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Stephen Ellmann

New York Law School, stephen.ellmann@nyls.edu

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TRUTH AND CONSEQUENCES

*Stephen Ellmann*¹

INTRODUCTION

Consider the following excerpts from an initial interview, fortunately fictional, between a lawyer and a potential client. The lawyer, Michelle Washington, is a middle-class, white, legal services lawyer with many years of experience in immigration law. The person she is interviewing, Massoud Pojolan, is a Kurdish citizen of Iraq. He maintains that Iraqis loyal to Saddam Hussein persecuted him on the basis of his ethnicity, along with a great many other ethnic Kurds in Iraq. If Mr. Pojolan can persuade an asylum officer of the veracity of his account, he may be eligible for asylum in the United States. If, however, there are factors justifying an exercise of discretion against him, he may be subject to deportation.

After some preliminary ice-breaking conversation, the interview proceeds as follows:

L1: So, Mr. Pojolan, I understand you are interested in applying for asylum.

C1: That's right.

L2: For me to understand your case and figure out whether we can help you, naturally I need to know the facts. Of course, everything you tell me is confidential. Why don't you tell me a bit about what happened to you in your home country that led to your wanting to seek asylum now?

¹ Professor of Law and Associate Dean for Faculty Development, New York Law School.

1. This material is copyrighted by, and used with the permission of, West Group. This is a version of a chapter from the book that Robert Dinerstein, Isabelle Gunning, Ann Shalleck, and I are writing entitled *Legal Interviewing and Counseling*, to be published by The West Group in 2002. I drafted this chapter (which corresponds to Chapter IV in our tentative table of contents), with comments from my colleagues; the final version of this and all chapters will reflect our collective revisions and judgments and will certainly be somewhat different from this draft. Meanwhile, many thanks for comments from Carol Buckler, Larry Grosberg, Randy Jonakait, Rick Marsico, Nancy Rosenbloom, Tanina Rostain, Don Zeigler, and the participants in a Clinical Theory Workshop at New York Law School (NYLS) on November 20, 1998, and an NYLS faculty scholarship lunch discussion of this piece on March 28, 2000.

[At this point, Mr. Pojolan describes the violent, mass persecution of ethnic Kurds, such as himself, in certain areas within Iraq. In response to open-ended questions from Ms. Washington, he describes killings during anti-Kurdish riots, round-ups and shootings of Kurdish leaders and their supporters, and massive economic deprivation. Ms. Washington then shifts the conversation's focus with the following question:]

L3: Those are shocking events and certainly the kind of thing that asylum is meant to protect people from. Given what has been happening in Iraq, I very much hope I can help you with your case. But you haven't told me very much yet about what happened to you as an individual during these terrible times; could you tell me more about that now?

C3: Yes, of course. For a while, nothing happened in my town, but of course that couldn't last. For me, the troubles began in November 1999, almost exactly a year ago. They started painting slogans on my house and throwing garbage . . . and other stuff . . . over our walls. Everyone knew who was a Kurd and who wasn't, you see, so once it started there was no escaping it.

L4: Did anything else happen to you?

C4: Well, I saw all kinds of bad stuff happen. But for me personally . . . what happened was a couple of months later, at the store where I worked with my cousins. I guess they hated us even more than the others, because we had enough money to have a store.

L5: What happened at the store, Mr. Pojolan?

C5: There were soldiers and a big crowd of Iraqis, and they were shouting all kinds of things I'd been away at lunch, and I was just walking back when it started, and all of a sudden it got very bad. Very, very bad. They kicked down the door of our store, and then people poured into the shop. I couldn't see what they did inside the shop, but I could hear screams . . . terrible screams . . . and then I saw my cousins

[Mr. Pojolan paused at this point and was obviously upset. After giving him time to take several deep breaths and getting him a glass of water, which he drank, Ms. Washington resumed:]

L6: You were saying that you saw your cousins . . .

C6: Yes. These were my own family. I grew up with them. They were good people Anyway, I saw them try to get out of the store. People were grabbing them and hitting them, and they were trying to get away. But they didn't get away. I saw them dying, and I couldn't help them.

L7: [Gently] There was nothing you could do about it, was there?

C7: No, nothing. Except run. I did run, too. I had to. People in the crowd were starting to point at me, and I could see that I was next. I turned around and ran as fast as I could straight out of there. I could hear them laughing, and somebody yelled, "We'll be coming for you next." I managed to get across town, and I hid in an old warehouse. I had nowhere else I could go, because I couldn't trust my own neighbors. I stayed there for three full days and nights. I stole a little food and water, otherwise I would have starved.

L8: Then did you leave the country?

C8: I wanted to, but it wasn't easy. First, I moved to another town where things weren't quite so crazy. And then I started trying to get out of the country, but it took me six months to find a way to slip across the border into Turkey. Of course I couldn't stay in Turkey—I knew that—but from there I managed to get here.

L9: Why did it take so long?

C9: Because you had to pay to get out. Not officially, you understand, but you couldn't get out without one bribe, and then another, and then another. And some people were so scared of Saddam you couldn't even bribe them. I was lucky to manage it as soon as I did.

L10: How were you able to live during this time?

C10: Oh, well, that wasn't such a big problem. I found some people I knew, and they gave me a place to stay and enough to eat, and I returned the favor by helping them with whatever they needed doing.

L11: What kind of stuff was that?

C11: Mostly I drove a truck for them, making pickups and deliveries. It was mostly just regular stuff, I mean, nothing to worry about and not illegal, you know, or anything like that.

L12: I'm not sure I understand. Was some of the stuff you were carrying not what you call "regular stuff"?

C12: This is all confidential, right?

L13: Certainly.

C13: Well, mostly it was just food, clothes, rugs—really all right, perfectly legal. But a couple of times the guy who owned the truck would ride in the truck with me and he'd say, "Okay, Massoud, tonight we'll have a special ride, huh?" I didn't like this at all, but I felt like I couldn't refuse to drive, because this man was helping me so much. So I tried to just laugh and go about the driving.

L14: Did the truck owner ever tell you what was in the truck those times?

C14: No.

L15: So you really don't know what you might have been carrying then?

C15: I know. I had to help unload it.

L16: What was it?

C16: Drugs.

L17: *Illegal* drugs?

C17: Yes.

L18: I think you'd better tell me, as precisely as you can, which drugs you were carrying, how much of them, and how many times.

[Mr. Pojolan said nothing, and after a brief pause Ms. Washington went on:]

L19: Please remember, Mr. Pojolan, that what you tell me is confidential. But I do have to know the truth if I am going to represent you effectively. This is a crucial matter, Mr. Pojolan, and if you don't feel you can tell me the truth, you need to understand that then I will not be able to take your case at all.

C19: All right, all right. Opium.

L20: How often?

C20: Just a few times. Three or four times in the six months.

L21: Three or four separate times? Not just a couple?

C21: Yeah.

L22: And how much? How much each time?

C22: Not much.

L23: *How much?*

C23: Mostly just a few kilos.

L24: [Grimly] What was the largest amount?

C24: The biggest was 100 kilos.

L25: You carried 100 kilos of opium?

C25: Yes. I told you, my friend asked me to do it. I had to. It was like returning all the favors he was doing for me.

L26: Did you get paid extra for this favor?

C26: He'd hand me a hundred dollars at the end of the trips. But I didn't think of it as pay.

[At this point, Ms. Washington stopped taking notes and closed up her note pad. Then she said:]

L27: Mr. Pojolan, I wish what you've just told me had never happened. But since it did happen, I have to tell you that your drug transporting is either an absolute bar to your getting asylum or it's a factor the government can and likely will hold against you in deciding whether to grant you asylum even if you otherwise are entitled to it.

