

COMING FACE-TO-FACE WITH A LEGAL RESEARCH AND WRITING CLIENT

BY NANCY OLIVER

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Teachable Moments for Teachers ... is a regular feature of Perspectives designed to give teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. It is a companion to the Teachable Moments for Students column that provides quick and accessible answers to questions frequently asked by students and other researchers. Readers are invited to submit their own "teachable moments for teachers" to the editor of the column: Louis J. Sirico Jr., Villanova University School of Law, 299 N. Spring Mill Road, Villanova, PA 19085-1682, phone: (610) 519-7071, fax: (610) 519-6282, e-mail: sirico@law.vill.edu.

My first year of full-time teaching of legal research and writing courses was an intense and exciting learning experience for me. Every day yielded some new insight into how my students perceived the materials I presented and ideas about how to improve the sequence, timing, and substance of my classes. New careers are exciting in this way—you can hardly keep up with how much you are learning and you are never bored. Noteworthy among my early days filled with learning opportunities was the day my colleague and I reviewed the results of our experiment regarding simulated client counseling sessions. On that day, I knew I had learned a valuable and unexpected lesson that would influence my approach to teaching for many years to come.

As we discussed our simulated counseling sessions, my colleague reported that one of her students told her after the simulation: "This is the first time I thought of them as people!" Although my students had not chosen these particular words, I realized that this was the sentiment at the heart of many of the comments my students had made in a class in which we discussed the counseling simulations they had recently

conducted. Prior to the simulations, my students had not thought of the hypothetical clients we presented them as people.

The students, at the beginning of the second semester of their first year of law school, had participated in simulated client counseling sessions in their lawyering II—advocacy classes. Through these simulations, the students had come face-to-face with their first clients. While their clients had been purely hypothetical up to this point, thinking of the clients as real people seemed to add a new dimension to the studies the students engaged in the rest of the semester.

This article will address how first-year students come to see their clients as purely hypothetical beings, how the counseling simulations were conducted in our lawyering II classes, and how the students benefited from meeting one of their legal research and writing clients.

Clients as Purely Hypothetical

Until my colleague and I sat down and discussed our impressions of the client counseling simulations we had added to the beginning of our courses that semester, I hadn't thought about the perception my first-year students had of clients. In many of their classes, their experience up to that point had involved the analysis of appellate decisions. While such analysis is a wonderful teaching tool for learning the nuances of torts, contracts, criminal law, and other first-year courses, most such experiences did little to focus the students on their relationship with their future clients. By the time most cases make it to the appellate process, the nature of the relationship between a party to the case and his or her attorney will rarely merit discussion.

Further, the research and writing projects my colleague and I had assigned our students the first semester involved purely hypothetical people. The assignments began with a standard tasking memo in which we described a client's legal problem. In our memos, we directed the students to research and analyze the problem and prepare objective office memos in which the students were to present their analysis of the situation.

Because we used purely hypothetical people in our writing assignments, our first-year students

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never had the opportunity to carefully consider the experience of being a client. The two or three clients involved in their writing projects were presented in rapid progression to the students. I now imagine that the typical first-year student begins to see each of these clients as merely another of the many hypothetical people involved in hypothetical legal situations that must be dealt with before moving on to the next ones in an attempt to avoid drowning in the pile of work that typifies the first year of law school. Somewhat like my students' experience, I remember a time in my past when I was a busy, practicing attorney. At times, I certainly could have viewed all of my open files as just a big pile of undifferentiated work if I hadn't had clients' names and faces to attach to each file. My teaching epiphany came when I realized that attaching names and faces to at least some of their work the first year would be a valuable experience for my students.

