

## 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.<sup>1</sup> 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.<sup>2</sup>

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

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<sup>1</sup> Swidler & Berlin v. United States, 524 U.S. 399 (1998).

<sup>2</sup> *Id.* at 410 n. 4.

lawyers and 105 laypersons who had consulted lawyers in the up-state New York county where Cornell University is located, conducted by Fred C. Zacharias and reported by him in a 1989 law review article.<sup>3</sup> Over 70% of the clients said their first attorneys had never told them anything about confidentiality.<sup>4</sup> That response was consistent with the lawyer data: over 80% admitted that they informed clients about confidentiality in less than 50% of their cases. (Over 20% of all lawyers said they “almost never” inform clients about confidentiality.)<sup>5</sup> Of those clients who said their lawyers told them nothing about confidentiality, 79% claimed to know about it nonetheless, although many were unsure of the source of their knowledge. 42% of those clients incorrectly thought that the lawyer’s duty to honor confidentiality was absolute. In 1994 Leslie C. Levin reported on an even more extensive survey, of 776 lawyers throughout the State of New Jersey.<sup>6</sup> In contrast with Zacharias’ study, her research indicated that more than 95% of the lawyers had talked to at least some clients about confidentiality in the prior 12 months; however, 88% of those lawyers had informed few if any of those clients about New Jersey’s unusual requirement that lawyers *must* disclose confidential information if necessary to prevent serious harm, even if the client conduct to be prevented was only fraudulent, not criminal.<sup>7</sup>

This article has its origins in a paper presented at a conference entitled “Problem Solving in Clinical Education.”<sup>8</sup> The conference organizers asked presenters to address how “we teach students to engage in creative and strategic problem solving, to frame the problem, to generate and evaluate alternatives, to develop effective strategies.”<sup>9</sup> That paper offered to the conferees the difficult question of how to explain confidentiality, as a genuinely unresolved problem to serve as an example of how to engage law students as collaborators. The problem is real and important, the teacher does not have the right answer hidden up a Socratic sleeve, and students may actually contribute to

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<sup>3</sup> Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

<sup>4</sup> *Id.* at 382-83. The lawyer’s professional duty of confidentiality includes information covered by the attorney-client privilege discussed in the *Swidler & Berlin* case, which is part of the substantive law of evidence, but also protects a wider range of information. See GEOFFREY C. HAZARD, SUSAN P. KONIAK & ROGER C. CRAMTON, *THE LAW AND ETHICS OF LAWYERING* 203 (3rd ed. 1999).

<sup>5</sup> *Id.* at 382.

<sup>6</sup> *Testing the Radical Experiment: A Study of Lawyer Responsibilities to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81 (1994).

<sup>7</sup> *Id.* at 122-23 (65% had told no client about this exception; 23% had told fewer than 10% of their clients).

<sup>8</sup> See note \*, *supra*.

<sup>9</sup> *Problem Solving in Clinical Education: Conference Schedule and Abstracts* (2001), *supra* note \*, at 1 (on file with author).

the ongoing discourse in the legal community by identifying and clarifying issues and suggesting innovative solutions.

In Part I of this article I summarize the substantive law on confidentiality and review leading textbooks for teaching legal ethics and client interviewing to show that existing teaching materials do not present comprehensive answers to how to explain confidentiality — and indeed do not fully present the problem. In Part II I explain how I developed an upper-level course on legal ethics that uses the classroom as a kind of sociolinguistic laboratory for experimenting with different methods of explaining confidentiality. Part III then presents in detail the teaching materials on explaining confidentiality used in this course as well as transcripts and student papers from one semester demonstrating the creative and insightful ways students can contribute to analyzing this problem. Teachers are invited to use Part III, as well as an on-line version of this article containing links to complete videotapes of four classroom simulations and downloads for all exercise materials, for their own classroom and clinical courses. Part IV concludes with information about the next stage of research into effective explanation of confidentiality, in the real life setting of law school clinics.

#### I. THE DILEMMA OF EXPLAINING EXCEPTIONS TO CONFIDENTIALITY

Although each state has its own set of rules regulating the legal profession, the majority of jurisdictions have adopted the American Bar Association's Model Rules of Professional Conduct. ABA Model Rule of Professional Conduct 1.6 ("Confidentiality of Information") generally prohibits a lawyer from revealing "information relating to representation of a client."<sup>10</sup> The rule permits, but does not require, the lawyer to disclose such information if the client consents (explicitly or implicitly) or to the extent necessary for either one of the following two purposes:

- (1) to prevent reasonably certain death or substantial bodily harm; or
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.<sup>11</sup>

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<sup>10</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (2002) [hereinafter MODEL RULES 2002].

<sup>11</sup> *Id.* at R. 1.6(b)(1) and (3). Model Rule 1.6(b) contains two other exceptions: "to

I will call the first exception “harm prevention” and the second “lawyer protection.” A different Model Rule creates a more ambiguous exception to the confidentiality duty. Rule 3.3 (“Candor toward the Tribunal”) prohibits a lawyer from offering “evidence that the lawyer knows to be false” and requires that if a lawyer “has offered material evidence and . . . comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”<sup>12</sup> The rule further states that the duty to “take reasonable remedial measures” applies even if compliance requires disclosure of confidential information. I shall term this third exception “client perjury.” A lawyer who simply tells a client that “everything you tell me is confidential and I can’t disclose anything without your permission” has thus misinformed her client about the extent of her legal rights.

In both the year before and the year after Zacharias’ empirical study was published law review articles appeared advocating the position that lawyers must disclose the exceptions to confidentiality to clients. In 1988 Roy M. Sobelson analyzed the issue primarily in terms of the 1969 ABA Model Code of Professional Responsibility, which was at that time still more widely adopted by states and had somewhat different exceptions than the ABA Model Rules of Professional Conduct which had only been approved by the ABA four years earlier.<sup>13</sup> He concluded his article with a proposed two-page statement entitled “Confidentiality: Your Rights and Your Lawyer’s Duties”<sup>14</sup> that clients would read and sign before conferring with a lawyer; a copy of this statement appears in the Appendix to this article. In a 1990 arti-

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secure legal advice about the lawyer’s compliance with these Rules . . . and to comply with other law or a court order.” *Id.* at Rules 1.6 (b)(2) and (4). The current language of the harm prevention exception represents an amendment to Rule 1.6 approved by the ABA in 2002 and has not yet been adopted by any state. The pre-2002 version of the harm prevention is more restrictive, permitting disclosure only “to prevent *the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm*” (emphasis added). See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (b)(1) (2001) [hereinafter MODEL RULES 2001]. A majority of states have versions of Rule 1.6 that differ from both the current and the pre-2002 ABA Model Rules by creating broader exceptions to the duty of confidentiality. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.21, at 9-78 (3rd ed. 2003).

<sup>12</sup> MODEL RULES 2002, *supra* note 11, at 3.3(a)(3). The phrase “including, if necessary, disclosure to the tribunal” was added by the ABA as an amendment to Rule 3.3 in 2002 and, like the ABA’s amendments to Rule 1.6, has not yet been adopted by any state. See note 12, *supra*. In the pre-2002 version of the Model Rules, it was the comments to Rule 3.3 rather than the text that indicated that “reasonable remedial measures” might require disclosure to the court of confidential information. MODEL RULES 2001 *supra* note 12, at R. 3.3 cmt. 6-13.

<sup>13</sup> *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing without Listening*, 1 GEO. J. LEGAL ETHICS 703 (1988).

<sup>14</sup> *Id.* at 772-74.

cle that cited Zacharias' research, Lee A. Pizzimenti discussed both the Model Code and Model Rules exceptions and concluded that failure to disclose the exceptions to confidentiality "is morally problematic because it involves professionals trying to build and encourage trust and then using it to deceive."<sup>15</sup> She proposed that the following oral explanation be given to clients in criminal cases:

You should know that I work for you and that I consider it very important to keep your confidences. The attorney-client privilege essentially means that I cannot be forced to disclose information about discussions we have. For example, judges sometimes can order lawyers to disclose information, but they can't make me tell them about whether you committed the crime. You should know about some limits to the privilege, however. If I learn that you will lie or have lied on the witness stand, I must report that. I am also allowed to report if you tell me you are going to commit a crime. I may also report limited information to defend against claims made against me or to collect my fee, but I am allowed to report only that information necessary to meet those goals. For example, if we fight about my fee, I might be able to show my billing records, but I couldn't just reveal all the things I know about you. Although there are times I may feel it is necessary to report information, I want to remind you that I take the privilege very seriously and would never lightly decide to share information."<sup>16</sup>

Pizzimenti acknowledged in her article that "[t]hose reading this suggested statement might believe all of this sounds terrible and the client would view the lawyer as greedy and self-protective."<sup>17</sup> However, she did not deny that the explanation would produce this impression with the client but simply insisted that the client is nonetheless entitled to this information: "The ethics rules provide for these exceptions, and if they sound as if ethical priorities are misplaced, the rules should be changed. So long as they exist, however, the client should be aware of them."<sup>18</sup> Sobelson prefaced his proposed written explanation by saying that such a statement "must not be so complicated and frightening that it unduly chills the open and honest exchange of information";<sup>19</sup> yet if one reads this statement in

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<sup>15</sup> *The Lawyer's Duty to Warn Clients about Limits on Confidentiality*, 29 *CATH. U. L. REV.* 441, 478 (1990). "[A] policy of not disclosing limits on confidences, if intentional, goes beyond the isolated incident that will not encourage others to lie. Rather, it reflects an ongoing practice of deception." *Id.* at 482-83. "[S]o long as the client understands that the lawyer may be hampered by a lack of information, the choice of whether to disclose belongs to the client." *Id.* at 484.

<sup>16</sup> *Id.* at 488-89.

<sup>17</sup> *Id.* at 489.