C27: But does it have to come out at all?

L28: Maybe not. You may never get asked these questions. But they may come up—not these questions, maybe, but others that may get at all this. And whatever you are asked, you'll have to tell the truth. And if you don't, I'll have to reveal the truth myself.

C28: But you said it was all confidential.

Did Ms. Washington handle this interview appropriately? From one perspective, the answer is yes. She obviously needed to know what forms of persecution her potential client had suffered in order to assess his chances of convincing the Immigration and Naturalization Service that he should receive asylum. Her initial question (L10) about how Mr. Pojolan survived during the six months he waited to get out of the country was a natural one, because she already knew that he had lost his store and that other Kurds were facing economic deprivation too. She naturally would have wanted to get a complete account of his experiences. When he surprised her by answering in a way that seemed to imply he had engaged in some activity that wasn't "regular" (C11), she had no alternative but to inquire further, because she knew that illegal activity in the home country could amount to a reason to deny asylum. His answers, moreover, never gave her any reason to stop inquiring, so she pressed on to the bitter end. When she learned, finally, that he had transported drugs, she could tell him only what she did—that this information might be fatal to his case.²

2. She was right on this point. See Immigration and Nationality Act, 8 U.S.C.A. § 1158(b)(2)(A)(iii) (West 1999) (barring eligibility for asylum where "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States"). Even if this conduct does not raise a mandatory bar to asylum, it may weigh heavily in the discretionary decision whether to grant asylum to an eligible applicant. Carol A. Buckler, *Asylum, Withholding of Removal, Refugee Status and TPS*, in *Immigration*

and that neither the client nor the lawyer could deny the facts if they became an issue in the case.

From another perspective, the answer to the question of whether Ms. Washington handled this interview appropriately would be no. Ms. Washington did her best to win her client's confidence by employing the kinds of techniques we urge lawyers to use as a matter of good, standard interviewing: ice-breaking at the start, expressing her desire to help (L3), confirming that she shared his outrage at what happened (L3), offering personal attention and patience when her client became upset (after C5), and communicating empathy (L7). In addition, she repeatedly assured her client that what he told her was confidential, not only at the start of the interview (L2), but also when she and her client began discussing what turned out to be the drug transporting issue (L13). The third time she assured him of confidentiality (L19), Ms. Washington also reiterated that she needed the information in order to represent Mr. Pojolan effectively. With all of these assurances to help her elicit answers, she asked questions that became decidedly more narrow and closed-ended, emphatic and insistent, even alarmed. It was only after her client grudgingly acknowledged the most damaging facts that Ms. Washington revealed two crucial points: first, the information she had just extracted (but which she had been aiming at for some time) was very damaging to the client's interests, and second, the client might be unable to keep this information secret, because if he was asked about it and tried to deny it, she would reveal it herself. In other words, only after telling the client that the information he shared with her would be confidential did Ms. Washington reveal how little that confidentiality was worth.

This dialogue raises a series of questions on interviewing ethics and skills, subjects which are the focus of this chapter.³ In the sections to come, we will consider the following issues:

First, is getting the whole truth always the right objective in interviewing? Should Ms. Washington have regarded it as her duty to pursue the facts about the drug deliveries?

Second, are lawyers who have elicited the truth either obliged or permitted to disclose it over the client's objection? Was Ms. Washington right that she could reveal what her client might want to keep hidden?

Third, what advice on confidentiality is consistent with the actual extent of lawyers' duty of disclosure? Should Ms. Washington have given the broad and repeated assurances of confidentiality that she did, and should she have revealed the important qualification on these

Law and Procedure: Desk Edition § 29.04 (Stanley Mailman ed., 2000).

3. See *supra* note 1.

assurances—that she could reveal false testimony by her client—only deep into their meeting?

Fourth, what advice can lawyers give clients about the law that bears on the clients' situations without compromising the lawyers' obligations to truth? Here, should Ms. Washington have explained the legal significance of drug transporting before, or after, asking the client about it?

Fifth, how skeptical should lawyers be of their clients' veracity? Here, for example, should Ms. Washington have accepted her client's half-truths (for example, his answer (C13) that he was mostly transporting innocuous items such as food, clothes, and rugs) as sufficient answers to her questions?

Sixth, when lawyers do need to press their clients for the truth, how should they do this? Was Ms. Washington justified in using the rather peremptory, demanding questions that she did?

We turn to these questions from a particular starting point. As we will explain elsewhere in this book,⁴ we see the lawyer's role first and foremost as a helping one, and we believe that lawyers are justified in helping clients, because clients have a right to be helped. Without shutting our eyes for a moment to the realities of human frailty, we understand the proposition that clients have a right to be helped as implying at least a measure of respect for the clients, for their individual attributes, or at any rate for the humanity they share with their attorneys. We believe that this respect implies a presumption—to be sure, a rebuttable presumption—that clients are worthy of respect, or in other words that they are capable of fidelity to the truth and of attachment to others. Some clients will disprove these presumptions, and in a society governed by law, even these clients will enjoy the right to counsel. Nevertheless, we see the paradigmatic lawyer-client relationship as one between two honorable, or at least potentially honorable, people.

I. IS TRUTH ALWAYS THE OBJECTIVE?

Ordinarily, it is in the client's interest for his lawyer to know the truth. A lawyer represents her client best when she knows all of the relevant circumstances. Only with this complete knowledge can a lawyer present the client's case or position in the most favorable light, avoid disastrous surprises, devise strategies to handle whatever weak points exist as well as they can be handled, and ensure that the eventual outcome of the case fits the client's actual wishes and interests as accurately as possible. For pragmatic and professional reasons, therefore, seeking the truth makes sense.

4. See *supra* note 1.

Is there any downside to the lawyer's complete knowledge of the facts? Not if that knowledge imposes no constraints on the lawyer's freedom of action. For example, American lawyers take for granted that a lawyer may represent a criminal defendant who pleads "not guilty" and vigorously defend the case, even if the lawyer knows—from the client's own admissions and the lawyer's corroborating investigation—that the client is guilty as charged. The lawyer remains free to contest the charges no matter how fully she has become convinced of their validity.

In many other circumstances, however, it is conceivable that the lawyer might know too much. We discuss the obligations that possessing such knowledge may impose in more detail in Part II. Here, it is enough to say that in all representations, lawyers are forbidden from making knowingly false statements of fact. In civil cases, they may not affirm or deny claims if they have no basis for doing so, may not knowingly introduce false evidence, and must correct evidence they have already offered if they come to know that it is false. Similar obligations apply to criminal prosecutors and *may* apply even to criminal defense attorneys. In short, knowledge may be empowering, but it may also be disempowering.

Of course, all of these constraints vanish if, as is sometimes argued, lawyers never know the truth or falsity of any proposition. Monroe Freedman calls one version of this approach "the Roy Cohn solution."⁵ Freedman, who considers this solution unacceptable, quotes Cohn as saying:

Before a client could get three words out, any lawyer with half a brain would say, "You probably don't know whether you're guilty or not, because you don't know the elements of the crime you're charged with."

[Then, to avoid hearing what I'm not supposed to hear, I ask the client:] "If someone was going to get up on the stand and lie about you, who would it be? And what would they lie about?" And if the client's got any brains, he'll know what I'm talking about.⁶

Freedman goes on to explain:

Under Mr. Cohn's solution, therefore, the lawyer has it both ways. For tactical purposes, he knows what he has to know. For purposes of any ethical obligation, however, he does not know either that the client is guilty or that the client is going to commit perjury when he denies the "lies" about him.⁷

Cohn seems to know, in all but name, exactly what he does not want

5. Monroe H. Freedman, *Understanding Lawyers' Ethics* 119 (1990).

6. David Berreby, *On Trial: The Cohn/Dershowitz Debate*, *Nat'l L.J.*, June 7, 1982, at 15, *quoted in* Freedman, *supra* note 5, at 119.

