HOW TO EXPLAIN CONFIDENTIALITY?

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One of the most critical, yet inadequately explored, issues in lawyer client communication is the problem of explaining confidentiality, especially exceptions which permit or require the lawyer to disclose confidential information. Failure to disclose these exceptions results in misrepresentation to the client (e.g. "everything you tell me is confidential"), yet an accurate and complete explanation of the exceptions may inhibit the very trust that the right of confidentiality is intended to create. This paper will report on the use of simulated interviews in the classroom to model an empirical approach to analyzing this problem that can be applied to law school clinics.

INTRODUCTION

One of the most bizarre scandals of the Clinton presidency was the suicide of Deputy White House Counsel Vincent Foster in July 1993 nine days after he retained private lawyers to represent him in an early phase of the Special Prosecutor's investigation of the Clinton White House. Two years later the Special Prosecutor issued grand jury subpoenas to those lawyers for their handwritten notes of their meeting with Foster. In a decision holding that the lawyer-client privilege survives the death of the client, the Supreme Court repeatedly referred to the importance to clients of knowing that their communications will be confidential before they can communicate "fully and frankly" with their lawyers.[1] However, in a footnote the Court admitted that what limited empirical evidence existed seemed to show that clients are "often misinformed or mistaken" about the attorney-client privilege.[2]

One of the studies cited by the Supreme Court was a survey of 63

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[1] Swidler & Berlin v. United States, 524 U.S. 399 (1998).

[2] *Id*. at 410 n. 4.

> who invites full disclosure and at the same time cautions the client about the possible betrayal of his confidences. . . . The lawyer who gives a Miranda warning is not the client's champion against a hostile world; on the contrary, she presents herself at the outset as an agent of that hostile world. . . . [I]t is important to recognize that the frightened and confused client who is given a lawyer-client Miranda warning may well be innocent. As Professor Stephen A. Saltzburg has observed, "Good persons (or persons with good claims) may shrink from the attorney who gives Miranda warnings as quickly as bad persons (or persons with bad claims)." Note too that the lawyer-client Miranda warning must be given before any serious lawyer-client discussions can begin — that is, before the lawyer can possibly make an informed judgment about the client's guilt or innocence."[52]

II. Turning the Classroom into a Sociolinguistic Laboratory

My first experience in law teaching was teaching legal ethics as an adjunct professor from 1985-87 while practicing law; I taught both a traditional, large-enrollment required upper-level course several times and once co-taught an innovative, small-enrollment first year elective. However, during my first ten years of full-time teaching (1987-97) I only taught ethical issues in the context of clinical and practical skills courses. In 1998 I volunteered to begin teaching the required upper-level legal ethics course in hopes that what I had learned as a clinical teacher could be applied to a more traditional classroom setting. I decided to develop an innovative approach without using a published textbook, titling the course, "The Legal Profession: Heroes and Villains" (*Heroes & Villains*).[53] I was aware both from my prior adjunct teaching experience and from discussions with colleagues that law students often entered the required upper-level ethics course with disinterest, scepticism or both. None other than David Luban, one of the leading scholars and teachers in the field, has commented that the required upper-level course is the "dog of the curriculum"[54] and gen-

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[52] *Id*. (footnotes omitted). It should be noted that if Freedman or Smith failed to tell their own clients about exceptions to confidentiality, they would not later find themselves in the position of inviting trust only to betray it because they make clear that they themselves would *never* disclose confidential information, whether pursuant to the discretion given by Model Rule 1.6 or even to prevent or remedy client perjury referenced in Model Rule 3.3. *Id*. at 127-90.

[53] Information about the current version of this course, now titled *Professional Responsibility: Heroes and Villains*, can be found on the course web site, <http://law.gsu/edu/ccunningham/PR/> (last visited February 25, 2003) (hereinafter *Heroes & Villains* web site).

