

“Down with the Death Penalty!”— Using Hot Topics with a Twist to Introduce Persuasive Advocacy and Legal Ethics

By Kimberly D. Phillips¹

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I sat in my office staring down at but not really seeing my desk. As I straightened my military ribbons and re-tucked my shirt into my pressed and starched trousers, I took one last look at my shoes to make sure both shined like mirrors. I took a deep breath, opened my office door, and walked into the lobby. “Good morning Petty Officer Jones,” I said. “Good morning, ma’am,” he replied. I had just nervously met my first client accused of sexually assaulting his child.

I had anticipated this day for many months since the Navy had assigned me to serve as a defense attorney at the Naval Legal Service Office Northwest in Bremerton, Wash. Thus far the Navy had accused my clients of mostly military crimes, such as disobeying orders or fraternization, drug sales and abuse, and miscellaneous other misdemeanor criminal offenses. The crimes these prior clients were accused of were lessened by their willingness to serve their country; either that or they usually just got into trouble for making dumb but costly mistakes. This time, however, my client was accused of something that I found personally

sickening and repulsive.² How was I even going to bring myself to shake his hand?

Well, I did shake his hand, and throughout the process of representing him and others like him, I learned one of the biggest lessons of my life: an effective and ethical attorney is one who can

¹ I extend a sincere thank you to Dr. Natalie Tarenko, Writing Specialist, Texas Tech University School of Law, for her help with this article.

² I certainly did not seek advice from a senior attorney about my feelings. By telling the students my thoughts about my first heinous criminal defense client, I also hope to teach them that talking about their personal issues with representing different types of clients is healthy and productive although not the norm. See Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 *Buff. Crim. L. Rev.* 339, 342 (2006). “In the conventional view the very acknowledgement of our work’s emotional aspects—of the pain we cause, the pain we experience, the costs of the dissonance between role and conscience, the empathy or revulsion we may feel toward particular clients and how we ought to deal with it—seems at odds with law’s essence as a rational and rigorous discipline. In short, acknowledging the role of emotion may brand one as not merely weak, but downright unlaywerlike.”

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identify arguments on both sides of an issue no matter how distasteful or unappealing the issue.³

Eight years since defending that client, I am now teaching at a law school, and I want my students to learn this important lesson before they face the situation in real life.⁴ Therefore, I introduce them to ethics and effective oral advocacy when representing clients by having them participate in the following in-class exercise. First, I have my students clear their desks of all materials. I also have them move to one side of the room or the other depending on their personal views of the death penalty. For example, if they believe in the death penalty they should sit on the right side of the room; if they do not, they should move to the left side of the room. Next, I write their group's label on the chalkboard: Pro-Death Penalty or Anti-Death Penalty. The excited murmurings of the students combined with their facial expressions reveal their thoughts: "Now this is why I came to law school ... to argue about issues I care about!"

³ I do not mean to suggest that students or lawyers should abandon their personal viewpoints or beliefs. See Lawrence S. Krieger, *What We're Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from Its Roots*, 13 *J.L. & Health* 1, 24 n.95 (1998–1999), where Krieger opines that "[t]here are important distinctions for a lawyer to draw between positions he disagrees with, or positions that are unpopular, and positions that violate his conscience. I believe one must avoid the latter in order to maintain a healthy regard for one's self and all that flows from that self-regard. These are subjective matters. For example, when faced with a potential client requesting action or advocacy of a position that all might agree to be reprehensible, one lawyer may be unable to proceed in good conscience, while another may be compelled to proceed by a genuine and overriding sense of fairness, belief in the nature of the adversary system, commitment to the universality of constitutional rights, etc."

⁴ See Edward J. Walters Jr., *Portrait and Perspectives: A Look at Us, Marian Mayer Berkett: A Life and Law Career of "Firsts" for This People's League Co-Founder*, 46 *La. B.J.* 379, 387 (Feb. 1999). During an interview with Berkett, a Louisiana lawyer who had recently won the New Orleans Bar Association award (among other awards) and had practiced law for 61 years, Walters asked Berkett her thoughts on the current reputation of lawyers. Berkett replied, "Our professional obligation is to represent as best we can the interests of our client as if he were speaking for himself. The interest of our clients is not always praiseworthy. Sometimes our clients take positions that are grasping, aggressive and unappealing. We must expect to be criticized, for example, when we defend a criminal, but the criminal is entitled to a defense and we are obliged to afford it and obliged to expect a public distaste because of it."

At this point in the class, I drop "the bomb" on the students. I instruct them to switch sides of the room. I tell them that, during the next 20 minutes, they as a group must develop arguments to support their "new" position. I also have each group choose someone who writes down the group's arguments. I ask them to consider social, policy, legal, moral, and any other arguments they can think of. The result is dropped jaws. "Professor Phillips, how could you ask me to argue for something that I am wholeheartedly against?" they moan. "The lesson comes later," I reply.