7. Freedman, *supra* note 5, at 119.

to know. A more palatable approach might assert that only the jury can “know” the truth under our system of law. Yet another approach could invoke a modern, or post-modern, skepticism about the ascertainability of truth.

But this sort of denial of knowledge has two tremendous, and in our view fatal, disadvantages. The first is that it requires lawyers, who like everyone else no doubt believe that they “know” many things about many subjects, to profess utter lack of knowledge about matters they should be studying especially carefully, namely the facts of their cases. In other words, it requires lawyers to disclaim common sense.

The second disadvantage to disclaiming knowledge in this fashion is that it requires lawyers to assert that the many provisions in the professional codes of ethics which forbid lawyers from using or uttering knowing falsehoods are actually mere pretense, because they will never, ever have any bearing on lawyers’ actual duties. We do not suggest that lawyers should casually assume they know the falsity of their clients’ statements. On the contrary, we feel that the test for knowledge should be a demanding one, perhaps on the order of “beyond a reasonable doubt.”⁸ Precisely because such a test will not be satisfied easily, it fits with the lawyer’s primary orientation as the representative and helper of her client (and fits especially well in the field of criminal defense where it is a truism that the defendant has the right to put the state to its proof). Nevertheless, lawyers must acknowledge that *sometimes* they know that they are hearing lies.

Even if knowledge exists and can be constraining, we would have no alternative but to seek it if we could not conceive of any other way to conduct an interview. Thus, it might be argued that there is nothing else lawyers can seek in interviews *except* the whole truth, for no other interviewing objective would be coherent. That, however, is probably not true. In criminal defense work, for example, the lawyer’s goal could conceivably be the “collection of facts so that he can evaluate the extent to which inculpatory information is accessible to the government and usable to frame an indictment.”⁹ To achieve *this* goal, the lawyer must learn what the government knows and what it will have the legal ability to discover, but the lawyer does not necessarily have to learn the entire truth from the client’s own mouth. Interviewing focused on this objective might start with an inquiry into everything the client knows about the state’s case against him or her,

8. For an overview of the various standards courts have applied to this question, see Deborah L. Rhode & David Luban, *Legal Ethics* 294-95 (2d ed. 1995). The proposed Restatement suggests a “firm factual basis” standard. Restatement (Third) of the Law Governing Lawyers § 180 cmt. c (Tentative Draft No. 8, 1997) [hereinafter Restatement].

9. Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* 38 (1985).

and only then (if at all) ask for the client's explanation of the information thus assembled.

Scott Turow, a novelist and former federal prosecutor, illustrates this mode of defense practice in his novel *Presumed Innocent*. In this novel, Rusty Sabich, a senior prosecutor, finds himself accused of murder and turns for his defense to his longtime adversary Sandy Stern. Stern takes the case. At one of their early meetings, the two of them discuss where the case stands:

"So," he [Stern] says. "Do we now understand Della Guardia's case?"

"I think I do."

"Fine, then. Let me hear it. Thirty-second summation, if you please, of Nico's [the prosecutor's] opening statement."¹⁰

At this point, Sabich reflects on his meetings with his lawyer:

Sandy Stern, with whom I have done business for better than a decade, against whom I have tried half a dozen cases, and who on matters of gravity, or of little consequence, has always known that he could accept my word—Sandy Stern has never asked me if I did it. . . . Perhaps he does not ask because he is not certain of the verity of the answer he may get. It is a given of the criminal justice system, an axiom as certain as the laws of gravity, that defendants rarely tell the truth. . . .

Thus it would be an act contrary to his professional acumen were Sandy Stern to commit himself to an unreserved faith in everything I say. Instead, he does not ask. The procedure has one further virtue. If I were to meet any new evidence by frontally contradicting what I had told Sandy in the past, legal ethics might require him to withhold me from the witness stand, where I almost certainly intend to go. Better to see everything the prosecution has, to be certain that my recollection, as the lawyers put it, has been fully "refreshed," before Sandy inquires about my version. Caught in a system where the client is inclined to lie and the lawyer who seeks his client's confidence may not help him do that, Stern works in the small open spaces which remain. Most of all, he desires to make an intelligent presentation. He does not wish to be misled, or to have his options curbed by rash declarations that prove to be untrue. As the trial approaches, he will need to know more. He may ask the question then; and I certainly will tell him the answer. For the time being, Stern has found, as usual, the most artful and indefinite means by which to probe.¹¹

10. Scott Turow, *Presumed Innocent* 161 (Farrar Straus Giroux 1987) (This and the following excerpt from *Presumed Innocent*, copyright © 1987 by Scott Turow, are reprinted by permission of Farrar, Straus and Giroux, LLC.).

11. *Id.* at 161-62.

Criminal defense work, of course, differs from most other legal representation in a crucial way: the client does not have to testify or offer evidence against himself. Such strategic interviewing is harder to imagine in other legal contexts where the client is ultimately going to be subject to the probing of an adverse attorney or adjudicator. But even in these circumstances, it is possible to conceive of other interviewing objectives besides seeking “the truth, the whole truth, and nothing but the truth.” The lawyer here might aim to learn those facts necessary to make out the client’s case and to refute the likely contentions of the other side, but choose not to press her inquiries so far as to unearth damaging matters that the opposition most likely would overlook; if the lawyer could calibrate her inquiries to this goal, she could learn all she needs to in order to help her client, without learning additional information that would hurt his case.

There may be many conscientious lawyers who would endorse such an approach, but as a general matter we cannot join them. We reject this strategy, first of all, on professional grounds, because we fear it would undermine effective representation of clients. We are skeptical about the ability of most lawyers, and most clients, to conduct carefully-structured dialogues with enough finesse to ensure that the lawyer learns what she must but does not hear what she would rather not. While we do not favor random probing for damaging information,¹² we believe that the lawyer is most likely to learn what she needs to know if she does not try to circumscribe her search for the facts.

Moreover, we see the lawyer’s effort to avoid excessive knowledge as deeply inconsistent with important moral premises of lawyers’ work. Lawyers who disregard the goal of truth with their clients are implicitly assuming—normally, no doubt, without expressly discussing the point with the client themselves—that the clients prefer self-interest to truth. This assumption denies clients the respect we believe they are due as human beings and is thus inconsistent with a basic foundation of the lawyer-client relationship.¹³ We worry, also, that a relationship marked at its inception by avoidance of truth may grow worse rather than better over time. Clients who have avoided one truth with the lawyer’s aid may avoid other truths as well, even against the lawyer’s wishes. Lawyers who might seek, for example, to counsel their clients about ethical matters may find that their standing to do so has been impaired. Additionally, lawyers who seek to avoid the burden of knowledge compromise their fidelity to the ethical

12. See *infra* note 102 and accompanying text.

13. Cf. Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 Houston L. Rev. 327, 331 (1998) (arguing that “[l]awyers who prohibit client confession . . . ignore the possibility that the client might seek goals other than freedom, such as forgiveness, reconciliation, and a clear conscience; they ignore the possibility that the client might want to confess”).

obligations with respect to truth that we have already mentioned. As we will see shortly, these compromises may not amount to breaches of the rules, but they do depart from a full commitment to working within the bounds of the truth.

Even more fundamentally, we see such stratagems as inconsistent with the function of lawyers in a just legal system. Lawyers in an adversarial system are not bound to assist the tribunal in seeking the truth—that formulation has a more inquisitorial than adversarial flavor to it—but we as a society do not have lawyers *in order to* enable people to prevail on false claims. The Model Code of Professional Responsibility states the proposition, or truism, that members of our society are entitled to zealous representation “within the bounds of the law,” so that everyone in our society will be able “to have his conduct judged and regulated in accordance with the law.”¹⁴ Nor do we protect attorney-client confidentiality *in order to* enable lawyer and client to cleverly skirt the truth in the privacy of the lawyer’s office. On all these grounds, we agree with Ms. Washington’s desire to discern the truth.