Client Counseling Simulations

In an ongoing response to the McCrate Report,¹ the faculty of my law school continues to identify additional opportunities for our students to study the professional skills and values discussed in the report. One result of these efforts is an innovative approach to the second-year professional responsibility class in which our students receive training focused on client relationships and interpersonal lawyering skills. Although these professional responsibility classes provide a more detailed study of these skills, our legal research and writing professors recently decided to introduce client interviewing and client counseling in our first-year lawyering classes. We felt that the study of these interpersonal skills would nicely complement the rest of our curriculum focused on the study of the skills of research, writing, problem solving, legal analysis, reasoning, and oral advocacy.

¹ American Bar Association Section of Legal Education and Admission to the Bar, Report of the Task Force on Law Schools and the Profession; Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum (1992) (known as the McCrate Report).

Our first attempt at incorporating these interpersonal skills into our classes occurred in the spring semester of 2004 in our lawyering II—advocacy classes. In this class, the students learn persuasive communication skills, write a brief in the setting of a pretrial motion, and present an oral argument in front of a faculty judge. Two of our three legal research and writing professors participated in the maiden voyage of our counseling classes. Although each of us took a slightly different approach to how we presented the material, we both concluded that the students benefited from an introduction to client counseling.²

To kick off the semester, I added a class in which I lead a student discussion about the relationship between a lawyer and a client and the various models of decision-making in this relationship. We also discussed the fundamental lawyering skills and values from the McCrate Report and the many upper-level classes, journals, clinics, institutes, and extracurricular activities offered by our law school in which the students could further develop these skills and values.

During this class, we also discussed the basic goals and steps of an effective client counseling session.³ We discussed the importance of setting a friendly, collaborative tone in greeting the client and providing a comfortable and private location for the meeting. We explored effective methods of conveying an assessment of the client's legal

² Our counseling classes followed a common sequence used in teaching skills: we taught, demonstrated, practiced, and discussed the skill. Specific ideas about how to conduct the simulations came from discussions with Professor Marjorie Aaron, executive director of the Center for Practice in Negotiation and Problem Solving at the University of Cincinnati, and from my experience teaching as an adjunct in the Lawyering program at Southern Methodist University Dedman School of Law in Dallas, Texas.

³ See generally, e.g., Robert F. Cochran Jr., John M.A. DiPippa & Martha M. Peters, *The Counselor-At-Law: A Collaborative Approach to Client Interviewing and Counseling* 131–164 (1999) (discussing client counseling); Stefan H. Krieger & Richard K. Neumann Jr., *Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis* 215–265 (2d ed. 2003) (discussing client counseling); Nancy L. Schultz & Louis J. Sirico Jr., *Legal Writing and Other Lawyering Skills* 195–203 (3d ed. 1998) (discussing effective client consultations).

problems using easily understandable language and collaborative methods to convey and evaluate options available to the client to resolve the problems. Finally, we discussed helping the client choose an appropriate option to implement and the importance of identifying the actions that will follow, the parties responsible for these actions, and the next contact with the client. I then conducted a brief demonstration of a client counseling session in which I acted as the lawyer and an administrative assistant acted as the client. At the end of class, the students were instructed to review the last objective memorandum they wrote in the fall semester for our next class.

During the next class, we discussed the client's legal situation from their last objective memo of the fall.⁴ For this memo, the students were instructed to represent Dr. Cheryl Kowalski, an ophthalmologist practicing in Kenosha, Wisconsin. Dr. Kowalski came to our firm seeking advice about a covenant-not-to-compete (hereinafter CNC) contained in an employment contract she had signed when she joined the Kenosha ophthalmologic practice owned by Dr. David Friedman. The covenant provided that for two years after leaving the practice, Dr. Kowalski would not practice ophthalmology in Kenosha and certain specified surrounding counties. However, she wished to join a new practice with Dr. Linda Garrison in a suburb of Racine where she could perform laser eye surgery, an activity Dr. Friedman had decided not to pursue. Our client wanted to know if Dr. Friedman could enforce the terms of the CNC against her and prevent her from taking this new job. The students were provided with many other facts regarding such things as the area from which Dr. Friedman's practice drew patients, Dr. Kowalski's training, and market conditions.