<sup>18</sup> *Id.*

<sup>19</sup> Sobelson, *supra* note 14, at 772.

the Appendix one will find that Sobelson, motivated by an admirable desire to be accurate and complete, ended up with 15 separately labeled limitations or exceptions to confidentiality that the client is expected to read and understand before the first meeting begins.<sup>20</sup>

After reading the articles by Sobelson and Pizzimenti, the conscientious lawyer might feel trapped in a paradox. The duty of confidentiality exists to inspire client trust and prompt candor. To achieve these purposes, clients should be informed about confidentiality at the very outset of the relationship. Yet an explanation that maximizes candor — “everything is confidential” — seems to be an indefensible misstatement of relevant law. However, an accurate explanation that covers all the potential exceptions might destroy the very trust confidentiality was intended to create.

In a review of three leading textbooks in the field of legal ethics<sup>21</sup> one will find a great deal of space devoted to the duty of confidentiality and its exceptions, but little if any attention to the questions of whether lawyers have a duty to give clients an accurate explanation of confidentiality and how to resolve the dilemma of explaining the exceptions without damaging the atmosphere of trust and candor that lawyers strive to create in their initial meetings with clients. Zacharias’ study is specifically mentioned by Deborah L. Rhode and David Luban in their textbook; they comment that his “survey raises questions about how often confidentiality is necessary and sufficient to avoid chilling client disclosures.”<sup>22</sup> They also mention another empirical study showing that few lawyers inform clients about exceptions to confidentiality, “[a]pparently [because] most lawyers fear that doing so will undermine the very trust they are trying to create.”<sup>23</sup> However the textbook then moves on without further discussion or attempted resolution of the questions raised by Zacharias’ study. In a later discussion of the client perjury exception, Rhode and Luban make the important point that this exception is “critical *not* because it arises frequently in practice [it does not] . . . [but] because it influence[s] what lawyers tell criminal defendants in their first meetings [and] what defendants believe they can tell lawyers . . .”<sup>24</sup> However, they do not follow up on this point to discuss whether, or how lawyers, should tell criminal defendants about this exception in their first meeting, and in their discussion problem about this exception they do not include in

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<sup>20</sup> *Id.* at 772-73, ¶¶ 2(a)-(e), 3(a)-(e), 4 (a)-(d), and 5.

<sup>21</sup> STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (6th ed. 2002); HAZARD, KONIAK & CRAMTON, *supra* note 5; and DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS (3rd ed. 2001).

<sup>22</sup> *Id.* at 190-91.

<sup>23</sup> *Id.*, citing Levin, *supra* note 7.

<sup>24</sup> *Id.* at 265.

the hypothetical facts any indication whether the client was warned about the exception before telling the lawyer an account of his activities at the time of the alleged crime that turns out to be inconsistent with his later testimony at trial.<sup>25</sup>

In his textbook, Stephen Gillers begins his discussion of the exceptions to confidentiality with this passage:

Under the law, your statements to me and the advice I give you are privileged and confidential. Nothing will go outside this room without your permission. No one can make us repeat our conversation.” If you earned ten dollars each time a lawyer said something like this to a client, you’d soon be as rich as Bill Gates. (Well, maybe not quite.) Sure, this spiel puts clients at ease and encourages candor. Often, though, it’s wrong. In several circumstances, lawyers may reveal, or may be required to reveal, information clients would like to protect. The following examples are among the important exceptions<sup>26</sup> . . .

Although this passage certainly suggests to students that the “everything is confidential” statement is both common<sup>27</sup> and problematic, Gillers does not go on to discuss whether there is an ethical duty to explain confidentiality in an accurate way nor the challenge of explaining the exceptions to a client. Elsewhere in his textbook Gillers offers two thought-provoking discussion problems that involve one or more exceptions, but in neither of the fact patterns is there any mention of whether the lawyer explained confidentiality or its exceptions before the client confided information that might not be protected.<sup>28</sup>

Geoffrey Hazard, Susan Koniak and Roger Cramton cite the Zacharias study in the context of a discussion of whether exceptions should be discretionary or mandatory.<sup>29</sup> They begin by recognizing that:

[t]he major argument against broadening exceptions to confidential-

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<sup>25</sup> *Id.* at 264-65. In the TEACHING MANUAL (2001) for RHODE & LUBAN the authors include the following quote from noted criminal defense lawyer (and legal academic) Alan Dershowitz that seems to indicate that a lawyer should inform a client of relevant confidentiality exceptions: “When a client walks through the door, he assumes he’s coming to you in confidence. . . . That means his name, his appearance, his fingerprints [are given to you in confidence]. If the judge [in a case discussed in the main text] had ruled the other way, I’d have to say to clients: “Don’t give me your name. Wear a mask. Don’t leave fingerprints in my office.” *Id.* at 66, citing Dershowitz’s quoted remarks in Jeffrey Schmalz, *Lawyer Granted Right to Conceal Client’s Identity*, N.Y. TIMES, Oct. 14, 1993 at A1.

<sup>26</sup> Gillers, *supra* note 22, at 56.

<sup>27</sup> A few pages later in the textbook, Gillers suggests to students that they read Zacharias’ article as “a critique of the fundamental justification for confidentiality,” but he does not specifically mention the findings reported in that article about the failure to explain confidentiality or its exceptions. *Id.* at 68.

<sup>28</sup> *Id.* at 38-39.

<sup>29</sup> HAZARD, KONIAK & CRAMTON, *supra* note 5, at 334-35 n.39.

ity is that clients will be deterred from confiding information to their lawyers. . . . [T]he fact that the lawyer may disclose client information may diminish client trust and adversely affect the quality of the relationship and the single-mindedness with which the lawyer pursues the client's interests. If and when the lawyer informs the client that disclosure is desirable or contemplated, a serious conflict arises between the lawyer and the client. The client feels betrayed and the relationship ends in bitterness.<sup>30</sup>

The authors then discount this argument by citing Zacharias as, admittedly limited, empirical evidence that clients are "relatively uninformed" about the details of confidentiality exceptions, so the scope of those exceptions will not actually deter most clients from confiding in their lawyers.<sup>31</sup> They suggest that the only clients likely to be sufficiently well-informed so that they will actually shape their communications in relation to the exceptions would be "sophisticated repeat-players, usually substantial corporations, who want to use lawyer secrecy to reduce their costs of complying with legal and regulatory requirements."<sup>32</sup> The authors do not, however, discuss in their textbook whether lawyers owe a duty to unsophisticated clients to make sure they have an accurate understanding of their confidentiality rights or how such an explanation might be accomplished without deterring clients from confiding in their lawyers, although Hazard has addressed these issues elsewhere.<sup>33</sup>

Review of three textbooks on client interviewing and counseling<sup>34</sup> shows greater attention to this issue but significant variance among the suggested approaches. The pioneering textbook in this area is *Lawyers as Counselors: A Client-Centered Approach* by David

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<sup>30</sup> *Id.* at 334.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 335. This reference to the use of lawyer secrecy to avoid regulatory standards relates back to a discussion earlier in the textbook of several cases in which it was alleged that tobacco companies had tried to cover up evidence about the harmful effects of tobacco use by claiming attorney-client privilege. *Id.* at 250-53.

<sup>33</sup> Indeed, according to MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 155 n.10 (2nd ed. 2002), Hazard was the first to use the phrase "lawyer-client Miranda warning" to describe the explanation of confidentiality exceptions. *See also* Monroe H. Freedman, *But Only If You "Know,"* in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS* 135, 144 n. 22 (Rodney J. Uphoff, ed. 1995) (describing ABA-produced videotape in which Hazard advises how lawyers can avoid the client perjury exception while still learning everything important about the case from the client).

<sup>34</sup> DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991); ROBERT F. COCHRAN, JOHN M.A. DIPPIA & MARTHA M. PETERS, *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELLING* (1999); and STEFAN H. KRIEGER & RICHARD K. NEUMANN, *ESSENTIAL LAWYERING SKILLS* (2nd ed. 2003).

A. Binder, Paul Bergman and Susan C. Price.<sup>35</sup> They caution against using “model preparatory statements” at the initial interview, but acknowledge that telling “a new, unsophisticated client that what the client tells you is confidential” might be a “standard” topic.<sup>36</sup> A few pages later their text provides a sample opening statement to a new client that ends as follows:

Remember, everything you tell me is confidential; I cannot and will not disclose it to anyone outside this office without your permission. Any questions?<sup>37</sup>

Much later in the text, in a section entitled “Techniques for Responding to Client Reluctance,”<sup>38</sup> Binder, Bergman and Price offer a slightly modified statement intended to encourage candor from a reluctant client by stressing attorney-client confidentiality:

Remember, unless you tell me you’re planning to rob a bank or something like that, everything you tell me is confidential. I cannot and will not divulge anything you say without your express permission.<sup>39</sup>

In a footnote, they say: “Hopefully, the humorous reference to bank robbery allows you to suggest that the attorney-client privilege is not unlimited while still providing motivation.”<sup>40</sup> This footnote then refers the reader to a footnote on a preceding page that seems to take a position against providing clients a complete explanation of confidentiality exceptions:

[S]ometimes the resultant data [from a client interview] requires you to act against a client’s interest. For example, if a client indicates an intent to commit a crime, you may be obligated to disclose this intention to the authorities. *See, e.g., ABA Model Rules of Professional Conduct 1.6 (1984).* . . . However, we believe the practice of encouraging clients to reveal information so that you can help them is a time honored one which you should continue. First, until the information is revealed, there is no meaningful way to assess whether a revelation is helpful or harmful. Second, . . . [a]ll

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<sup>35</sup> BINDER, BERGMAN & PRICE, *supra* note 35. This text is frequently referred to as “Binder & Price” because it was preceded by DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). A new edition is in progress and Professor Paul Tremblay will be added as an additional co-author. (Email correspondence from Tremblay to author dated June 21, 2000.)

<sup>36</sup> *Id.* at 111.

<sup>37</sup> *Id.* at 125.

<sup>38</sup> *Id.* at 239.

<sup>39</sup> *Id.* at 241.