In the face of these arguments, however, it is somewhat startling to realize that the Model Rules of Professional Conduct, as well as the Model Code, do not explicitly state that the duty of the lawyer is to seek the truth from her client. The ABA has suggested that lawyers who avoid “knowledge” by “not questioning the client about the facts in the case . . . may be violating their duties under R[ule] 3.3 [to prevent and correct the use of false testimony] and their obligation to provide competent representation under Rule 1.1.”¹⁵ But these implications, plausible as they are, are not explicitly confirmed by the texts. Moreover, the proposed *Restatement of the Law Governing Lawyers* also stops distinctly short of imposing such a duty. Instead, lawyers generally owe their clients “the competence and diligence normally exercised by lawyers in similar circumstances.”¹⁶ A comment explains that this duty requires lawyers to “perform tasks reasonably appropriate to the representation, including, where appropriate, inquiry into facts”—but this language does not specify the tenor of that inquiry.¹⁷ As for the duty not to knowingly use false evidence, the Restatement comments that “[a]ctual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry.”¹⁸ So, too, with the duty not to

14. Model Code of Professional Responsibility EC 7-1 (1981) [hereinafter Model Code].

15. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 n.9 (1987).

16. Restatement, *supra* note 8, § 74(1).

17. *Id.* cmt. c.

18. *Id.* § 180 cmt. c. In a similar vein, the Restatement posits that lawyers are generally not liable to non-clients for negligent misrepresentation, which might result from a factual inquiry not aimed at the truth. *Id.* § 77 cmt. f. Lawyers are also not liable for malicious prosecution if the lawyer acts with “probable cause,” *id.* § 78(2),

assist a client in action that the lawyer knows is criminal: “[A] lawyer is not required to make a particular kind of investigation in order to ascertain more certainly what the facts are, although it will often be prudent for the lawyer to do so.”¹⁹

While other sources of law may impose greater obligations,²⁰ within the framework of the Restatement the main limit on competent, willed ignorance seems to be the doctrine of “conscious avoidance.” Under this doctrine, a lawyer who deliberately avoids knowledge may be charged with having that knowledge.²¹ As David Luban has pointed out, however, it is not necessarily the case that a person who avoids learning whether something is true or not actually knows that it *is* true.²² Sandy Stern, in *Presumed Innocent*, may ultimately learn that Rusty Sabich is guilty, or that he is innocent. The view of the Restatement Reporter, Charles W. Wolfram, is consistent with this recognition; that view is that “the preferable rule is that proof of a lawyer’s conscious disregard of facts is relevant evidence which, together with other evidence bearing on the question, may warrant a finding of actual knowledge.”²³ Under this view, a lawyer who simply did not ask certain questions, but had no clear indication of what the answers to those questions would be, would seem to lack the “knowledge” upon which the Restatement places so much weight.

To say that lawyers are not legally obliged to seek the truth, however, provides no affirmative reason to depart from the ethical principles we have already sketched that call for lawyers to try to learn the truth. It might be argued, however, that even honorable people, when caught within an unjust system, do not owe the operators of that system truth. In principle, we agree. A Jew in Nazi Germany did not have an obligation to reveal his Jewishness to those who would kill him for it, even if he had to lie under oath in a court of law to keep the truth concealed. But we are not in Nazi Germany. Although American society and American law are far from perfect,

and a comment declares: “Whether probable cause existed is determined on the basis of the facts known to the lawyer at the time.” *Id.* cmt. d. The Reporter’s Note refers to “the rule that probable cause is appraised on the basis of the information available to the lawyer, without any requirement of investigation,” *id.* Reporter’s Note on cmt. d, though citing one contrary decision, *Nelson v. Miller*, 607 P.2d 438, 448-49 (Kan. 1980).

19. Restatement, *supra* note 8, § 151 cmt. g.

20. For example, as the Restatement observes, procedural rules like Rule 11 of the Federal Rules of Civil Procedure typically require lawyers to undertake “an inquiry about facts and law that is reasonable in the circumstances.” *Id.* § 170 cmt. c.

21. See, e.g., *United States v. Cavin*, 39 F.3d 1299, 1310 (5th Cir. 1994) (approving “deliberate ignorance” instruction “where the evidence shows (1) subjective awareness of a high probability of the existence of illegal conduct, and (2) purposeful contrivance to avoid learning of the illegal conduct”); *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 590 (9th Cir. 1983) (similar).

22. See David Luban, *Contrived Ignorance*, 87 Geo. L.J. 957, 959, 961-62 (1999).

23. Restatement, *supra* note 8, § 151 Reporter’s Note on cmt. g.

perfection is not an attainable goal in life. We believe that the protections of constitutional rights and the rule of law in the United States, as well as the potential for democratic changes in unjust policies, provide strong justification for requiring lawyers—who have chosen to enter their profession and taken an oath of fidelity to the law—to offer their clients representation only within the bounds of the law.

As we have just seen, however, “the bounds of the law” are not as tight as might have been expected. Instead, it appears that they leave some room for lawyers to calibrate their inquiry into truth, through the questions they ask and do not ask and also, as we will see, through such means as the advice they give about the limits on confidentiality for the clients’ answers. If we lived in a perfectly just society, there might be no justification for the existence of such discretion. But in the imperfect world and nation in which we live, there may well be circumstances where the lawyer’s full discovery of truth, and the subsequent ethical obligations incurred by such knowledge, will lead to results that she conscientiously sees as unjust. The lawyer who learns of a welfare client’s petty fraud, for example, may be unable to press the client’s claim for benefits essential to health or life. Exactly where justice ultimately lies in such a conflict between law’s demands and equity’s claims may be a profound philosophical problem, but the rules of professional ethics do not exist to resolve all such problems. Instead, within their boundaries, discretion remains for multiple, even differing moral perspectives. Put more concretely, the rules of professional duty leave no room for knowing violations, but they do leave some room for not knowing.²⁴

Had Ms. Washington believed that the denial of asylum to people with past criminal histories was profoundly unjust, she might have considered exercising this sort of discretion here. Before she asked Mr. Pojolan what “[ir]regular” items he transported, however, she could not know his answer. For her to be sure that denial of asylum based on that answer would be unjust, she would have to hold the view that Mr. Pojolan was entitled to asylum (assuming the other requirements of asylum law were satisfied) no matter what he was transporting. Would she maintain that view if the cargo had been, for instance, children enslaved into prostitution? If not, then her decision not to ask would have to factor in the possibility that she was becoming a party to injustice rather than justice. Additionally, she would need to believe that getting an answer to her question would be, as a tactical matter, more of a hindrance than a help. But if Mr. Pojolan’s criminal conduct is actually limited, as he maintains throughout, then such a tactical judgment might be entirely wrong.

24. David Luban’s insightful article develops a similar argument. See Luban, *supra* note 22, at 978-79.

She obviously would not want to learn this information for the first time during Mr. Pojolan's asylum interview, when it would be too late to explore possible mitigating circumstances. Deciding what to do once she has the information may be difficult, but not asking requires her to make a similar decision in the dark. In sum, we doubt that this case would have been an appropriate one for the exercise of such discretion in the name of justice, and we suspect that similar considerations will frequently weigh against lawyers' choosing this course.