In their fall memos, a slight majority of the students concluded that the CNC was most likely not enforceable because the geographic restriction

was unreasonably broad. However, this conclusion was far from airtight. I led a discussion of how the client's situation could unfold if Dr. Kowalski chose to leave her current employment and start the new job.

The students concluded that even though the CNC was unlikely to be enforced, the risk of being sued by Dr. Friedman if she left his practice to compete in the area was too great to be ignored. Further, having to face such an expensive distraction while starting a new professional job seemed like a heavy burden to the students. Although they hadn't researched the topic, I told the students that in some jurisdictions, Dr. Garrison could also be sued for tortious interference with Dr. Friedman's contract with Dr. Kowalski. To the students, this didn't seem like an ideal way to start a new relationship with an employer.

The students and I brainstormed various possible solutions to Dr. Kowalski's problem including staying in her current employment, leaving without talking to Dr. Friedman and hoping for the best, and attempting to discuss the issue with Dr. Friedman before leaving her employment with him and negotiating a settlement to any dispute that might arise with Dr. Friedman. Eventually, most of the students advocated the last option.

The students then looked at the interests of both Dr. Friedman and Dr. Kowalski in the dispute that would likely arise when the issue of the CNC was broached with Dr. Friedman. On the blackboard, we listed the interests and concerns of each party. With respect to Dr. Friedman, the students noted that if Dr. Kowalski left his practice and joined Dr. Garrison's practice, he would have to train a new ophthalmologist in the ways of his practice, he would possibly lose income because of the direct competition with Dr. Kowalski, he would be worried that she would steal his patients, and he would fear a reduction in the need for his services if she used laser surgery to correct the vision problems of the residents in the area where he practiced.

The students also brainstormed ways to convince Dr. Friedman to release Dr. Kowalski from the CNC. They came up with offering to

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⁴ I thank my colleague, Professor Christine Zimmer, who created the research and writing problem discussed in this article. The problem is purely fictitious.

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have Dr. Kowalski practice only laser surgery during the restricted time period of the CNC (a type of ophthalmological care Dr. Friedman didn't provide), offering that Dr. Kowalski would not directly solicit Dr. Friedman's patients to whom Dr. Kowalski provided treatment, offering that Dr. Kowalski would stay with Dr. Friedman's practice for six months to train her replacement, and offering a monetary settlement. The students left the class armed with many handouts—instructions for a simulated client counseling session, a written description of a suggested format for an effective client counseling session, a summary of the fundamental lawyering skills and values from the McCrate Report, and a list of upper-level classes and activities that offered opportunities to develop these skills and values.

Each student had been assigned a role to play in the simulated client counseling session with Dr. Kowalski that was to take place at a time of the students' choosing during a week in which the students did not meet with me because they were attending training in computer-assisted legal research. Students were assigned to groups of three—two lawyers to counsel one client. If the client turned out to be a male student, we referred to him as Dr. Karl Kowalski. I distributed confidential instructions for both the clients and the lawyers that were to be kept secret until after the simulations were concluded. The client instructions directed the student-client to become angry at least once while discussing the situation, to act confused at some point during the counseling session, and to tell the attorney that he or she would be willing to pay a settlement of up to \$15,000, but to disclose this only if specifically asked. The lawyers' instructions included directions regarding the law firm's hourly rates and included an estimate that negotiating a settlement on behalf of Dr. Kowalski would likely take about seven hours including the preparation of a settlement agreement. Both sets of instructions told the students that after conducting the simulations, they were to prepare a written, two-page memo in which they were to discuss the parts of the sessions that went well, the parts that didn't go as well, the decisions made during the

sessions, and what the students learned from the sessions.

During the next meeting of the class, we held a discussion about the counseling simulations and the students turned in their memos discussing the simulations. I was happy to hear that most students found the simulations enjoyable and useful. I was also happy and surprised to find that the classes and simulations about client counseling met various pedagogical goals, not all of which I had anticipated.

