling is that you encourage clients to identify potential solutions as well. Clients’ backgrounds and experiences may lead them to suggest sensible options that you might have overlooked. At the very least, clients’ suggested solutions may suggest concerns that you can account for in solutions that you devise.

7. The “hallmarks” described above do not of course constitute the entire range of features of an effective attorney-client relationship. For example, your professional responsibilities include keeping clients reasonably informed about the status of their matters and responding promptly to clients’ requests for information. See Rule 1.4, ABA Model Rules of Professional Conduct.
By way of illustration, consider a situation in which you represent a building contractor who has been sued by a residents' association for alleged construction defects in a large apartment complex. The residents contend among other things that a basement laundry facility floods as a result of the contractor's failure to properly seal the foundation walls. The contractor is probably more likely than you to identify a solution that includes a repair process that will cure the flooding. Thus, asking the contractor to suggest possible solutions promotes the likelihood that the contractor is satisfied with the eventual outcome.

C. ENCOURAGE CLIENTS TO MAKE IMPORTANT DECISIONS

A third hallmark of client-centered counseling is that you encourage clients to make important decisions. The strategies and techniques that constitute a client-centered approach put clients in a position to make knowledgeable decisions by facilitating identification of possible outcomes and their likely consequences. At the end of the day, however, the factors described above, such as the inevitable presence of non-legal ramifications and variations in values and risk-aversion, suggest that important decisions are for clients to make.

Depending on such factors as clients' readiness to make decisions and the time available for decision-making, you may play a more or less active role in the decision-making process. For example, you may recommend a course of action to an indecisive client or suggest that a client who has made a too-hasty decision may want to reconsider. However, across a broad spectrum of client conversations your basic task is to provide clients with a reasonable opportunity to evaluate options and likely consequences, and leave to clients the choices that they believe are in their best interests.8

D. PROVIDE ADVICE BASED ON CLIENTS' VALUES

Within the universe of decision-makers are clients who may require that you take a more active role in decision-making. For example, even experienced and sophisticated clients may not want to make decisions until hearing your advice. Other clients may be "socially disempowered" from decision-making. That is, because of mental impairment or social, economic or cultural disadvantage, some clients may need your advice as to the solution that you think is in their best interests.9 Your ethical obligation is to maintain a normal attorney-client relationship "as far as is reasonably possible."10 Thus, even if a client is not so disabled as to require appointment of a guardian or other formal rights-holder, provid-

8. Of course, if your client is a minor or suffers from some sort of mental impairment, you may need to undertake more of the decision making than when such factors are not present. See Rule 1-14, ABA Model Rules of Professional Conduct.


10. See Rule 1-14, ABA Model Rules of Professional Conduct.
ing effective representation to socially disempowered clients may require you to take an expanded role in the decision-making process.

In all such situations, provide advice according to your understanding of clients’ circumstances, values and non-legal concerns. Giving advice based on the consequences you personally think important would impose your values and sense of appropriate risk taking on clients and would be antithetical to client-centeredness.

E. ACKNOWLEDGE CLIENTS’ FEELINGS AND RECOGNIZE THEIR IMPORTANCE

Another hallmark of client-centeredness is that you understand and respond to clients’ feelings. Legal problems do not exist in emotionless vacuums. Clients’ emotional reactions to problems and their possible solutions are often as significant as the facts which generate the problems. Thus, clients often want and need to talk about their feelings. Later chapters introduce you to techniques for talking about and acknowledging clients’ emotions. Use of those techniques enables you to recognize implicit feelings, to reflect them back to your clients, and to include those emotions in a search for appropriate solutions. By responding to clients’ feelings as well as to the substance of their problems, you can build rapport, promote clients’ motivation and recall, and help fashion solutions that meet clients’ needs.

At the same time nothing about these techniques requires you to play “amateur psychologist.” Your legal training and experience do not equip you to counsel clients with respect to psychological problems, and the client-centered approach does not require you to try to help clients overcome not only their legal but also their psychological problems. A client-centered approach simply acknowledges the reality that legal problems often give rise to emotional feelings and concerns and seeks to incorporate a consideration of those feelings and concerns into searches for satisfactory solutions.

4. INTEGRATING CLIENT-CENTERED HALLMARKS INTO THE INTERVIEWING & COUNSELING PROCESS

This book focuses on the lawyer-client relationship, and on strategies and techniques for establishing and maintaining an effective relationship, gathering information from clients, and helping clients reach satisfactory solutions to their problems.