<sup>40</sup> *Id.* at 241 n. 5. Pizzimenti opened her article by quoting the predecessor version of this explanation of confidentiality found in Binder and Price’s work, also part of a section on dealing with client reluctance: “Remember, whatever you tell me is strictly confidential. I cannot and will not divulge anything you say to anyone else without your express permission.” Pizzimenti, *supra* note 16, at 441 (quoting BINDER & PRICE, *supra* note 36, at 108).

questions are intended to cause clients to reveal information. Surely no one would suggest that each should be preceded by a warning that a response may be harmful; such a result would surely paralyze all lawyer-client dialogue.<sup>41</sup>

The textbook on interviewing and counseling by Robert F. Cochran, John M.A. DiPippa and Martha M. Peters, in contrast to Binder, Bergman and Price, takes a position seemingly similar to that advocated by Sobelson and Pizzimenti.<sup>42</sup> Indeed, the authors begin their discussion by citing Zacharias' study:

[A] study showed that many lawyers rarely fully advise their client of these rules [about confidentiality] and that many clients significantly misunderstand [them]. . . Lawyers owe it to the public to do a better job explaining confidentiality in light of the study's findings of widespread public misunderstanding. The best place to do this is where the lawyer meets the public, i.e. during the initial interview. Because a proper client understanding of fees and confidentiality are important to establishing and maintaining trust and competence, we suggest that lawyers carefully plan how to explain them to their clients. It may be useful to distribute a written explanation of the rules on confidentiality and the lawyer's fee structure before the initial interview. A written explanation of confidentiality allows the lawyer to cover both the ethical rule on confidentiality and the attorney-client privilege rule in that jurisdiction. This allows the lawyer to provide a full explanation to the client in a more efficient manner than a mini-lecture at the beginning of the interview, when the client may not be listening intently.<sup>43</sup>

The authors then offer five guidelines about confidentiality; the first is: "Explain confidentiality rule early in the interview."<sup>44</sup> They explain:

We justify the rules about confidentiality by saying that clients will

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<sup>41</sup> *Id.* at 239-40 n. 4 (the footnote is written primarily as a reply to a more general discussion of BINDER & PRICE (1977) by Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987)).

<sup>42</sup> THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELLING 70-71 (1999)

<sup>43</sup> *Id.* at 70. The TEACHER'S MANUAL (1999) to COCHRAN, DIPIPPA & PETERS, *id.*, contains cautionary language, though, about giving clients a detailed explanation of the confidentiality exceptions. "[L]awyers who value client autonomy and dignity owe the client a thorough explanation of the rules of confidentiality. The explanation need not be treatise-length but it should be more than the straightforward but inaccurate statement that 'everything we say here is confidential.' . . . [W]e recognize that a thorough explanation of the details of the ethical rule of confidentiality and the evidentiary attorney-client privilege will likely harm rapport with the client. Perhaps the best solution is to give clients a somewhat detailed written explanation [of] these rules prior to the meeting with the lawyer. The lawyer can then generally assure the client of confidentiality, refer to the written explanation, and answer any questions that [the] client has." *Id.* at 49-50.

<sup>44</sup> *Id.* at 71.

be more forthcoming. If clients don't know about these rules, however, there is no basis for them.<sup>45</sup>

A third textbook, by Stefan H. Krieger and Richard K. Neumann,<sup>46</sup> advises against either an "everything is confidential" statement or a detailed explanation of exceptions at the beginning of the interview:

How should you explain confidentiality? It is not accurate to say, "Everything you tell me is confidential." There are important exceptions to this statement. . . . Most clients, however, do not want to hear a lecture on all the exceptions.<sup>47</sup>

These authors tell the reader that "the time to bring up attorney-client confidentiality is when you start asking questions," and offer the following sample statement:

Before we go further, I should explain that the law requires me to keep confidential what you tell me. There are some exceptions, some situations where I may or must tell someone something you tell me, but for the most part I am not allowed to tell anybody.<sup>48</sup>

The authors then say, "If the client asks about the exceptions, you can explain them."<sup>49</sup>

This sampling of legal textbook discussions of the duty to explain confidentiality would be incomplete without inclusion of an influential, student-oriented treatise by Monroe H. Freedman and Abbe Smith, entitled *Understanding Lawyers' Ethics*.<sup>50</sup> They take a strong position against saying anything to clients about the exceptions to confidentiality found in the Model Rules. They term such an explanation a "lawyer-client Miranda warning."<sup>51</sup>

[S]uch a warning is going to impede, if not wholly frustrate, the already difficult task of establishing a relationship of trust and confidence with the client. . . . The question in the client's mind is "Can I really trust you?" And the client will not be reassured by a lawyer

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<sup>45</sup> *Id.*

<sup>46</sup> ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS (2nd ed. 2003).

<sup>47</sup> *Id.* at 89.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* A few pages later, the authors discuss how to handle "possible client fabrication," *id.* at 102-04, and in that context provide this advice: "Start by giving the client a motivation to tell the truth. . . . Say that your first loyalty is to the client, and summarize the rules on attorney-client confidentiality. Do all of this before you turn to the lie you suspect you are being told." *Id.* at 103.

<sup>50</sup> *Supra* note 34.

<sup>51</sup> *Id.* at 155. As mentioned earlier, Freedman and Smith give Geoffrey Hazard credit for originating this characterization of an explanation of confidentiality exceptions. *Supra* note 34. The phrase "Miranda warning" of course refers to the famous warning police give upon arrest about the right to remain silent pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).

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."<sup>52</sup>

## 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*).<sup>53</sup> 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"<sup>54</sup> and gen-

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<sup>52</sup> *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.

<sup>53</sup> 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).

<sup>54</sup> 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.”<sup>55</sup>

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.<sup>56</sup>

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,<sup>57</sup> 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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<sup>55</sup> *Id.* at 38 (quoting from Dale C. Moss, *Out of Balance: Why Can't Law Schools Teach Ethics*, *STUDENT LAW.*, Oct. 1991 at 19).

<sup>56</sup> *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).

<sup>57</sup> 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.<sup>58</sup> 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

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<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup>

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.<sup>61</sup> 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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<sup>59</sup> 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.

<sup>60</sup> 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.

<sup>61</sup> 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”<sup>62</sup> 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.”<sup>63</sup> 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.”<sup>64</sup> 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.”<sup>65</sup>

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.<sup>66</sup> My initial purpose in using

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<sup>62</sup> 20% rated the course outstanding in 2000 and 22% rated it outstanding in 2002. Course evaluations on file with author.

<sup>63</sup> 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.

<sup>64</sup> (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.

<sup>65</sup> 75% said “yes” in 2000 and 59% said “yes” in 2002. Supplemental Final Evaluations on file with author.

<sup>66</sup> 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 materials.<sup>67</sup> 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 Shepard, 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."<sup>68</sup> I have modi-

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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).

<sup>67</sup> Signed consent forms on file with author.

<sup>68</sup> 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.

fied it further for use in the *Heroes & Villains* course.

In the Simon Exercise as used in *Heroes & Villains*, students are told to assume that the interviews take place in January 1987. It is necessary for events to take place at this time because an actual newspaper article from that period is a key piece of evidence. The lawyer role is that of an attorney working in a governmentally supported legal services office in New York City providing free legal services to low-income persons, Morningside Heights Legal Services (MHLS). The client is Mr. (or Ms.) Simon, a low-income tenant living in a public housing project. Simon is 39, a high school graduate and the single parent of one boy, Gordon, 17. (The other parent died of cancer when Gordon was two years old.) Simon works part-time as a private security guard and is attending community college to complete an associate's degree. The Housing Authority of New York City (HA), a city agency, has served a notice of termination of tenancy against Simon, alleging that Gordon attempted to rob another tenant, Mrs. Lucy Montez, on December 14, 1986. The administrative hearing date on the notice is 10 days after the date of the initial client interview. Other than the location of the alleged crime, there is no further information on the notice, which the lawyer has seen prior to the interview. (Simon left a copy of the notice at the legal services office when making the interview appointment.)

Students are also told to assume that both the lawyer and client know the following information about the New York City Public Housing authority procedures for evicting tenants. MHLS represents tenants whom the Housing Authority seeks to evict from their state-subsidized apartments on various grounds, including the ground of "non-desirability." Often, as in the Simon simulation, the charge of non-desirability is based on the alleged criminal conduct of one member of a family residing in the public housing apartment. (A non-desirability charge can also be based on non-criminal, nuisance type conduct.) MHLS represents the tenant named on the public housing lease, usually the mother or father in the family. However, the charges of non-desirability, as in the Simon case, are often based on the alleged conduct of a child. The non-desirability charges are tried in an administrative proceeding before a hearing officer. At the hearing, the Housing Authority must prove its non-desirability charges by a "preponderance" of the evidence. Otherwise, the procedure at a termination of tenancy proceeding is closely analogous to that of a criminal trial. The Housing Authority is represented at the proceeding by an attorney who is, in effect, a prosecutor. All testimony is taken under oath, the witnesses swearing "to tell the truth, the whole truth and nothing but the truth." A person who lies is subject to prosecu-

tion for perjury, a felony, although no one has ever in fact been prosecuted for lying at a Housing Authority hearing.

If the Hearing Officer finds the non-desirability charges sustained by the evidence, he or she can impose one or more of the following dispositions on the tenancy of the family:

- a) Termination – The family has to move out of public housing, usually within six months to a year. Termination is a very serious sanction because public housing is subsidized and other housing in New York at the same price is likely to be slum quality.
- b) Probation – The family is watched closely by the Housing Authority for a year. Any violation of authority rules, or non-desirable activity by any member of the family (whether the original offender or not), will result in another hearing and likely eviction.
- c) Permanent Exclusion – The family remains eligible to live in public housing but the offending family member must reside elsewhere permanently. Under case law, the offender is allowed to visit, but not live, in the family's apartment. (The line between visiting and living is a source of continuing controversy.) If the Authority finds the offending family member around the projects too much, they can bring a charge of violation of permanent exclusion against the tenancy which, if sustained, will result in the family's eviction.