Advantages of Meeting the Legal Research and Writing Client

We believe that we fulfilled our main goal of successfully introducing the interpersonal lawyering skill of client counseling to our first-year students. The classes and simulations related to counseling were aimed at discussing the skill, demonstrating the skill, having the students practice the skill, and then discussing the simulation experience. In addition to fulfilling our main goal, the counseling classes gave us the opportunity to discuss the relationship between the attorney and the client, enriched our discussion of professional values, and helped our students understand the importance of their work in their objective memos on the lives of their client.

The class in which we discussed the relationship between the attorney and the client yielded many student insights and an enthusiastic discussion. I began the discussion by summarizing the three models of legal counseling presented in the textbook the students would use the next semester in their professional responsibility class. These models are the authoritarian, client-centered, and collaborative models.⁵ Under the authoritarian model, an attorney takes control over the representation and shares knowledge with a rather passive client about how the client should handle the legal problems.⁶ Under a client-

⁵ Cochran Jr. et al., *supra* note 3, at 2–9.

⁶ *Id.* at 2–4.

centered model, on the other hand, an attorney actively involves a client in the process of evaluating potential solutions to the client's legal problems by analyzing the consequences to the client of the options using the prism of the client's values.⁷ The collaborative model of decision-making requires an attorney and client to work together to advance the interests of the client with each bringing his or her skills and knowledge to bear on the client's problem. While the client maintains control over the decisions, the attorney operating under the collaborative model structures the decision-making process including consideration of how the decisions affect other people.⁸

The students identified the advantages and disadvantages of each model and concluded that they preferred the collaborative model. While the students could easily see why a lawyer should not impose his or her values on a client by making all decisions regarding the representation, discussion was livelier as we probed the possible problems with a purely client-centered approach. As the discussion proceeded, students observed that a lawyer might be able to help a client by objectively analyzing the client's situation even when the client could not be objective because the situation was replete with emotion and possible negative consequences for the client. In such a situation, the students observed that the lawyer could help the client identify interests and goals the client may not have considered while mired in the legal problem. Further, the students realized that their personal integrity and professional responsibilities would prevent them from becoming a hired gun willing to do anything to further the client's interests.

Our discussion of professional values was also more robust than it would have been if not tethered to a client's situation. For example, the students who acted as lawyers were better able to appreciate the value of competent representation when looking into the eyes of Dr. Kowalski, a

client depending on them. Many student-lawyers remarked in their reflections memos that they would be more thoroughly prepared in the future to counsel a client because of the awful feeling they had when they weren't prepared to answer a client's reasonable questions. Further, many of the student-clients remarked how helpful and reassuring it was for them when their lawyer was knowledgeable and prepared to help them. I hope that they will remember this experience and try to re-create that feeling for their own clients.

Finally, when the students recognized the clients as real people, they realized that the job of a lawyer doesn't end when the lawyer makes a prediction about the client's legal situation in his or her objective memo. It wasn't enough for Dr. Kowalski to hear from her lawyer that her CNC was likely overbroad, and, therefore, unenforceable. She needed to know how to proceed with this knowledge. Should she merely ignore the offending CNC? The students decided this would not be the best course and brainstormed various options of how to otherwise help this client. They identified various options to offer their client in a collaborative decision-making counseling session.

In a memo discussing a client counseling simulation, one student noted surprise at how much the attorney needed the input of the client to proceed with representing the client. Another expressed concern that the decisions he would make for a client are not necessarily the ones the client would make for herself. As my colleague's student noted so precisely: "This is the first time I thought of them as people!" This experience taught me that my students had not thought of our hypothetical clients as people. Having learned this valuable lesson, I will try to take advantage of my unique position in my student's first-year experience to help them meet at least one of their legal research and writing clients face-to-face.

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⁷ *Id.* at 4–6.

⁸ *Id.* at 6–9.