[54] David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 Geo. J. Legal Ethics 31, 37 (1995).

erates as much student interest as a "high school session on personal hygiene."[55]

In designing the course, I was also strongly influenced by a very thoughtful seminar paper I had received the prior year entitled "Hearing the Lawyer-Heros." The student identified what he perceived to be "a deficiency" in law school education:

> [I]t was chiefly on the faith that there were [heros] . . . in the profession of law that lured me to law school even after five years of doing other things. . . . [But] law school neither encourages nor facilitates a student in seeking out their own individual lawyer-heros, and the unfortunate result is that students do not hear what may be the most important voice in the language of the law.[56]

Reading this paper made me realize that the way I taught legal ethics in the past primarily presented students with lawyers who were villains — or careless fools — and, therefore, probably made students even more cynical about the practice of law after the course than before. I found myself wondering what the point was of forcing law students to take a course that increased an already troubling level of law-school-induced cynicism. So I decided to build my new course around real and fictional lawyers who were at least arguably heroic,[57] and to discuss the ethical challenges they faced. I expected students to enjoy and appreciate this approach, including the unconventional reading material and the use of movies and documentaries in class. I was therefore disappointed with what I considered to be generally lukewarm student evaluations the first time I taught the course. I threw myself into the task of redesigning the course, going to the extent of engaging the research assistance of three excellent students who had taken the course; these students analyzed the evaluations closely, conducted focus group discussions with other students who took the course, and reviewed teaching materials used at other law schools. To my dismay, the second time I taught *Heroes & Villains*, the course evaluations were even worse, with a number of comments from students who really disliked the class.

The third time I taught the course I developed the teaching method which is the subject of this article. The first two times I had

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[55] *Id.* at 38 (quoting from Dale C. Moss, *Out of Balance: Why Can't Law Schools Teach Ethics*, STUDENT LAW., Oct. 1991 at 19).

[56] *Hearing the Lawyer-Heros* 1,3 (unpublished paper submitted in partial satisfaction of course requirements, *Law as Language, Law as Literature*, Washington University School of Law, Feb. 24, 1997, on file with author),

[57] For example, in the first class, students read about Saint Thomas More, Nelson Mandela and M.K. ("Mahatma") Gandhi and discussed scenes from the Academy Award-winning movie about More, *A Man for All Seasons* (1967). *See Heroes & Villains* web site, supra note 54, Syllabus: Class One.

used some simulation exercises, including the Simon Exercise discussed below, but these exercises were fairly peripheral to the course. I sent the students off in small groups to conduct largely unsupervised simulations. (I rotated from group to group but could not spend enough time with any one group to provide much guidance or critique.) The students then returned to the classroom for a discussion of the ethical issue the exercise was designed to illustrate, such as confidentiality or conflicts of interest; they also had to fill out a short, pass-fail report on what happened in their group. The major change I made when I taught the course for the third time was to move the simulations into the classroom and make the analysis of those simulations the major focus of both teaching and graded assignments.

Each simulation took place twice, using the same facts but with different persons playing the roles. When I taught *Heroes & Villains* in Fall 2000, I had an enrollment of 44 students.[58] I divided the class into four groups (A-D); each group was then assigned a two-part simulation exercise. For example, the Simon Case was the first exercise, taking place in the 4th and 6th class of the semester; thus the group, consisting of ten students, assigned the Simon Exercise was labeled Group A. This group was further divided into two subgroups of five students: A-1 and A-2. Within each subgroup, three students were assigned to the lawyer role and two were assigned the client role. All students were told to prepare to play the role; I did not select the role players until the day of class. For part one, two students from subgroup A-1 conducted an initial 20 minute interview while subgroup A-2 waited outside the classroom; the rest of subgroup A-1 and the other students in the class observed. Subgroup A-1 then joined the rest of the class to observe as two students from subgroup A-2 conducted their interview. Both interviews were videotaped, digitized by our multimedia department, and placed on the course web site within two working days. The interviews could be viewed by computer using the RealPlayer software, either in the school's computer lab or at home on a personal computer using the Internet. By digitizing the videotapes, it was possible to place precise "real time" marks for each second of the interview, displayed in the corner of the computer screen as the interview played (e.g. 3:29 for 3 minutes and 29 seconds into the interview).