The files of termination proceedings are supposed to be confidential, though there are occasional leaks. Decisions of the Hearing Officer can be appealed to the state courts under a statutory procedure for review of administrative determinations. Students are also told that MHLS attorneys often try to negotiate a settlement with the Housing Authority before the hearing, in effect a plea bargain, which is subject to the hearing officer's approval. In such a plea bargain, the tenant must either admit "guilt" or plead "no contest" to the charges. Students are told that some tenants plead "no contest" to charges that they still deny committing to their attorney. At the hearing, the tenant who pleads "no contest" does not admit that an offense was committed but the "no contest" plea cannot be accepted if the tenant denies the charges to the Hearing Examiner. If a "no contest" plea is entered and accepted, the Hearing Officer can impose any of the three sanctions listed above, just as she could if the tenant was found guilty. In this context, the only advantage of pleading "no contest" is that the tenant does not have to admit on the record that he (or a member of his family) committed the offense charged.

Students assigned to the lawyer role are told they will have 20 minutes for the initial interview. They should explain to Simon that the lawyer must leave for a court date in 20 minutes but that there is time for a follow-up interview in a week. Students are told to use the 20 minutes as they think best, but to be as realistic as possible and stay

in role at all times. The only specific requirement they must satisfy is that at some point during the initial interview they must explain to Simon about the confidentiality of the interview. They are to assume that ABA Model Rules 1.6 and 3.3 apply in that jurisdiction. They should strive to provide an explanation that (a) accurately describes what the Model Rules require, prohibit and permit, (b) is comprehensible to the client, and (c) effectively encourages the client to trust the lawyer.

Students assigned to the client role are given additional confidential information and instructions:

Gordon has consistently denied to you being anywhere near Madison and 107th Street [the crime location] the night of December 14. He said did not remember exactly where he was on that evening and time. All he said was that he was “hanging out” with his friend John Clifton that evening. . . . You yourself had spent the evening at home alone studying for a test that you were taking the next day. Gordon had gone out after dinner and at the time you had no idea where Gordon had gone. . . . After you got the termination notice you got very worried about being evicted or being forced to kick Gordon out in order to keep the apartment. You have no family in New York that could take Gordon in. Thus you had a long talk with Gordon. Gordon continued to deny flatly to you that he tried to rob anybody or knew anything about it. Although you really weren’t sure in your heart of hearts that you believed Gordon, you told him that you did and tried to make yourself believe that you did. You also told him, however, that, even though he was telling the truth, the hearing officer was not likely to believe him if Gordon could not account for his whereabouts that night. You told him that you and he would have to come up with a better story, even if it meant lying. Lying was bad but being unjustly evicted was worse.

Gordon agreed and you then discussed with him what your story would be. Gordon said he remembered watching a Jets football game that weekend and thinks it was the Sunday evening he spent with John Clifton. The game stuck in his mind because there was a club record for sacking the opposing quarterback 9 times. He suggests that you two just say he was watching the game at home with you instead of with Clifton. As you two talk he remembers that the losing team was Pittsburgh. You then recalled that 60 Minutes (which you always watch) started 15 minutes late that Sunday because of the football game. Because you, of course, don’t know any details of the game (you didn’t watch it at all), you and Gordon agree to say that you were in and out of the living room during most of the game preparing dinner and studying in the bedroom.

. . . . Be prepared for the possibility that the attorney will “cross-examine” you on the alibi to test your credibility and to de-

termine for himself or herself if you are telling the truth. Plan, in a general way, what your response will be to each possibility. Help make the experience a believable one for your attorney. If, during the interview, you feel that, under the circumstances at the moment, Simon would admit that the alibi was false, you are free to do so. During the meeting, try to make yourself feel like Simon. Try to remember what emotions you experience as your attorney talks to you.

In the first interview from Fall 2000, by the A-1 subgroup, the lawyer spends about 4 of the first 6 minutes trying to explain confidentiality. She begins with the conventional overstatement of confidentiality:

(Beginning at 2:01)<sup>69</sup>

Attorney: Also I want to talk about confidentiality. Before we begin, I want you feel comfortable here, be able to you know tell me whatever you feel is necessary, whatever you want to talk about. And so anything you say to me, or any information I may find when I'm doing research on your case, is confidential.

Client: Okay.

Attorney: That means I won't disclose any of this information to anybody unless you give me permission to or it's in order for me to represent you to the best of my ability and do a good job for you.

The client immediately responds asking questions even before the exceptions are disclosed:

Client: Well, what kind of research would you be doing for this?

Attorney: In case I had to talk to any witnesses — you had said that your son might have been involved in an altercation, I might want to talk to them, find out what happened about that — look at a police report.

Client: Well, Gordon's a good boy and he'd never really been in any trouble before. So, I don't know if you can actually find someone who said he's done anything wrong other than Mrs. Montez.

The lawyer then launches into an explanation of the harm prevention exception and promptly makes two misstatements: that the exception exists “in order to protect you” (it primarily exists to protect persons the client might harm) and that it applies to “a criminal act that might hurt yourself or somebody else” (the exception requires that the “hurt” be death or serious bodily harm).<sup>70</sup>

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<sup>69</sup> This video as well as the other three videos discussed in this article can be viewed on a computer by the reader by following directions posted on the ELCC web site, *supra* note \*, and the indicated time marks will assist the reader in “fast forwarding” to the quoted video segments. They can also be viewed while reading the web-based version of this article posted on the ELCC web site.

<sup>70</sup> Model Rule 1.6(b). The student was describing the pre-2002 version of Rule 1.6(b) which, unlike the current version, did not apply generally to the prevention of death or

Attorney: Okay, we'll look into that and that's definitely something we'll want to look at. And just to finish on the confidentiality, I want to tell you that I won't disclose any information unless you give me permission or, like I said, in order to represent you. There are a couple of exceptions to that rule and I want you to understand that, in order to protect you, I would have to disclose if you gave me any information, or I found any, which would lead me to believe that — I'm not saying this is going happen — that you were going commit a criminal act that might hurt yourself or somebody else, that I would have to disclose that. It's not that I think this is going happen, but I want you to understand all the rules and exceptions of the confidentiality. Okay?

Client: Okay.

The interview then quickly goes downhill when the lawyer moves to the lawyer protection exception:

Attorney: Another time might be if there was a legal proceeding brought against me because of our relationship or because of my representation of you — again I'm not saying this is going happen — but I want you to understand that at that point I might to disclose some information, um. . .

Client: Well, what kind of information would you have to disclose?

Attorney: If something like that should come up, a legal proceeding against me, I would disclose the least amount of information possible in order to resolve that issue.

Client: Well I don't know that I feel really very comfortable, knowing that you'd be able to tell anything that I told you in a meeting.

Attorney: Hmm.

Client: I'm not real sure in these meetings with the Housing Authority are real confidential anyway, but you know, how can I really feel like that everything I say there is confidential if everything here might not be totally confidential?

The lawyer's discomfort with this exception is marked by the increasing use of verbal hedges and hesitation. The response to the client's reasonable question, "What kind of information would you have to disclose?", is noticeably evasive: "I would disclose the least amount of information possible in order to resolve that issue." From this point on the lawyer abandons further efforts to explain the exceptions, leaving the explanation of the lawyer protection exception incomplete and never reaching the client perjury exception (the most relevant). Instead, in a style of "protesting too much," she tries to reassert the confidentiality of the interview:

Attorney: Right. I totally understand your concerns and I under-

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serious bodily harm but only applied if the harm to be prevented would be caused by the client's own criminal act.

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stand why you would feel like that. I'm going, to the best of my ability, keep everything that you say here, any information that I find confidential. I'm very dedicated to doing that. There are some exceptions. If for some reason — and this might not even apply to your situation — you know, they thought that together we had done some illegal — it doesn't, might not pertain to the situation — but it is an exception that I want you to understand.

Client: Okay, I guess that's Okay.

Attorney: I don't anticipate it happening but I do I do want you understand that that's a possibility.

Client: Okay.

Attorney: Okay, like I said even then I would release the least amount of information possible and try and keep everything we said here confidential

Client: Okay.

Attorney: Okay, do you have questions about the confidentiality policy?

Client: No, I guess I don't.

Attorney: Okay, if you do any have questions at a later time, please feel free to ask me about it. I want you to feel comfortable here I want you to know that I'm committed to representing you and to keeping everything you say confidential.

Client: Okay.

(Ending at 5:45)

Although the client in the A-2 interview is much more passive, the lawyer in that interview spends even more time — four and a half minutes of the first six minutes of the interview — attempting to explain confidentiality:

(Beginning at 1:04)

Attorney: Before we start talking very much about your case or details of your personal life, I need to discuss something first with you. I'm sure you've heard of attorney client privilege or client confidentiality before. I don't know if you've ever been involved in a case before or had an attorney before, but what is your understanding of the concept?

Client: Basically all I know is whatever I tell you you're not suppose to tell anybody.

Attorney: That's very good as far as the basics of it; I need to explain a little bit more about it though. You're right that I'm prohibited from revealing any personal information or information relating to your case that you tell me without your consent, except for what I obviously need to say to represent you. I can't deny that you're my client or pretend that I don't know you in court obviously. I'm not . . . I can't go to the police if you're engaged in an illegal activity. Or the Housing Authority if maybe your sister lives with you and they don't know about it or something — I won't

report any of those things that you tell me.

Client: Okay.

Attorney: The only case in which I'd be permitted to report something would be if you told me you were going to commit a serious violent crime. And unless you tell me you're going to murder your neighbor or something, we won't have a problem with that. Or if we were involved in a case together, such as you sued me because I didn't represent you properly. And this is so that you feel comfortable with me and can trust me, and that I can give you the best kind of representation. And that you won't have a problem even if there's something kind of embarrassing or hard to tell me or that you might think might hurt your case you should feel free to tell me. Okay?

Client: Okay.

Attorney: Alright and this extends to everyone at Morningside Office including Mrs. Robertson that you met or any secretaries in the office of the other attorneys. They would have to keep anything confidential that they came across.

Client: Okay.

Attorney: Okay I'm not going to purposely tell them or anything but if one of them had to take over for me they would assume the same role and have the same confidentiality.