II. HOW COMPLETE IS CONFIDENTIALITY?

Three times in the dialogue, Ms. Washington assures her client that what he tells her is confidential. Each of these assurances is unqualified. Perhaps she was right to speak in these terms,²⁵ but it is clear that she was not *accurate*. The truth is that what clients tell lawyers is not simply, and unqualifiedly, confidential. The exact contours of the limits on confidentiality vary from jurisdiction to jurisdiction,²⁶ but we can briefly outline some of the leading restrictions.²⁷

Our primary focus here is on the confidentiality protected by the codes of legal ethics. Confidentiality under the codes is a considerably broader notion than the attorney-client privilege. First of all, it prohibits, or purports to prohibit, all disclosures, not just those made in testimony. Additionally, it protects from disclosure a much wider range of information. The difference in scope is reflected in DR 4-101 of the Model Code of Professional Responsibility, which explains that the ethics rule protects both "confidences" and "secrets."²⁸

Confidences consist of "information protected by the attorney-client privilege under applicable law."²⁹ Wolfram offers the following "general encapsulation" of the scope of the privilege:

- (1) a person (client) who seeks legal advice or assistance
- (2) from a lawyer acting in behalf of the client,
- (3) for an indefinite time may invoke, and the lawyer must invoke in the client's behalf, an unqualified privilege not to testify
- (4) concerning the contents of a client communication
- (5) that was made by the client or by the client's communicative agent
- (6) in confidence
- (7) to the lawyer or

25. See *infra* Part III for a discussion of this issue.

26. Lawyers and law students handling actual cases will of course need to consult the particular confidentiality rules of the jurisdictions in which they are practicing.

27. For a detailed analysis of all the limits on confidentiality, keyed to the relevant provisions of the Model Code, see Roy M. Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 *Geo. J. Legal Ethics* 703, 717-71 (1988). We have benefited from this discussion in the following pages.

28. Model Code, *supra* note 14, DR 4-101(A).

29. *Id.*

the lawyer's confidential agent, (8) unless the client expressly or by implication waives the privilege.³⁰

In addition to shielding such privileged information, DR 4-101 also protects "secrets"—"other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."³¹ Model Rule 1.6 is, if anything, broader in scope than DR 4-101: the Model Rule protects "information relating to representation of a client"³² and not just the various forms of "information gained in the professional relationship" encompassed in the Code's definition of "secrets."³³ Broad as the protections under the Code and Rules are, however, they are also subject to profound limitations.

First, both the Model Code and the Model Rules authorize disclosure to prevent the client from committing future crimes.³⁴ The Model Code allows such disclosure in all cases,³⁵ but the Model Rules more narrowly permit such disclosure only to prevent crimes likely to cause death or serious injury.³⁶ Neither the Model Code nor the Model Rules ever explicitly requires disclosure on this basis,³⁷ but there are some states that do.³⁸ Moreover, the Model Rules, as currently interpreted, require lawyers to carry out "noisy" withdrawals from representation—withdrawals accompanied by notification to adverse parties that the lawyer disavows prior assertions on the client's behalf—when the lawyer learns that those assertions are fraudulent and the client will not correct them.³⁹

30. Charles W. Wolfram, *Modern Legal Ethics* § 6.3.1 (1986).

31. Model Code, *supra* note 14, DR 4-101(A).

32. Model Rules of Prof'l Conduct R. 1.6 (1983) [hereinafter Model Rules].

33. Model Code, *supra* note 14, DR 4-101(A).

34. A related doctrine in the law of attorney-client privilege, the "crime-fraud exception," makes clear that statements made by the client in the course of using the lawyer's services to further a crime or fraud are not privileged. *See* Wolfram, *supra* note 30, § 6.4.10.

35. Model Code, *supra* note 14, DR 4-101(C)(3).

36. Model Rules, *supra* note 32, R. 1.6(b)(1).

37. Both provisions are phrased permissively. The comment to Rule 1.6 explicitly states that "[a] lawyer's decision not to take preventive action permitted by [this section] does not violate this Rule." *Id.* R. 1.6 cmt. Sobelson observes that footnote 16 to DR 4-101(C)(3) seems to suggest that disclosure could sometimes be obligatory, but he also comments that "[t]he exact persuasive force of a footnote is not clear." Sobelson, *supra* note 27, at 739 n.180; *see* Model Code, *supra* note 14, Preamble n.1.

38. States imposing mandatory duties of disclosure include Florida, Illinois, New Jersey, and Virginia. The relevant provisions are excerpted in Stephen Gillers & Roy D. Simon, Jr., *Regulation of Lawyers: Statutes and Standards* 76-78 (1995). For a state-by-state tabulation of rules prohibiting, permitting, or requiring disclosure of otherwise confidential information revealing the client's criminal or fraudulent conduct, *see* Restatement of the Law Governing Lawyers, § 117B Reporter's Note (Proposed Final Draft No. 2, 1998).

39. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992); *see* Model Rules, *supra* note 32, R. 1.6 cmt.

Second, both the Model Code and the Model Rules prohibit lawyers from making false statements of fact, or knowingly using false evidence, in the course of their representation of clients.⁴⁰ These duties quite clearly prevent lawyers in civil cases from making assertions that they know to be false, or offering testimony (at least from witnesses other than the client himself) that they know to be false.⁴¹ Just how far these duties reach in criminal cases may be debated, but the Model Rules plainly are meant to impose obligations in criminal as well as civil cases.⁴²

Third, both the Model Code and the Model Rules also have provisions authorizing, and in fact requiring, disclosure to correct client perjury. The Model Code's provision contains an exception that seems to swallow the rule, so that under the Code, lawyers seemingly could report that their clients intended to commit perjury—as a future crime—but could not correct it after it occurred.⁴³ Under the Model Rules, on the other hand, while lawyers ordinarily cannot report their clients' intention to commit perjury as a future crime, because normally perjury does not result in anyone's death or substantial bodily harm, they can, and apparently must, take "reasonable remedial measures" to correct it once it has happened—even at the cost of disclosing confidential communications, and even in criminal cases.⁴⁴ This is what Ms. Washington threatens to do at the end of the dialogue (L28), and in those jurisdictions that follow the Model Rules, what she threatens is no more than her duty.

40. Model Code, *supra* note 14, DR 7-102(A)(4) & (5); Model Rules, *supra* note 32, R. 3.3.

41. See Model Rules, *supra* note 32, R. 3.3 cmt.

42. The comment to Rule 3.3 states: "The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances." *Id.* R. 3.3 cmt. It goes on to acknowledge, however, that some jurisdictions have interpreted constitutional safeguards for criminal defendants as giving defendants a right to insist that counsel present their testimony even when the lawyer knows it is false, and states that "[t]he obligation of the advocate under these Rules is subordinate to such a constitutional requirement." *Id.*

43. The provision in question is DR 7-102(B)(1), which begins by declaring that "[a] lawyer who receives information clearly establishing that . . . [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal," and then—by virtue of a 1974 amendment—declares that this obligation does not apply "when the information is protected as a privileged communication." Model Code, *supra* note 14, DR 7-102(B)(1). ABA Ethics Opinion 341 completed the evisceration of this disclosure duty by interpreting the words "privileged communication" here to include all confidential information under DR 4-101. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 341 (1975); Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 377-78 (5th ed. 1998). Gillers notes, however, that "[a] majority of jurisdictions refused to subscribe to the reversed priorities of the 1974 amendment." *Id.* at 378.