Before the beginning of the 6th class, when the second part of the exercise took place, members of Group A were required to submit a

[58] I have taught the course twice since then. The second time, in Spring 2002, at Washington University, there were 32 students in the course. In Spring 2003 I am teaching a somewhat modified version of the course to 39 students at my current law school at Georgia State University.

5-7 page paper analyzing the first interview conducted in their subgroup, citing to specific time marks. They were to analyze the accuracy and comprehensibility of the explanation of confidentiality as well as whether the explanation effectively encouraged the client to trust the lawyer, and generally how the lawyer conducted the interview so as to learn the client's story.[59] Students were encouraged to include comparisons with the interview conducted by the other subgroup and to propose alternative ways, viewing the interview with the wisdom of hindsight, that the lawyer could have explained confidentiality and learned the client's story. Students assigned to the client role were not to refer to their confidential instructions in this paper. Some of the best papers would be posted anonymously on the course web site, so that after students completed their own analyses, they had the opportunity to read analyses of the event written by others.[60]

By assigning these papers I was encouraging students to do something similar to what sociolinguists call "discourse analysis," close and repeated viewing of recorded speech events with attention to every detail.[61] As Susan Corcoran, one of the students in the course during the Fall 2000 semester, commented in her second writing assignment:

> One doesn't usually have a chance to review an interview, much less review it dozens of times. It's particularly instructive to realize how inaccurate not only first impressions can be, but even tenth impressions.

Not only did students get the opportunity to "experiment" with different approaches because there were alternate versions of the first interview, but they also saw a "second act" to the drama in a follow-up client meeting intended to make the task of explaining confidentiality even more problematic in a realistic way. Thus most students had to consider ethical issues both in role and as observers of simulated interviews.

Student evaluations for this revised version of the course were markedly improved, and remained good when I used the same format

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[59] Prior to the exercise, the students in the class had read and discussed materials on client-centered practice and the importance of learning the client's own story which are published on the *Heroes and Villains web site*, supra note 54; *see* syllabus and linked readings 19-26, assigned for Class Two.

[60] Because students knew that their papers might be posted, most students omitted information that would identify themselves, such as whether they had personally played one of the roles. As a result, some papers were presented as an objective observer's critique of what was in fact the writer's own performance.

[61] For a further description of discourse analysis, *see* Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1349-57 (1992) and Clark D. Cunningham & Bonnie S. McElhinny, *Taking It to the Streets: Putting Discourse Analysis to the Service of a Public Defender's Office*, 2 CLINICAL L. REV. 285, 288-90 (1995).

to teach *Heroes & Villains* a fourth time in the Spring 2002 semester. A significant number of students in both 2000 and 2002 gave the course the highest possible rating of "outstanding"[62] and, in a pleasant contrast to the first two offerings of *Heroes & Villains*, no one rated the course "poor" in 2000 and only one student did so in 2002. Free response comments on the evaluations in 2000 included many encouraging statements such as "Terrific course" and "One of best courses in my 3 years."[63] Evaluations in 2002 produced these positive responses: "the best course I have had during law school" and "I think that every law student should be required to take *this specific course*. I will take the information I've learned and remember it through all my days."[64] Both in 2000 and 2002 I administered a short evaluation form on the last day of class to supplement the official law school questions. The first question asked, "If you had known *in advance* what you know *now* about this course, would you have taken it even if the law school didn't require you to take an ethics course?" In both 2000 and 2002 a majority of students replied, "Yes."[65]

For many students the simulations clearly seemed to have engaged their respect and intellectual energy for the challenge of applying the principles of legal ethics in practice and made the stories of the real-life lawyers more relevant to them.[66] My initial purpose in using

[62] 20% rated the course outstanding in 2000 and 22% rated it outstanding in 2002. Course evaluations on file with author.

[63] Other comments included: "I enjoyed role plays and interactive style of class. I appreciated the ability to come to class at such an early time [7:40 am] and leave satisfied." . . . "[C]reated a very exciting syllabus with a dry subject matter. Thanks, I really enjoyed the course." . . . "I learned a lot." . . . "Well done." . . . "I liked the unconventional structure of the class." . . . "The class was a lot better than I expected!" . . . "Class exercises require consideration of ethical dilemmas, that require both legal and moral analysis." . . . "Exercises and case studies materials were very applicable in presenting tough ethical evaluations. Great class!" . . . "I have enjoyed the class. I really enjoyed the role playing. It really helped me to visualize the readings." . . . "It has made me think and I have learned a lot. I really like the course." . . . "It has focused on the hard decisions lawyers have to make. It did so in the most interesting way possible — telling stories about people who had to make the decisions." Fall 2000 Course Evaluations of *Heroes & Villains* on file with the author.