Client: Okay.

Attorney: So even if after this meeting you should decide not to use me as your attorney I'm bound to keep everything you told me so far confidential and I want you to feel free to share with me during this meeting.

Client: Okay.

Attorney: It's your privilege so you can decide if certain information should not be disclosed and otherwise I will just use my discretion as to what's necessary and relevant to provide you with the best representation. Do you have any questions so far?

Client: No

Attorney: Okay, there's only one really major exception to the attorney client privilege that I need to discuss with you and that's related to perjury. As an attorney I am prohibited from lying to a court or offering evidence that I know is false, and that would include if I knew for a fact that my client was lying, say on the stand, or otherwise trying to commit a crime against the court. And I would in that sort of situation would be required to tell the court that I knew you were lying. And also if there's evidence that has come across and I reasonably believe that it's false I can choose not to present to the court as well. Okay?

Client: Okay.

Attorney: And that's just part of my responsibility as a lawyer. Any questions?

Client: Good enough, no.

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Attorney: Okay.

Client: Okay, that's okay.

Attorney: You understand it?

Client: Thanks.

Attorney: You understand it ?

Client: I, I guess, I mean as much as I probably am ever going to understand all that lawyer stuff.

Attorney: Um, well, as an issue comes up and if you have a question you know about a particular thing that you might want to tell me, just ask me — okay — and we can go over this again. Alright?

Client: Okay.

Attorney: Okay and if at any time you have any questions about anything just stop me and ask me.

Client: Okay.

Attorney: Okay. With that out of the way, would you feel comfortable talking a little bit about yourself now? . . .

(Ending at 5:33)

I did not know exactly what to expect during the exercises. The two interviews, though, confirmed my suspicion that the task of explaining confidentiality “accurately and completely” was more difficult than either students or scholars might anticipate. Although the students playing the lawyer roles may have felt frustrated during the interview itself, their papers (as well as from the other students) show that the process of closely examining the videotape of both their own interview and that of the other subgroup produced a thoughtful understanding of this issue. The A-2 lawyer's paper was particularly interesting because she felt strongly that her efforts to explain had a “chilling effect” even though her client did not send strong signals of discomfort as did the A-1 client. This student wrote:

An attorney must learn the fine art of accurately and effectively explaining confidentiality, while still being able to elicit the client's story. The Simon Case is illustrative of the difficulties an attorney might encounter in attempting to avoid any chilling effect of conveying confidentiality to his or her client. . . . An attorney's efforts to ensure a client's comprehension of confidentiality will directly impact whether or not the client will then trust the lawyer. One method of building trust is to intersperse policy reasons and personal reassurances within the confidentiality exception. [The A-2 attorney] reassured her client about the general requirement of confidentiality . . . but failed to provide the rationale behind the exceptions. . . . Ironically, [the effort to discover the client's story] can be thwarted by any explanation of confidentiality because there may be a “chilling” effect on the client's willingness to share confidentiality with the attorney. One such way is through the explanation of the exceptions, which cause the client to filter each piece of

information for its potential impact should one of the exceptional situations arise. Another is if the client does not fully understand confidentiality and its exceptions, and thus chooses to “err” on the side of not disclosing information. A third way is if the entire explanation process is not handled so as to engender trust, a client may be apprehensive and choose not to share anything unfavorable with the attorney.

One of the most intriguing suggestions in the first set of papers came from Adam Avitable, who was one of the students assigned the lawyer role in subgroup A-1 who only observed the first interview. He proposed that the client be told simply that the confidentiality protection applied only as long as the client was honest with the lawyer. Under his approach, explaining the exception would thus reinforce the purpose of the confidentiality principle, to encourage client candor with the attorney.

Avitable had indeed proposed an elegant solution, but as revealed by our discussion in the class between the first and second interviews, his explanation, apparently of the client perjury exception, was far from accurate. Our discussion focused on the leading U.S. Supreme Court case of *Nix v. Whiteside*, a post-sentence federal review of a state court murder conviction for alleged denial of the constitutional right to effective representation.<sup>71</sup> *Whiteside*, the defendant, had killed the victim, Calvin Love, in an argument over a drug deal. *Whiteside* had come to Love’s apartment late at night to purchase marijuana and found Love in bed with a girl friend. *Whiteside* testified at trial that he stabbed Love in self-defense, thinking that Love had grabbed a gun from under his pillow. According to the Supreme Court opinion, written by then-Chief Justice Warren Burger, when *Whiteside* first told his story to his court-appointed lawyer, Gary Robinson, *Whiteside* told the lawyer that Love “was pulling a pistol from underneath the pillow on the bed.” However, upon “questioning by Robinson” *Whiteside* clarified his story to admit “that he had not actually seen a gun, but that he was convinced that Love had a gun.”<sup>72</sup> It is likely that the “questioning” by Robinson resembled the process described by Monroe H. Freedman in his famous law review article, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*:<sup>73</sup>

[the lawyer] must seek the truth from his client, not shun it. This means that he will have to dig and pry and cajole, and, even then, he will not be successful unless he can convince the client that full and

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<sup>71</sup> 475 U.S. 157 (1986).

<sup>72</sup> *Id.* at 161.

<sup>73</sup> 64 MICH. L. REV. 1469 (1966)

confidential disclosure to his lawyer will never result in prejudice to the client by any word or action of the lawyer.<sup>74</sup>

According to the opinion in *Nix v. Whiteside*, during preparation for direct examination a week before trial Whiteside told his lawyer that he “had seen something metallic” in Love’s hand. Upon further “questioning” by his lawyer, Whiteside reportedly said, “If I don’t say I saw a gun I’m dead.” The lawyer later described his response as follows:

[we told him] we could not allow him to [testify falsely] because that would be perjury . . . I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony.<sup>75</sup>

Faced with this threat, Whiteside reverted to his earlier story, admitting on cross examination that he had not actually seen a gun in Love’s hand. Following his conviction, Whiteside sought a new trial claiming that Robinson’s threat to disclose their confidential conversations denied him effective assistance of counsel. The U.S. Court of Appeals agreed with Whiteside<sup>76</sup> but was reversed by a unanimous Supreme Court. The Court only decided that the lawyer was not prohibited by the Constitution from acting as he did, not that he was required to do so.<sup>77</sup> Indeed, the Court was not called upon to decide whether actual disclosure of client confidences was permitted, since that did not actually take place in *Nix v. Whiteside*. On the Court’s reading of the facts, the only “harm” the lawyer caused to Whiteside was to prevent him from committing perjury,<sup>78</sup> and the Court found no constitutional right to commit perjury even in one’s own defense.

At first glance, Avitable’s proposed “only honesty is protected” explanation might seem an accurate reflection of *Nix v. Whiteside*. The lawyer’s threat to betray the client’s confidences was triggered by the client’s false statement of what took place. However, a closer

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<sup>74</sup> *Id.* at 1473. The Supreme Court’s decision in *Nix v. Whiteside* does not explore further what exactly Robinson said to Whiteside to obtain his admission that he did not actually see a gun.

<sup>75</sup> 475 U.S. at 162.

<sup>76</sup> *Whiteside v. Scurr*, 744 F.2d 1323 (8th Cir. 1984).

<sup>77</sup> This point was emphasized in concurring opinions by Justice Brennan, 475 U.S. at 177-78, and Justice Blackmun, *id.* at 178-79.

<sup>78</sup> As pointed out in Justice Blackmun’s concurrence, in *Nix v. Whiteside* the lower courts had made the factual finding that the lawyer “had strong support” for believing that the “saw something metallic” account was a deliberate lie, and he drew a contrast to *United States ex rel Wilcox v. Johnson*, 555 F.2d 114 (3rd Cir. 1977), where it was held that the right to counsel was denied by a threat to “go to the judge” which prevented defendant from taking the stand — there the defense lawyer’s belief that the client was about to commit perjury was based on mere “conjecture.” 475 U.S. at 186, 190 n.4, n.8 (discussing *Wilcox* case).

reading reveals that the client perjury exception was actually based on the client's earlier truthful admission that he had not seen a gun. Had the client consistently (and falsely) told his lawyer that he had seen a gun, the lawyer would not have had the requisite "knowledge" that he would be presenting false testimony to the court. The relevant confidential communication that the lawyer threatened to reveal was the prior honest account of what happened. Had the lawyer persuaded Whiteside to provide that account by telling him that statements were confidential as long as they were honest, his later threat to reveal that original, honest account would have been in direct contradiction to such an explanation.<sup>79</sup>

The second part of the exercise was designed to place the lawyer in the midst of the client perjury dilemma. For the second part of the exercise — the follow-up interview one week later — the client instructions were unchanged. However, this time the lawyers had confidential instructions based on a report from their investigator based on telephone interviews with Gordon, the victim, and a friend of the victim named Mrs. Karp who was with her at the time and positively identified Gordon. The reported interview with Gordon contained all the details of the alibi in case the student playing Simon in the first interview had not provided them. The investigator's report indicates that the case against Gordon seems pretty strong. Most importantly, the report also included a copy of a newspaper article showing that the Jets-Pittsburgh football game Gordon and the client claimed to have been watching together on Sunday night was in fact played on Saturday night. However, the investigator points out that New York's other football team, the Giants, did play Sunday night and one detail of the game reported by Gordon (a club record for sacking the opposing quarterback 9 times) actually took place in that game. The report thus raises the question whether the client and Gordon are lying outright about the alibi or are simply confused about which game they were watching together on Sunday night.

For the second interview subgroup A-2 went first, while subgroup A-1 waited outside. Once again, everyone in Group A was told to prepare to play their assigned role and theoretically I could have used again one of the students who role-played the first interview, though I did not. Even though different students played the lawyer and client roles, they were told to "pick up" where the first interview left off, assuming that they themselves had said what was recorded in the first

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<sup>79</sup> See Freedman, *supra* note 74, at 1477-78 for a more detailed discussion of this point, leading to his conclusion — rejected in *Nix v. Whiteside* — that the duty of confidentiality requires the lawyer to remain silent even if she knows the client is about to or has committed perjury.