44. Model Rules, *supra* note 32, R. 3.3(a)(4) & cmts.

Fourth, both the Model Code and the Model Rules permit lawyers to disclose confidential information when necessary to protect themselves against charges of misconduct.⁴⁵ It is notable that these charges need not be made by the erstwhile client; instead, the lawyer may disclose the client's confidential communications to demonstrate to a prosecutor, for example, that she (the lawyer) was not in league with the client in some improper scheme.⁴⁶ Moreover, a Model Rule comment indicates that the "charges" need not have ripened to the stage of litigation or prosecution; the lawyer may disclose information in order to prevent matters from ever reaching such a point.⁴⁷

Fifth, lawyers may make disclosures if such disclosures are impliedly authorized as necessary to the representation.⁴⁸ If the lawyer believes that a particular matter must be disclosed in the course of representation in order to achieve the client's goals, for example, the lawyer may do so without explicit authorization. Although clients can certainly countermand such implicit authority, lawyers will frequently exercise this discretion in circumstances where clients will not be able to object until, from their point of view, it is already too late.⁴⁹

Sixth, lawyers may make disclosures with the client's consent.⁵⁰ As a matter of theory, this is not an exception to client confidentiality at all, because no one questions that clients can waive confidentiality whenever they wish. But in practice, this may be an important limit on confidentiality, because lawyers have substantial power to press, or even coerce, their clients into giving such consent. The client whose lawyer threatens to withdraw from the case unless the client authorizes some disclosure, for example, may justly feel that the confidentiality of his communications is less than absolute.⁵¹

45. Model Code, *supra* note 14, DR 4-101(C)(4); Model Rules, *supra* note 32, R. 1.6(b)(2).

46. See Model Rules, *supra* note 32, R. 1.6 cmt.

47. *Id.* ("The lawyer's right to respond arises when an assertion of such complicity has been made.")

48. *Id.* R. 1.6(a). The Model Code contains a similar provision, but only in an Ethical Consideration. Model Code, *supra* note 14, EC 4-2 (disclosure permitted "when necessary to perform [the lawyer's] professional employment").

49. As Sobelson notes, if a client attempted to restrict such disclosures so sharply that the lawyer could not competently handle the matter, the lawyer would be obliged to withdraw. Sobelson, *supra* note 27, at 726-27; see Model Code, *supra* note 14, DR 2-110(B)(2) (requiring withdrawal if "continued employment will result in violation of Disciplinary Rule") & DR 6-101 (regarding "Failing to Act Competently"); Model Rules, *supra* note 32, R. 1.16(a)(1) (providing for mandatory withdrawal if "the representation will result in violation of the rules of professional conduct") & R. 1.1 ("A lawyer shall provide competent representation to a client.")

50. Model Code, *supra* note 14, DR 4-101(C)(1) (permitting disclosure "with the consent of the client or clients affected, but only after a full disclosure to them"); Model Rules, *supra* note 32, R. 1.6(a) (permitting disclosure if "client consents after consultation").

51. The grounds on which lawyers can seek to withdraw from a case—and so the

This is not a complete catalogue.⁵² Moreover, no complete catalogue of the limitations the Model Code and Model Rules place on confidentiality is possible, for the laws of confidentiality and privilege are always subject to development and reconsideration, just as other laws are. This proposition is vividly illustrated by the continuing litigation pursued by Kenneth Starr over the dimensions of attorney-client privilege in the relationships between government attorneys and officials.⁵³ Given this inescapable uncertainty, it is impossible to fully and precisely describe the confidentiality of client communications. Even leaving that aside, it is clear that any reasonably comprehensive statement of the law of confidentiality must include a number of qualifications on the scope of confidentiality permitted by the laws and rules of ethics.

III. ADVISING THE CLIENT ABOUT CONFIDENTIALITY

It follows from what we have said in Part II that Ms. Washington's advice about confidentiality was incomplete and inaccurate. It does not necessarily follow that she should have said something different. To decide whether she should have chosen other words, we might begin by considering whether there are ways to make Ms. Washington's statement that "everything you tell me is confidential" more accurate without making radical changes to the basic approach she uses. Consider the following possibilities:

(a) "Everything you tell me is confidential as provided by law." That statement may be accurate, if "confidential as provided by law" actually means "confidential to the extent provided by law," but it is hopelessly obscure.

(b) "Everything you tell me is confidential to the extent provided by law." This statement avoids some of the ambiguity of the previous formulation, but the problem with this comment is that if the client

circumstances in which lawyers can threaten their clients with this consequence—are quite numerous. See Model Code, *supra* note 14, DR 2-110; Model Rules, *supra* note 32, R. 1.16.

52. Some important information provided by clients to their lawyers—for example, the client's identity—is normally not treated as confidential at all. Sobelson, *supra* note 27, at 716. Even otherwise confidential information may also be revealed in circumstances besides those cited in the text, for example, when required by some law outside the ethics rules. Model Code, *supra* note 14, DR 4-101(C)(2) (authorizing disclosure when "required by law"); Model Rules, *supra* note 32, R. 1.6 cmt. ("Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such supersession.").

53. See, e.g., *In re Lindsey* (Grand Jury Testimony), 158 F.3d 1263 (D.C. Cir., 1998), *cert. denied sub nom.* Office of the President v. Office of Indep. Counsel, 525 U.S. 996 (1998). For another example of the Independent Counsel's challenges to attorney-client privilege, this one unsuccessful, see *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (declining to allow attorney-client privilege to end with the death of the client).

really hears it he will know that he hasn't been told anything; whether his words are confidential at all depends on what "extent" of protection the law provides, and the lawyer hasn't actually said anything about that.

(c) "I want you to know that, of course, everything you tell me is confidential between us to the full extent provided by law." This statement, delivered with emphasis and a sincere expression, might lead the client to believe that he had just been assured of confidentiality, while at the same time the lawyer could accurately say that she had promised only what the law allowed. This gap between what is said and what is heard is not a virtue.

(d) "Everything you tell me about what has happened will be confidential between us." This statement reflects an important qualification on confidentiality—namely that the client's statements of criminal future intentions may not be confidential. As such, it is more accurate than the version in (a), which omitted this and all other qualifications. But the new formulation is still not accurate. It too omits the other qualifications,⁵⁴ and it might be taken to imply that nothing the client says about future intentions is confidential, when, in fact, information the client provides about his lawful future plans and actions *is* protected by confidentiality.

We could go on inventing and critiquing variations of these assurances. No statement will be perfect, for it is simply not possible to describe the rules on confidentiality completely, clearly, and accurately in one or two sentences. To progress further, we must first step back to recognize what purposes advice about confidentiality fulfills in a lawyer-client interview. Then we will be in a position to consider what kind of advice can best achieve those purposes.

One purpose of such advice is to tell the client about the law that governs his communications with the lawyer. So far, we have been using the performance of this function as the criterion for assessing Ms. Washington's advice and the variations on it. As a general proposition, one of the lawyer's responsibilities in the course of representing a client is to inform the client of the law bearing on his situation.⁵⁵ It seems reasonable that the lawyer's responsibilities on this score should also include informing the client of the law bearing on the client's communications with the lawyer.

54. In some cases, moreover, what the client says about his past conduct may reveal that he is engaged in continuing criminality, in which case even information about past conduct may be subject to disclosure via the "future crime" exception. For a critical appraisal of this basis for disclosure, see Sobelson, *supra* note 27, at 749-52.

55. Model Code, *supra* note 14, EC 7-8 ("A lawyer should advise his client of the possible effect of each legal alternative."); Model Rules, *supra* note 32, R. 1.4 (requiring a lawyer to keep the client "reasonably informed about the status of a matter" and to "explain a matter to the extent reasonably necessary to permit . . . informed decisions").

The second purpose, however, is quite different. Assurances of confidentiality may be needed to encourage clients to tell the truth to their lawyers. Clients may be less likely to reveal damaging information—or helpful information that clients mistakenly think is damaging—if they do not believe their lawyers will keep what they said confidential. Clients, however, might not know or assume such confidentiality exists unless their lawyers explicitly tell them so. The lawyer's assurance of confidentiality may also serve as a way of winning the client's trust; if clients do not trust their lawyers, they surely will not communicate freely with them. It is worth remembering that lawyers can use reassurances of confidentiality strategically (which is not to say "improperly") by reminding clients of this protection at the very moments when clients are showing reluctance to speak.