[64] (Emphasis in original.) Some comments were more of the type that legal ethics teachers have come to expect, e.g. "Really a hideous topic for a class but Prof. Cunningham did the best he could. Tried to make it interesting and useful." Not everyone appreciated the simulation exercises, e.g. "The role plays were interesting, but of little value." Spring 2002 Course Evaluations of *Heroes & Villains* on file with the author.

[65] 75% said "yes" in 2000 and 59% said "yes" in 2002. Supplemental Final Evaluations on file with author.

[66] Each simulation was paired with one or more real life stories relating to the same topic. Thus, while writing their papers about confidentiality in the Simon Exercise, students were also reading about the famous case of lawyers Frank Armani and Francis Belge who were reviled in their community for keeping confidential the fact that their client had murdered two girls and hidden their bodies. *See* TOM ALIBRANDI & FRANK H. ARMANI, PRIVILEGED INFORMATION (1984). In between simulations involving conflicts of interest in

the Simon Exercise was to give students an appreciation of how difficult it can be to win a client's trust and how assurances of confidentiality can play a key role in winning that trust. Once having gained that trust, even in a simulated setting, I expected students to have a greater and deeper appreciation for the high value the legal profession places on protecting a client's confidences. However, as I watched the simulated Simon Case unfold in different variations, and read the students' insightful papers, I realized that I was also coming to new understandings about the importance and difficulty of explaining confidentiality.

III. The Simon Exercise

I have obtained written consent from all the students who participated in the Simon Exercise during the Fall 2000 semester to use the videotapes of their simulations and their papers analyzing those videotapes in academic articles and teaching maerials.[67] Where students specified in their consent forms that they would like to be identified by their real name, I have done so in this article; otherwise I have changed student names to designations like "A-2 lawyer." The Simon Exercise has its origin in an amalgam of actual cases that a Columbia Law School clinic handled. Professor Andrew Schepard, then at Columbia and now a professor at Hofstra, wrote the fictional story of Simon's threatened eviction from public housing as a discussion problem. This story was converted into a fact pattern for a simulated initial client interview by Professor David Chambers at the University of Michigan Law School for a first year elective course on legal ethics taught in small sections, called "Lawyers and Clients."[68] I have modi-

representing a corporation, students read about Clarence Darrow's struggles to balance his commitment to his clients and to the labor movement while initially representing a railroad company and later defending two union activists, whose guilty pleas devastated the labor union that was paying Darrow for their defense. Clarence Darrow, The Story of My Life 57-62, 172-85 (1932). A third simulation was based on the widely-publicized "Baby Jessica" case in which a University of Michigan law school clinic represented a couple who had attempted to adopt an infant only to face a court ruling that they must return the child two years later to the biological father, who had not known about the adoption proceedings. *See* Robby DeBoer, Losing Jessica (1994) (autobiographical account by the adoptive mother). Students were prepared for a simulated counseling session with the adoptive father about whether to pursue the case to the U.S. Supreme Court by reading about a similar critical moment in the University of Mississippi desegregation case in which NAACP attorney Constance Baker Motley (later Chief Judge for the U.S. district court for the Southern District of New York) persuaded the plaintiff, James Meredith, to keep going despite great personal risk. *See* Constance Baker Motley, Equal Justice Under Law 173-79 (1997) and James Meredith, Three Years in Mississippi (1966).

67 Signed consent forms on file with author.

68 I co-taught that course in 1987 as an adjunct professor with Chambers, Steven Pepe (a federal judge), and the late Wade McCree (a Michigan professor who had served as U.S. Solicitor General); I proposed a number of modifications to the Simon Exercise which all of us adopted that semester for our separate sections.