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interview. The contrast between the two subgroups could hardly have been more educationally useful if I had scripted the second interviews myself.

In the subgroup A-2 meeting the lawyer does not try to test the truthfulness of the client's story but instead uses the information from the newspaper article to assist the client to repair the faulty alibi:

(Starting at time mark 3:32:)

Attorney: One of the discrepancies that we found that I just want to clarify with you is about the game. You mentioned that it was a Jets and Pittsburgh game. And looking into it, I guess the Jets played on Saturday night. And it was actually the Giants and the Cards<sup>80</sup> that played on Sunday night. Does that sound right to you?

Client: That could be, I mean, I can even recall Gordon saying something. I know there was a game on. And like I said, I wasn't paying, you know, close attention.

Attorney: Right.

Client. I mean the game could have been on Saturday as well; but, I remember 60 Minutes.

Attorney: Okay.

Client: That comes on Sundays.

Attorney: Okay. And that came on late because of the game.

Client: Yes.

Attorney: Okay, and the thing that did happen in the Giants and Cards game that corresponds with both what you're saying, and what Gordon says, was the club record: nine times sacking the quarterback.

Client: Okay.

Attorney: So what you were just talking about, that happened in the Giants and Cards game. So do you think, that it could've been the Giants and Cards game?

Client: I know it was New York.

Attorney: Okay.

Client: So the New York Giants . . . New York Jets.

Attorney: So one of the two teams.

Client: Like I said, with work, I'm not a big sports fan. But I wanted to spend time with Gordon.

Attorney: Okay. Okay. . . .

(Ending at time mark 4:55)

Further, the lawyer does not attempt to test the credibility of the alibi when the client later in the second interview makes the following response when discussing the possibility of a negotiated "no contest" agreement:

(Beginning at 6:38)

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<sup>80</sup> In 1986 St. Louis had a football team (as well as a baseball team) named the Cardinals, or "Cards" for short.

Attorney: What do you think would be an option for us?

Client: Well, I mean, I spoke to Gordon and he says he didn't do it. It definitely wouldn't be fair to him to plead guilty. So that's not an option.

Attorney: Okay.

(Ending at 6:55)

As I pointed out in the class discussion after the A-2 interview, it seems decidedly odd that the client would resist a guilty plea because Gordon "says he didn't do it," if the client knows that Gordon is innocent because they were together at the time. The client makes two more similar slips later in the interview, yet the lawyer does not seem to pick up on them:

(Beginning at 11:19)

Attorney: . . . Are you saying this [the robbery] is something that [Gordon's friend] John Clifton did and . . .

Client: I'm saying, it's possible. It's just hard to believe that Gordon would do something like this.

Attorney: Right. Would that other boy match a description similar to Gordon's? (Ending at 11:35)

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(Beginning at 14:26)

Attorney: . . . Do you want to go home and talk to him [Gordon] about it [a probation agreement] and get back to me today? . . . [omitted conversation]

Client: And I'll just home and talk to Gordon about this and find out if he gives me the same story and if he can stay out of trouble for a year. So . . .

Attorney: Okay. And then we can talk this afternoon?

Client: Yes. Then I'll just give you a call after I speak to him.

Attorney: That sounds good and I'll talk to you this afternoon.

(Ending at 15:20)

When this interview was next re-enacted in class by subgroup A-1, it was Avitable who played the lawyer role. He had clearly planned his strategy carefully in advance and intended to use his proposed "honesty is best" explanation of confidentiality along with skeptical questioning to test the credibility of the alibi.

(Starting at 0:00)

Attorney: So we had our meeting last week and we are going to get into some stuff right now, but before I did I wanted to see if you had any other questions from what we discussed last time.

Client: No.

Attorney: Nothing. Okay. We found some more information regarding the case, regarding Gordon — and I want to say that I think maybe we should make clear, you know, I told you last time that everything was confidential, everything that you told me, however, I

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do think it is important to stress that only if you are really telling the truth is everything confidential. Because if you don't actually tell me the whole truth and then we are at the hearing, and we have corroborating witnesses that tell me something different and then I realize that maybe I haven't heard the whole truth, it's really hard for me to maintain confidentiality, and it can really prove a problem for us to have a good relationship in that situation. So it is very important that I know the whole story because once I know the whole story then I can come up with a good defense — a good, you know, just a way to counter everything they are going to say and there's no surprises. Because surprises is what can really kill any type of defense at all.

Client: Okay.

Attorney: So before we get into the information I found, I just want to see if you can you tell me anything about Gordon that, you know, like maybe these past . . . make sure that you are totally sure he was not involved in any of these past incidents he talked about and this incident.

Client: Well, the most recent incident that we are being charged with termination, he was not involved in.

Attorney: He was not involved in.

Client: Because he spent the evening with me. He was watching a football game and I was studying. The past incidents, are you referring to the group of kids? . . .

(Ending at 1:39)

Despite the client's unequivocal repetition of the alibi ("the most recent incident that we are being charged with termination, he was not involved in. . . . Because he spent the evening with me"), Avitable proceeds to lay out the evidence gathered by the investigator as showing that Gordon was involved, culminating with the newspaper article:

(Beginning at 3:54)

Attorney: When I talked to Gordon, he said that he was watching a football game. He said he was watching the one where he remembers the quarterback got sacked nine times. Now we did a little research and we think he might have gotten a little confused with which game he was watching, because that was the night before.<sup>81</sup>

Client: Okay.

Attorney: And so I think I just want to make sure that you are 100% positive that it was Sunday night that you were with Gordon and not Saturday night. I mean when the weekend when you're studying it's kind of easy just to get, you know, it all blurs together.

Client: Yes.

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<sup>81</sup> Actually the game where the quarterback got sacked nine times WAS on Sunday night but the New York team playing that night was the Giants, not the Jets as the client and Gordon had said. I think this misstatement by Avitable was unintentional rather than a ruse to trap the client.

Attorney: But this really does tend to just assume or imply that Gordon really was there and involved in some way. So I just want to see what you want to say about this, what you have to talk about this.

Avitable's blunt assertion that "this" implies that Gordon was really there obviously rattles the client, causing the client make the same error as the A-2 client of relying on Gordon's claim of innocence rather than the alibi:

Client: Well, all I can say is that it's possible that I may have mixed up the days; but, I know Gordon has sworn to me over and over again that he was not involved in that at all. And he's a good kid. He doesn't get into too much trouble, I mean, he's seventeen and he's sworn — so he's going to be influenced by his friends — but he's sworn over and over again that he wasn't involved in that.

Attorney: Hm. What would you do to him if he found out? You'd probably ground him?

Client: Yes.

Attorney: Punish him?

Client: I mean, I've talked to him before I don't really like the influence of the friends that he hangs out with right now. I don't like their influence and I've tried to discourage him from hanging out with them and try to socialize more with people at school and with people that he's met here. But I don't, I mean, I would ground him and all that and try to emphasize that he should think about his future and try to get his life in the right direction.

Attorney: Hm.

Client: But he's a good kid and he told me over and over again that he wasn't involved in that. I don't know what the witness saw. Or what. Or I don't know the circumstances but . . .

Attorney: Well, you know, he might be a good kid. But he might just be more susceptible to peer pressure than you think. And he might be a little afraid of what you're going to do to him if he tells you the truth. (Ending at 5:55)

Although the client has not explicitly admitted that the alibi is false, Avitable boldly assumes its falsehood in the following, rather dramatic interchange as they discuss the "guilty plea" option, with the result that the client ultimately does "confess":

(Beginning at 10:00)

Attorney: I think it might be best to try and ask for probation, in order, because I think it would probably be the best way without having to, um . . . I don't know, we can't obviously, you're not going to go up there and say that you were definitely sure that Gordon was there on Sunday night because it's — I mean — you can't do that. Besides the fact that it's illegal to lie.

Client: Hm.

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Attorney: And anyone who is worth their salt is going to be able to figure out that you're not absolutely sure that he was there.

Client: Okay, what are the odds that we could get this whole thing cleared up without probation or anything the way it is right now, with my testimony against Mrs. Karp's?

Attorney: What would your testimony be: that Gordon's a good boy?

Client: That he was with me that night.

Attorney: Well, we couldn't do that. I would have to, I mean, you don't know that he was with you that night and saying something under oath is not really recommended and I wouldn't be able to pursue this anymore if I thought you were going to actually lie on the stand. It's very counteractive to what we want to do, because if, you know, we don't know who they're going to present as a witness. If after they bring up Mrs. Karp, then you go up there and say Gordon was home with you all night, then they bring up one of his friends who says "oh yes, Gordon called and told me he was out Sunday night." Then everything that you said looks even worse for you.

Client: Umhuh.

Attorney: And they're going to be more willing to rule against you. I think, it's possible that we can impeach Mrs. Karp's testimony by saying that she does have a vendetta. But I don't think that it would really be worth it because it might not make a difference.

Client: Okay.

Attorney: I think we can probably, this is the first offense that they have a witness for and everything. The prior incidents that Gordon was supposedly involved with they've never done anything about it, brought any hearings against you or anything like that. They don't apparently have any serious witnesses that they've brought up. So I think that we can probably get probation which, I mean, is not that big of a deal. You just have to make sure that Gordon understands that if he does something with his group of friends he's gonna get you kicked out of home, which is probably very important to him, if he's worried about what you're going to do to him if he tells you if he tells you the truth about what he hangs around with, he's going to be worried about you in general.

Client: Okay.

Attorney: So I just think that that might be the best alternative right now.

Client: Just to . . .

Attorney: Uh . . .

Client: Be honest about the whole thing. . .

Attorney: We'll be honest. And we will ask since this is the first time that maybe they will be willing to give us just a probation. As, you know, just as a consideration for the fact that Gordon's got peer pressure. That there are other people other boys doing this. That

it's not just him and they haven't gone after these other boys, etc. .

Client: Mmm. Okay.

Attorney: So it's really, it's really, the best alternative to avoid getting even an even worse decision.

Client: Okay.