Certainly, there are many reasons for clients to distrust their lawyers. Aside from the intrinsic difficulty of discussing sensitive material with any stranger, lawyer-client relationships frequently present other, potentially significant barriers that need to be overcome. In the encounter between Ms. Washington and Mr. Pojolan, for example, lawyer and client differ in ethnicity and nationality. The shock Ms. Washington seems to express in responding to the client's revelations suggests that they differ in social experience as well—that Ms. Washington is committed to a life guided by the law, while her potential client has lived more tumultuously. There may be many other differences as well, both in our imagined dialogue and in actual lawyer-client relationships.⁵⁶ Such differences may actually be a source of strength in the relationship, and if they are instead a source of difficulty, we believe they usually can be dealt with—but they confirm the wisdom of shaping lawyers' interactions with their clients so as to build client trust as effectively as possible.

Both of these purposes of advice about confidentiality make sense. Each, however, is subject to important qualifications. Consider first the goal of informing the client of the law bearing on his situation—certainly, as a general proposition, an important objective. The lawyer's duty in this regard, however, is not to tell the client every legal consideration that could possibly bear on the client's situation, but rather to "explain . . . to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁵⁷ There is little point in raising issues that are very unlikely to bear on a client's case. In fact, there is a good reason *not* to provide such extraneous information: the lawyer's job is to provide expert information in clear fashion to a layperson, not to turn that layperson

56. In our dialogue, one point on which lawyer and client do *not* differ is language. In reality, in immigration cases and elsewhere, language barriers may vastly complicate communication.

57. Model Rules, *supra* note 32, R. 1.4(b).

into a lawyer. Too much information can confuse rather than enlighten.

The goal of building client trust is also subject to qualification. Fred Zacharias has pointed out the paucity of "empirical research testing the benefits of strict confidentiality and the validity of its justifications."⁵⁸ As he observes, "[e]ven if a lawyer makes a good faith effort to explain the rules to clients, the clients are likely to remain confused at least as to details."⁵⁹ In any event it is hardly certain that a lawyer's assertion to most clients that confidentiality is unqualified is central to the clients' willingness to speak frankly.⁶⁰ In addition, it is not clear that clients actually believe lawyers provide absolute confidentiality.⁶¹ If distrust is endemic, arguably the best response is not false denial but rather a candid discussion, both of the possibility of clashes between lawyer and client and of the lawyer's ethical prerogatives and duties should such a clash arise.⁶² We certainly do not endorse such dialogues as a routine step in initiating a lawyer-client relationship, but there is, again, little empirical evidence to support judgments either way.⁶³

Moreover, these two functions—informing the client of the applicable law and encouraging truthful communication—if taken to extremes, plainly call for very different kinds of lawyer advice about confidentiality. To describe the law of confidentiality more or less fully would require extensive disclosures; Roy M. Sobelson has developed precisely such a detailed statement. Sobelson argues that "[b]ecause a truly accurate disclosure is so important, and likely to be fairly lengthy, to the extent possible it should be made in a written form, submitted to the client prior to the interview, complete with a space for the client to indicate his understanding of the terms."⁶⁴ His suggested form begins with the following admonition:

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

58. Fred C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351, 353 (1989).

59. *Id.* at 365.

60. *See id.* at 386 (reporting on Zacharias' survey finding that only 15.1% of laypeople surveyed would withhold information "if the lawyer 'promised confidentiality except for specific types of information which he/she described in advance'"). *But cf. id.* at 395 (reporting survey evidence that confidentiality exceptions might deter 10-25% of clients from confiding in lawyers).

61. *See id.* at 394.

62. *See* Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 Geo. L.J. 1015, 1032-33 (1981).

63. We do, however, see candid discussion of limits on confidentiality as valuable when those limits are really at issue in a particular case. *See infra* notes 81-85 and accompanying text.

64. Sobelson, *supra* note 27, at 772.

WILL SIGNIFY YOUR UNDERSTANDING OF THE
MATTERS STATED HERE.⁶⁵

The form goes on to spell out the duty of confidentiality and then identifies five instances in which even confidential information isn't fully confidential (for example, when information must be revealed in discovery).⁶⁶ It continues by identifying five categories of information normally not covered by confidentiality at all (including the client's identity and statements made to obtain the lawyer's services in unlawful activity), points out four situations in which the lawyer may be "FORCED to reveal information" (including compliance with court orders, correction of client perjury, and prevention of future crimes by the client), and finally states the exceptions for lawyer self-defense and for suits to collect the fee the client owes the lawyer.⁶⁷ The form ends by saying: "IF YOU HAVE READ THE ABOVE DOCUMENT AND AGREE TO BE BOUND BY ITS TERMS, PLEASE SIGN BELOW."⁶⁸

Ironically, even this form is not exhaustive; it does not, and cannot, spell out the details of the many confidentiality exceptions to which it refers. But it does seem safe to say that this form offers advice that, in many respects, most clients would not need (most clients, for example, probably have no reason to want to keep their own identity secret). In addition, this form may become a source of confusion and distraction at the very beginning of the lawyer-client relationship, a point at which other matters—above all, hearing the client's story and concerns—should take precedence. We believe that a client confronted with this elaborate set of limits on confidentiality will not be likely to emerge reassured about the privacy of his communications with his lawyer.

We suspect, finally, that requiring a client to focus on, and sign a form accepting, these limitations before any relationship has been established may imply to the client that the lawyer fears the client will soon run afoul of the limits on confidentiality. That implication is not consistent with our starting presumption that clients are entitled to respect, and some clients may well feel it as an affront.⁶⁹ The impact of such an initial encounter seems likely to make the subsequent relationship distant and cautious, rather than close and trusting.

On the other hand, advice that would be unqualifiedly reassuring might have to characterize confidentiality as absolute. Anthony Amsterdam, for example, has offered a very firmly worded model statement about confidentiality for use in criminal practice. He argues that in the early stages of the relationship between the lawyer and a

65. *Id.*

66. *Id.* at 772-73.

67. *Id.* at 773.

68. *Id.* at 774.

69. We thank Tanina Rostain for pointing this out.

criminal defendant, it is hard for the lawyer to demonstrate concretely that she deserves the client's trust. One of the few tools available to the lawyer, Amsterdam suggests, is an emphatic assurance of confidentiality. He proposes:

Now, I am going to ask you to tell me some things about yourself and also about this charge they have against you. Before I do, I want you to know that everything you tell me is strictly private, just between you and me. Nothing you tell me goes to the police or to the District Attorney or to the judge or to anybody else. Nobody can make me tell them what you said to me, and I won't. Maybe you've heard about this thing that they call the attorney-client privilege. The law says that when a person is talking to [his] [her] lawyer, whatever [he] [she] tells the lawyer is confidential and secret between the two of them. This is because the law recognizes that the lawyer's obligation is to [his] [her] client and to nobody else; that the lawyer is supposed to be 100 per cent on the client's side; that the lawyer is only supposed to help [his] [her] client and never do anything—or tell anybody anything—that might hurt the client in any way. The District Attorney is the one who is supposed to represent the government in prosecuting cases; and the judge's job is to judge the cases. But the law wants to make sure that—even if everybody else is lined up against a defendant—there is one person who is not supposed to look out for the government but to be completely for the defendant. That is the defendant's lawyer. As your lawyer, I am completely for you. And I couldn't be completely for you if I were required to tell anybody else the things that you say to me in private. So you can trust me and tell me anything you want without worrying that I will ever pass it along to anyone else because I won't. I can't be questioned or forced to talk about what you tell me, even by a court, and I am not allowed to tell it to anyone else without your permission because I am 100 per cent on your side, and my job is to work for you and only for you; so everything we talk about stays just between us. Okay?⁷⁰

We consider this example an impressive combination of giving advice about the law, presented in extremely clear language, while laying the building blocks of the relationship with the client. But the assurances this statement offers go beyond what we believe can be sustained. Certainly this is true if even criminal defense lawyers can be required to correct client perjury and are expected to "know" when perjury has been committed. It might be argued that this advice is still not seriously inaccurate, because the chances that the lawyer will actually come to possess enough information to know that her client is lying are very slight.⁷¹ We do not quarrel with a demanding test for

70. Anthony G. Amsterdam, 1 *Trial Manual 4 for the Defense of Criminal Cases* § 80 (1984) (used with permission from American Law Institute—American Bar Association Commission on Continuing Professional Education).