A. THE REMAINING THREE PARTS OF THE BOOK

The remainder of the book consists of three parts:

Part Two sets forth the “building blocks” of client-centered lawyering. The chapters in this part examine a variety of listening and questioning skills that you may usefully employ throughout the counseling process.
Part Three focuses on the information-gathering process. In these chapters you will find strategies and techniques for identifying clients’ problems, eliciting information relevant to assessing clients’ likely legal positions and providing tentative advice.

Part Four explores the process of decision-making. The first chapter in this part suggests a standard to help you exercise judgment as to which decisions you should encourage clients to make, and sets out a process you may follow to help ensure that clients have adequate bases to make those decisions. Succeeding chapters explore a variety of counseling options and also discuss when and how you may effectively intervene in the decision-making process, such as when clients make seemingly illogical choices or make decisions that you believe to be immoral.

B. THE UNPREDICTABILITY OF THE COUNSELING PROCESS

The above summary may suggest that counseling is usually a linear process that starts with information gathering and proceeds smoothly to decision-making. Seemingly, all that remains is to implement clients’ choices: “sue the jerks,” “form a limited liability corporation.”

Certainly, some degree of linearity is inherent in helping clients reach decisions about solutions that will best solve their legal problems. For example, some data-gathering almost always precedes the giving of tentative advice or the identification of potential solutions. However, a number of factors typically cause the road from identifying clients’ problems to final problem resolution to be anything but smooth and straight. For one thing, evaluating the likely consequences of various options often makes you and clients realize the need for additional data. By way of example, assume that your client Marshall wants to go into business with Moore and that you and Marshall are discussing the option, “form a partnership with Moore.” You point out that a consequence of this option is that Moore’s creditors, if any, will be able to reach the partnership assets. As a result, before finally evaluating the option, you may ask Marshall to gather more data about Moore’s financial condition.

Second, while “choosing a course of action” may sound like the end of the counseling process with respect to individual decisions, often it is not. In the course of implementing decisions, factors such as changed circumstances, a client’s change of heart, or unforeseen hurdles may result in the decision’s revision or abandonment. That, in turn, may require additional data-gathering as part of a search for a new solution.

11. For example, in litigation, you typically do need to elicit rule-specific evidence before beginning to assess a client’s legal rights. See Jerome Frank, Courts On Trial 14–16 (1949); David A. Binder & Paul Ben-Dan, Fact Investigation 58 (1984). See also Fed.R.Civ.P. 11, which concerns requirements that plaintiffs must satisfy before filing suit. By contrast, in the initial phases of transactional matters, you are rarely concerned with identifying evidence before discussing potential alternatives. See Chapter 11.
For example, assume that Marshall's and Moore's decision was to form a limited liability corporation in order to include outside investors. Before you could fully implement this decision, interest rates fell. As a result, the pair decide to borrow the necessary capital instead of taking in additional partners. This decision may result in more meetings with Marshall, in which you engage in further data-gathering in pursuit of other options such as a sub-chapter S corporation.

Similarly, assume that your client, a Ms. Santiago, had come to see you because the company holding a mortgage on her home had threatened her with foreclosure. Her initial decision was to sue to enjoin the sale, and to pursue the suit aggressively. Shortly thereafter, she tells you that she and her husband are moving out of state, and that she does not want to put a lot of money or effort into the suit. This information will lead you both to revisit and perhaps revise Ms. Santiago's initial decision.

Finally, counseling tends to be non-linear because clients typically confront a number of important decisions as their matters proceed. For example, during an initial interview a client may describe a central problem:

"I found out that the house I bought has a cracked foundation, and that it'll cost me about $75,000 to repair it. What can I do?"

"I'm here to see about avoiding probate. What can you suggest?"

And clients often ultimately decide which option is most likely to best resolve the central problem:

"I'd like to sue the seller;"

"I'll establish a revocable living trust."

But inevitably, intertwined with the choice of basic solutions to central problems are important auxiliary issues that clients also need to resolve. For example, after deciding to sue the seller, the buyer of the defective house may have to make decisions about whether to hire an expert and how many depositions to take. Similarly, the client who chose the living trust may thereafter have to decide who to name as successor trustee and whether family members should be told of the trust's terms. In turn, each of these decisions may require you to repeat the processes of gathering data and identifying and evaluating options.