Attorney: Because, of course, getting evicted would be horrible or having Gordon have to move out would really be. I don't think he'd like that very much either.

Client: Yes.

Attorney: So. . .

Client: I mean, cause truth is, I don't know where he was that night; but I do believe that he wasn't involved. . . .

(Ending at 13:45)

Having first observed the A-2 interview in class where the lawyer in effect rehabilitated the alibi for the client, the students were fascinated to see the very different approach in the A-1 interview where the lawyer finally forced the client to reveal the falsity of the alibi. The second writing assignment for Group A was due only after the best papers from the first interview were posted on the web site along with some general comments by me. I gave to everyone the confidential instructions for both lawyer and client. Students in Group A were told to write about two topics. First, they were to supplement or revise their analysis of the first interview in light of what happened in the second interview and the confidential information. The second topic was to respond to the following questions about the second interview:

Do you think the way the truth of the alibi was handled (or perhaps even not explored) in your subgroup interview was the right way to handle it? By the "right way" I want you to think about the lawyer's legal and moral obligations to the client and the "legal system" as well as the lawyer's commitment to his or her own personal integrity. If it was "right," what made it right? If it wasn't "right," or at least not the best way the situation could have been handled, discuss at least one alternative way the lawyer could have handled the situation and explain why you think that would have been a better way.<sup>82</sup>

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<sup>82</sup> In the instructions, I also told them: "In previous simulations of the Simon case all of the following strategies were used by different students playing the lawyer role:

- went over the TV watching story in a neutral way without commenting on its believability
- worked with Simon to tell the TV-story in the most credible way consistent with the other known evidence (including the newspaper article)
- pressed Simon to tell the truth about the TV watching story
- tried to poke holes in the TV watching story
- said the hearing examiner would not believe the TV watching story
- said the lawyer himself/herself did not believe the TV watching story
- said the lawyer would refuse to permit Simon to testify if Simon insisted on telling the TV

The student who played the lawyer in second A-2 interview wrote a very thoughtful comparison between her approach and that used by the A-1 lawyer, Avitable.

Confidentiality is a tricky thing to relay and even after explaining it the lawyer may not be able to procure honest information from the client. This became crystal clear in the second interview when statements conflicted and, in the case of group A-1, the client admitted the alibi given was false. In light of the second interview it is important to re-analyze the method of informing the client about confidentiality and the differing outcomes of possible approaches. . . . It can be debated that having the client tell the truth is the best policy for the client's well-being. Telling the truth may not always be in the client's best interest. If the client tells the lawyer the truth but later decides to lie on the stand, the lawyer is required to take "reasonable remedial measures." While honesty generally is the best policy, in these instances the lawyer will have to report (in a reasonable manner) the lying of the client, thus demolishing the client's case. . . .

By not questioning the client on his honesty or reminding the client the importance of truth, lawyer A-2 never found out the real story from the client and was headed into the hearing without all the information. . . . The approach taken by lawyer A-1 completely contrasted that of lawyer A-2. He spent the first portion of the interview pressuring Mrs. Simon to tell the truth and give up her alibi. . . . [Later he made two] statements [that] were glaring accusations that Mrs. Simon had been lying and that neither the lawyer nor anyone else would believe her story. . . . I would be less likely to choose the harsh course of action taken by lawyer A-1. If the client had been telling the truth, which could have been possible, then Mrs. Simon could have been very offended. . . .

I think the "right" way to handle the situation would have been to approach the client in a neutral manner, not questioning until the client makes statements such as, "I spoke to Gordon and he says he didn't do it." These comments could have been followed up by the lawyer with probing questions such as, "What exactly do you mean by that statement," leaving the client open to explain the statement in whichever manner he or she decides to. The lawyer could also remind the client at that moment how crucial honesty is to the case. Additionally, the lawyer could remind the client that if there is anything he or she needs to explain or change it would be important

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watching story

-said he or she would withdraw from the case if Simon insisted on telling the TV watching story

-if Simon admitted that the TV watching story was false but insisted on still telling it at the hearing, the lawyer then said to Simon that he/she would have to tell the hearing examiner that Simon had admitted the story was false."

that it happen before the hearing so the lawyer could be prepared to help the client in the best way possible. While these statements might not elicit the truth, they give the client an opportunity to confess. The lawyer might have doubts about the honesty of the alibi; however, he or she does not know exactly what the truth is. By seeking the truth from the client the lawyer can honestly take the case into court and not violate rule 3.3 of the Model Rules, which prohibits “knowingly” allowing evidence that is false. While some might not find this approach moral, it is a method that seems to utilize integrity by serving the client while pursuing the truth. In addition, this approach allows the client to make the final decision as to whether or not the truth will be told, which gives the client the necessary choice in how his or her case will be handled.

The student who played the client in the second A-2 interview made similar points in a more dramatic way by building his analysis around a famous line from a courtroom drama:

In the movie *A Few Good Men*, Tom Cruise questions Jack Nicholson during a courtroom proceeding, and, in frustration, he exclaims: “I want the truth!” Nicholson retorts: “You can’t handle the truth!” Similar to the exchange between Cruise and Nicholson, the Simon Exercise presents the questions: Does an attorney want his client to tell him the “truth”; and, if so, can that attorney handle the “truth”? . . . During the [second A-2] interview, it appeared that [the lawyer] did not want the “truth” from Simon. In posing questions to Simon, [the lawyer] prompted Simon to answer in a way that actually helped him create a more consistent story. In addition, it is unclear whether or not [the lawyer] believed that she could handle the “truth”. . . . [The lawyer]’s reluctance to press Simon for the “truth” contrasted sharply with the Group A-1 attorney (“Adam”) who used various tactics in order to discover the “truth” from Simon. That is, from the outset of the interview, Adam clearly did not believe Simon’s initial story and was determined to press Simon and coax her into confessing. . . . Unlike [the A-1 lawyer], Adam believed he could handle the “truth” . . . . Adam’s aggressive and pressing style is good for the legal profession because it allows the attorney to decide the best option for his client, however, it may compromise an attorney’s own sense of personal integrity. . . . For instance, suppose Simon told Adam that she would lie on the stand no matter what. Adam now would know the “truth,” but could he handle it? That is, even if he recused himself as Simon’s attorney, could he keep Simon’s false testimony a secret? By asking a client to tell the “truth,” the attorney must be certain that he can handle that “truth.”

A very balanced comparison of the two interviews came from this student who was assigned the lawyer role in subgroup A-1 but ended up only observing both interviews:

[T]he misstatement of the Model Rule by A-1's attorney had a significant and interesting impact on the remainder of the interview. The Model Rules of Professional Conduct mandate that "a lawyer shall not knowingly offer evidence that the lawyer knows to be false." [Model Rule 3.3 (a)(4) (*Italics added*)]. As the lawyer is only obliged to prevent the submission of evidence that he knows to be false, statements that the attorney suspects, but does not know, to be dubious are not implicated by the rule. This viewpoint is buttressed by Official Comment 14 to Rule 3.3 stating that, "A lawyer has the authority to refuse to offer . . . proof that the lawyer believes is untrustworthy." By rewarding a lawyer's ignorance with the discretion to present questionable evidence, attorneys are actually dissuaded from learning the whole truth in some situations. While one's obligations to the legal system may be satisfied by intentionally remaining oblivious to the truth, every lawyer still has to satisfy his personal integrity. The attorney of group A-1 misstated the duty of candor during his explanation to the client. At time :35 to :55, the lawyer stated that, "If you don't tell me the whole truth, it's really hard for me to maintain confidentiality." With the benefit of 20/20 hindsight, I wonder if the inaccurate explanation of the duty of candor was just a mistake or part a careful strategy to uncover the truth. . . . [T]he client must have perceived that renouncing the alibi was in her best interests. Interestingly, the lawyer's misstatement of the duty of candor actually may have helped him to discover the truth.

#### IV. SOLVING IMPORTANT PROBLEMS WITH LAW STUDENTS AS PARTNERS

The legal profession owes a considerable debt to Professors Zacharias,<sup>83</sup> Levin,<sup>84</sup> Sobelson,<sup>85</sup> and Pizzimenti<sup>86</sup> for raising questions about whether lawyers are giving clients accurate explanations about confidentiality and whether lawyers have an ethical obligation to do so. Unfortunately, it does not appear legal education has yet devoted sufficient resources to responding to those questions.

What can law students do to improve the situation? What can we all learn from serious classroom experimentation and subsequent analysis of attempts to explain client confidentiality? First and foremost, these classroom experiments illustrate that the four words "How To Explain Confidentiality" need to have a question mark rather than a colon at the end of them; this phrase should be treated as a profoundly difficult question rather than as the title of a set of

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<sup>83</sup> See *supra* note 4.

<sup>84</sup> See *supra* note 7.

<sup>85</sup> See *supra* note 14.

<sup>86</sup> See *supra* note 16.

“how to” directions for talking with clients.<sup>87</sup> In the first part of the Simon Exercise, accurately explaining confidentiality was seen as potentially reducing client trust and candor. In the second part of the exercise, the apparent choices for the lawyer were (a) to avoid learning the complete truth to protect confidentiality, but at the risk of inadequate representation, or (b) to deceive the client about the extent of confidentiality in order to learn the truth. The students were very good at seeing not only problems — such as information overload or delay in allowing the client to tell her story — that might be solved through different methods of explaining the existing confidentiality rules<sup>88</sup> but also problems grounded in the rules themselves.