As the groups deliberate, I walk around and stimulate their thinking. The students are often so shocked and appalled about having to argue their "new" issue that it helps if I assist their analysis of the issues by asking them questions. For example, I ask the new Pro-Death Penalty students if prison overcrowding is a problem. I ask the Anti-Death Penalty students whether juries more regularly impose the death penalty on certain racial or economic groups. I might also ask the groups whether the death penalty is a specific and/or general deterrent (a subject that they are simultaneously studying in criminal law).

After 20 minutes, I have each group send to the front of the room a representative who presents the group's arguments and theories to the entire class. As one might imagine, the students find presenting their arguments difficult. Because the students are not arguing "their" side of the issue, they often do so in a lackluster manner; some common gestures are rolling eyes, downcast heads, and shuffling feet. I tell the students that if during their legal career as an attorney a client asks them to make arguments on behalf of the client that they personally do not agree with, they have an ethical duty to competently argue these issues. I explain several of the American Bar Association Model Rules of Professional Conduct to the students. For example, Model Rules of Professional Conduct, Rule 1.3,⁵

⁵ *Model Rules of Prof'l Conduct* R. 1.3 (2007), "[a] lawyer shall act with reasonable diligence and promptness in representing a client."

“I ask them to consider social, policy, legal, moral, and any other arguments they can think of.”

“‘Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial. ...’”

comment one, states in part that “A lawyer must ... act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”⁶ I instruct the students that zealous advocacy does not include eye rolling or making disgusted faces during argument. However, I also mention Model Rules of Professional Conduct, Rule 1.2,⁷ comment five, which states, “Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client’s views or activities.”

I continue by explaining Model Rule of Professional Conduct, Rule 1.16(b)(4),⁸ which states in part that “a lawyer may withdraw from representing a client if: ... (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. ...” At this time, we discuss two final points. One, defense attorneys exist not to “get people off” but represent clients to ensure that every American has equal access to this country’s justice system and to ensure that judges

⁶ *Model Rules of Prof’l Conduct* R. 1.3 cmt. 1 (2007), “[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”

⁷ *Model Rules of Prof’l Conduct* R. 1.2 (2007), “(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

⁸ *Model Rules of Prof’l Conduct* R. 1.16 (2007), “(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer’s services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.”

apply the law fairly and consistently to every citizen.⁹ Two, we discuss career options; if a student does not ever want to prosecute someone and argue for the death penalty as a punishment, then that student should not seek a career as a prosecutor in a state where the death penalty is an available punishment.

I end the exercise by telling them about my own experiences with clients including my relationship with Petty Officer Jones.¹⁰ I find that students appreciate hearing “war stories” if the professor does not overdo the storytelling. Through the stories, the students see that just like them, professors are

human beings who have emotions when faced with difficult situations and decisions.

In sum, I developed this exercise to introduce students to persuasive advocacy and legal ethics. Because the students must develop arguments for a side or party they do not normally align themselves with, I hope this exercise leaves them with a memorable lesson regarding the duty of attorneys to make persuasive arguments on behalf of their clients and the ethics surrounding those duties.

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Another Perspective

“About six years ago, I had a sudden and unexpected need to hire a lawyer to represent me in a workplace dispute. I was represented by that lawyer for three years, including the filing of a lawsuit in which I was the named plaintiff in a claim against a former employer. This was not the first time I had been represented by a lawyer, but it was the first time I had done so in an ongoing and contentious matter and the first time that I had been a party to litigation.

That experience made me realize that in all of my academic thinking about what makes a good lawyer, I had never really focused completely on the perspective of client. For the first time, I became aware that I would sit in classrooms, conferences, or just informal discussions with lawyers in which we talked at length about ‘the client,’ including what the client wants and needs. However, there were never any clients in the rooms for those conversations. I found myself wanting to shout about the obvious omission (that had not seemed obvious to me until that experience) and to contradict what was being said about ‘the client.’ I began to realize that we make a lot of assumptions about what clients want. A lot of those assumptions help structure legal education and many of them are wrong. We organize legal education around this notion that clients want to maximize their recovery and minimize their liability; that everybody fits in the same mold. We have this one image of an individual that is all about avoiding responsibility or recovering maximum compensation. I learned from my experience that what clients want and need is a lot more complicated than the model used in the law school classroom implies.”

—Symposium Issue, *The Opportunity for Legal Education: Panelist Dean Daisy H. Floyd*, 59 Mercer L. Rev. 859, 884–885 (2008).

⁹“True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures—unless as amateurs for our own principal amusement. There is little of all that we do which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men’s burdens and by our efforts we make possible the peaceful life of men in a peaceful state.” John W. Davis, Address at 75th Anniversary Proceedings of the Association of the Bar of the City of New York, March 16, 1946.

¹⁰ Petty Officer “Jones” pled guilty to sexual assault of a child, and the judge awarded him six and a half years at the United States Disciplinary Barracks at Fort Leavenworth, Kan. As a result of the plea deal that I negotiated with the prosecutor, Petty Officer Jones was able to attend, at the time, the only in-depth sexual offender treatment program offered by the military. Several months later, I received a card from him thanking me for helping him enter a treatment program. I will never forget working with and representing him.