An excellent example of how my students’ imaginativeness and insight have been teaching me is presented by Adam Avitable’s explanation that confidentiality is guaranteed if the client is honest to the lawyer. I initially critiqued Avitable for proposing an inaccurate explanation of the client perjury exception, but Avitable is right that the confidentiality rules should in fact promote client honesty in communications with their lawyers. This desirable feature of Avitable’s proposed explanation has prompted me to give greater attention to a version of the ABA confidentiality rules that pre-dates even the original 1984 Model Rules. The ABA Model Code of Professional Responsibility that preceded the Model Rules when originally adopted in 1969 had a rule that required a lawyer who knew that his client had “perpetrated a fraud” upon a tribunal (such as perjury) to reveal the fraud to the tribunal if the client refused to do so.<sup>89</sup> In 1974 the ABA added a condition to this rule: “except when the information is protected as a privileged communication.”<sup>90</sup> This amendment was controversial and only adopted by eighteen states.<sup>91</sup> As amended in 1974, the old Model Code provision actually came rather close to Avitable’s explanation. Assuming that “privileged communication” referred only to information conveyed directly by the client to the lawyer,<sup>92</sup> the

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<sup>87</sup> As illustrated by the review of legal ethics and interviewing textbooks earlier in this article, legal academics as well as students may need to learn more about the importance and complexity of the problem this question addresses. *Supra* notes 22-53 and accompanying text.

<sup>88</sup> For example, students who took *Heroes & Villains* in 2000, 2002 and 2003 have all suggested using a printed explanation that a client could review in advance of the first interview. Cf. Sobelson, *supra* note 14, and COCHRAN, DIPIPPA & PETERS, *supra* note 43.

<sup>89</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(B)(1) (1969).

<sup>90</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(B)(1) (1974).

<sup>91</sup> HAZARD & HODES, *supra* note 12, § 29-14, at 29-24.

<sup>92</sup> Unlike the ABA Model Rules, which refer inclusively to “all information relating to the representation of a client,” MODEL RULES 2002, *supra* note 11 at 1.6(a), the ABA Model Code of Professional Responsibility distinguished between “information protected by the attorney client privilege” and “other information gained in the professional relationship” although both types of information were protected by the general duty of confidenti-

1974 version of the ABA rule would protect Simon's truthful admission about the alibi (and Whiteside's initial statement that he did not actually see a gun<sup>93</sup> in *Nix v. Whiteside*), but if a lawyer knew that the client's testimony was false from some other source than the client, then the lawyer was still obligated to reveal the client's perjury to the court because the evidence of the perjury did not come from a privileged communication. Thus under the 1974 rule, a lawyer would be providing an accurate explanation, that also encouraged honesty, by saying that if the client told her the truth, that the truthful statement could not be later revealed if the client testified differently. The fact that the 1974 rule can be explained coherently in a way that encourages clients to be honest with their lawyers, in contrast to the current client perjury rule that seems to encourage lawyers to be dishonest with their clients, provides an interesting justification for the 1974 rule that I had not previously considered.

Much more could be written about how the serious study of how to explain confidentiality rules can prompt rethinking about their substantive content. However, because the purpose of this article is primarily to present an approach to legal education that engages students as collaborators in solving real problems to which the teacher lack the answers, I will not conclude by proposing here either a model confidentiality rule or a model for explaining confidentiality. I gain new insights as I continue to teach *Heroes & Villains*, and in fact look forward to learning more just a few days after the final editing of this article when I read papers from my Spring 2003 students analyzing the second client meeting in the Simon Case.<sup>94</sup> I believe that one or more models for explaining confidentiality can be developed, by a continuing process of teacher-student engagement that I hope will take place in a variety of law schools, perhaps prompted to some small degree by the information and materials presented here.

The classroom experiments described here are only one part of the undertaking that is needed; law schools clinics are also an essential component. Simulations are of course unreal. They provide a safe place for exploration and experiment. But the time must come for

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ality. See MODEL CODE, *supra* note 90 at DR 4-101(A).

<sup>93</sup> *Supra* note 72.

<sup>94</sup> For example, in one of the initial interviews simulated in Spring 2003 the lawyer promised absolute confidentiality without explaining any exceptions and the client shortly thereafter volunteered that the alibi was false at that first meeting (which had not happened in either Fall 2000 or Spring 2002). For that subgroup I was forced to vary the client instructions for the second meeting so that the client insisted on telling the alibi (rather like the *Nix v. Whiteside* situation, *supra* note 72), resulting in a very interesting interaction between a client who accused the lawyer of "ratting on him" and a lawyer who became very directive about what the client could say at the hearing.

testing new ideas and methods in the real world. The law school clinic is the ideal place. The Effective Lawyer-Client Communication Project, a collaboration of social scientists and legal educators from six different countries, is in the process of developing a standard methodology for assessing the effectiveness of initial interviews, using law school clinics as pilot sites.<sup>95</sup> One part of this methodology is use of a short questionnaire to be filled out by a client immediately after the initial interview, before the client leaves the clinic. The questionnaire asks the client to indicate agreement or disagreement on an 8 point scale with such statements as:

- The lawyer was someone I could trust.
- The lawyer made me feel comfortable.
- The lawyer said things I did not understand.
- I did not say everything I wanted to say.<sup>96</sup>

Applied to a sufficiently large sample, this questionnaire could be a useful measure for comparing two different methods of explaining confidentiality as to comprehensibility and client comfort, trust and candor. The form could be further customized to test whether clients actually understood the key elements of confidentiality that the law clinic intends to convey by including a few multiple choice questions or by asking clients to write down a free response explanation of confidentiality. If the initial interview is videotaped, then that videotape can be closely analyzed using the methods of socio-linguistics to provide additional information about the effects of different approaches to explaining confidentiality.

It is tempting to teach as if students are challenged by problems because they lack skills and knowledge and that their teachers have the answers. A collaborative approach to legal education, though, may lead teachers to learn from their students that many of the most important problems lie in the rules, norms and practices of the profession. How to explain confidentiality appears to be such a problem — a problem that we should welcome not only as a stimulus for re-thinking particular issues of legal ethics and effective communication, but also as a more general invitation to develop new methods, working together as students and teachers, for understanding and improving the legal system.

## APPENDIX

Written Statement of Confidentiality Exceptions Proposed by Professor Roy Sobelson:<sup>97</sup>

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<sup>95</sup> See ELCC web site, *supra* note \*.

<sup>96</sup> *Id.*

<sup>97</sup> Sobelson, *supra* note 14, at 772-74.

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***CONFIDENTIALITY: YOUR RIGHTS AND YOUR LAWYER'S DUTIES***

NOTE: THIS DOCUMENT STATES IMPORTANT LEGAL RIGHTS. IT IS ESSENTIAL THAT YOU READ AND SIGN IT ALL BEFORE YOU CONFER WITH YOUR ATTORNEY. IF YOU HAVE QUESTIONS ABOUT IT, ASK THE ATTORNEY BEFORE YOU SIGN IT. YOUR SIGNATURE AT THE END WILL SIGNIFY YOUR UNDERSTANDING OF THE MATTERS STATED HERE.

1. In order to represent you competently, it is essential that you and I speak openly and honestly, even about information which is damaging to your case or embarrassing. Any deletion, alteration, or concealment of relevant information could do great harm to your case and to our professional relationship. To encourage open communication, the law has developed rules of "confidentiality." **CONFIDENTIALITY HAS LIMITS, HOWEVER, AND THESE ARE DISCUSSED IN THIS DOCUMENT.**

2. Whether you end up hiring me or not, I have a duty of "confidentiality" to you which forbids me (even after any relationship between us ends) to voluntarily disclose information about your case or use it to your disadvantage. There are limitations on this, however, such as the following:

(a) Information is normally shared with other members of this firm, all of whom are bound by confidentiality. Upon your request, specific information will not be shared, as long as it is still possible to represent you competently.

(b) Secretaries, paralegals, and other essential nonlawyer personnel are also exposed to confidential information; these persons are admonished not to reveal this information. Upon your request, this will be limited, as long as it is still possible to represent you competently.

(c) Lawyers are occasionally required by law to give some statistical bookkeeping, and similar information to regulatory agencies such as the state bar, consumer protection agencies, and even the Internal Revenue Service. To the extent possible, this information will be submitted anonymously, but that is not always possible.

(d) This firm uses data processing services for bookkeeping and statistical purposes; these services must be given access to limited information in your file. You have the right to prohibit this dissemination of information, as long as it is still possible to represent you competently.

(e) In representing you, we are sometimes required to reveal to a court or other party information about your case, such as medical records, facts of an accident or occurrence, names of available wit-

nesses, and the like. This information may come directly from you, or it may be learned while working for you. You may request that certain items not be revealed, but it may not always be possible to honor that request and still represent you competently.

3. From the first moment we speak, you have a legal right to **PROHIBIT** me from disclosing any of our **COMMUNICATIONS** (oral or written). This prohibits me from disclosing anything you tell me about acts you may have engaged in before you consult with me. Except in rare circumstances, this prohibition *does not apply* to certain things, such as:

- (a) The fact and terms (such as fee) of our relationship;
- (b) Information such as your name, address, and phone number, and things that I may observe during our relationship, such as your appearance;
- (c) Information conveyed to me for purposes other than obtaining legal advice; an example is information conveyed for **PURELY** personal or business purposes. (Business or personal information conveyed in the context of legal consultation is protected);
- (d) Communications made for the purposes of having me participate or aid in criminal, fraudulent, or wrongful activity;
- (e) Tangible objects you give to or leave with me. (It does, however, cover anything you tell me **ABOUT** these objects.)

4. Despite my obligations of confidentiality, I may be **FORCED** to reveal information under the following circumstances:

- (a) If a court orders me to;
- (b) If certain laws require me to;
- (c) If you intend to commit a crime or fraud in the future;
- (d) If you commit a fraud, such as perjury, while I am your lawyer.

5. If any question is raised about the quality, legality, or value of my legal services to you, I may reveal information to the extent necessary to defend or otherwise protect myself. If I am forced to take legal action against you to collect fees I have earned, I may reveal information necessary to prove and collect my claim against you.

**6. YOUR RIGHTS UNDER THESE RULES MAY BE WAIVED (FORFEITED) BY REVEALING ANY INFORMATION TO OTHERS. UNLESS YOU HAVE CONFERRED WITH ME FIRST, PLEASE CONFINE ALL DISCUSSION OF YOUR CASE TO OUR OWN CONVERSATIONS. IF ANY PERSON ASKS YOU ABOUT YOUR CASE OR MATTERS RELATED TO IT, PLEASE DIRECT SUCH INQUIRIES TO ME.**