71. Monroe Freedman sees few instances where confidentiality should be breached, but because of the strong justification for those exceptions (for example, to

knowledge, as we have already explained.⁷² But even a demanding test will sometimes be satisfied. In any event, that is not the only difficulty with this statement.

A further problem is that the statement makes no mention of the situations in which a lawyer has discretion, though not an obligation, to reveal information. It might be argued that the lawyer can still promise all that this statement does, because even if the lawyer has the discretion to disclose information in various other circumstances, she is not bound to exercise her discretion that way. The lawyer who gives advice like this would do so in good faith if she was herself committed, for example, never to use her discretion to (1) report future crimes her client intends to commit; (2) reveal confidential information to defend herself against a charge of ineffective assistance of counsel; or (3) reveal confidential information to defend herself against a claim of conspiracy with her erstwhile client. But we cannot believe that most lawyers are prepared to forswear such discretion altogether, and if they are not, they cannot uphold all that this statement says.

Because we know so little, empirically, about how clients respond to confidentiality statements, it is impossible to reach absolute conclusions about the best advice on confidentiality. Nevertheless, we suggest that the problems in this area can be addressed most effectively if we recognize that different kinds of advice are appropriate at different points in the lawyer-client relationship.⁷³ We suggest, in particular, that lawyers should distinguish between the advice they give at the start of the relationship and the advice they are prepared to give later on.

At the start of the relationship, we believe lawyers should presume that their clients are honest and well-intentioned enough to make it unlikely that any of the exceptions to confidentiality will come into play. Why should lawyers start from a presumption of client honesty and decent intentions? If all clients were honest and good, this presumption would be accurate (and unnecessary), but angels rarely seek legal representation. It seems likely, in fact, that most clients, being human, find complete candor with their lawyers very difficult, and that many clients, again being human, harbor at least some ill intent towards others. Nonetheless, we think our presumption is the

save a life) and the great unlikelihood that they will actually have to be invoked, he would not inform clients of their existence. Freedman, *supra* note 5, at 121-22.

72. See *supra* note 8 and accompanying text.

73. Different kinds of advice may also be appropriate in different types of lawyer-client relationships. For example, experienced clients certainly may not need as much review of fundamentals as new entrants into the legal realm. Moreover, some matters on which lawyers are retained are so routine that no advice on confidentiality may be needed at all, or the chance of any qualifications on confidentiality ever becoming relevant may be so remote that all mention of these qualifications can be omitted. We do not, however, believe these exceptions are the rule.

right one. We say this partly because we believe that many less-than-perfect clients will ultimately conform to this presumption in their dealings with their lawyer if they have the opportunity to develop a trusting relationship with her. More importantly, however, we see a presumption like this as fitting the fundamental characterization of the lawyer's role, namely that the lawyer is a helper, who helps because she respects her clients.⁷⁴

Given that starting presumption, it would be possible to defend the lawyer's decision to provide unqualified assurances of confidentiality at the start of the relationship, on the lines of Ms. Washington's comments. After all, the argument goes, if clients won't encounter these exceptions, why mention them at all? But we think that this position is ultimately mistaken. It is, after all, *possible* that confidentiality exceptions will actually come to matter in any given case, and while we have presumed that that possibility is not a likely one, we would not describe it as "remote." If there is a real chance that exceptions will ultimately affect the client's case, then a complete failure to mention that such exceptions exist entails a form of deception. To respect another person, we believe, involves assuming that the other person will benefit from knowledge and not be corrupted by it. Here, it is a fact that lawyer-client confidentiality is incomplete, and we do not think this should be denied. We are not altogether sure that it even can be denied; as we have already seen, there is modest empirical evidence indicating that clients do not believe lawyers honor confidentiality absolutely.⁷⁵

At the initial stage of the relationship,⁷⁶ therefore, we recommend that the lawyer say something like this:

For me to understand your case and figure out whether I can help you, I need to know the facts. The law realizes this and realizes that it is important for you to be able to speak to me fully and frankly. For that reason, ordinarily everything you tell me is confidential. That means I won't, and can't, repeat it without your consent. Now, you should know that this rule, like most rules, has some exceptions, and if it turns out to be necessary as we go along I will explain these to you in detail. But normally, as I've already said, what you tell me—even about things that may be embarrassing or even illegal—is

74. See *supra* text accompanying note 4.

75. One reason for clients' disbelief may be that many people learn about confidentiality from sources other than their lawyers, such as television. See Zacharias, *supra* note 58, at 383.

76. Here and elsewhere in our discussion, timing is critical. While the dialogue at the beginning of this chapter, see *supra* note 1, goes from introductions to painful revelations in the space of a few pages, in reality lawyer-client interactions commonly occur in several meetings over a considerable period of time. In general, we believe that at the beginning of the relationship lawyers can rightly emphasize building trust more than complete disclosure; in later encounters, there will be more room, and sometimes there will be more need, for more painful and frank discussions.

confidential. That lets us talk frankly, which is what we need to do, and that's what I'd like to begin doing now.

This statement avoids asserting absolute confidentiality—the problem of the Amsterdam formulation.⁷⁷ It also avoids piling qualification on qualification—the problem of the Sobelson formulation.⁷⁸ Additionally, we believe, it offers a way to utilize the advice about confidentiality as a building block in the relationship, both by emphasizing the very substantial privacy lawyer and client do enjoy and by promising the lawyer's aid in understanding any limits on privacy if understanding them becomes necessary.⁷⁹ Finally, we believe this advice, by acknowledging but not belaboring the existence of exceptions to confidentiality, comports with the presumption of client honesty and decent intentions.⁸⁰

We do not, however, suggest that lawyers should embrace this presumption blindly. Their hopes may be disappointed, and when this

77. See *supra* text accompanying note 70.

78. See *supra* notes 64-68 and accompanying text.

79. This advice also promotes the lawyer's search for truth in another way, namely by repeatedly emphasizing that the lawyer needs the client to be candid so that she can effectively represent him. This exhortation deserves a moment's examination, because we have already argued that sometimes a client would be better off if the lawyer did not know everything. See *supra* notes 5-8 and accompanying text. We believe it is appropriate not to raise this possibility at the start of the relationship, in part because it would be inconsistent with the presumption of client honesty to suggest at the beginning the possible value of dishonesty. More fundamentally, we do not think that it is ever appropriate to suggest to the client that he might be better off lying, because it is hard to see how such a suggestion could be made without directly increasing the chance of perjury. While we would avoid explicitly stating to a client that it is always in his interest to tell us everything—because that is not quite true—we endorse the kinds of statements in the text which make a similar, though not quite so blunt, argument.

80. As we have already recognized, there are circumstances where a lawyer might conscientiously decide to skirt the truth in her encounters with her client. See *supra* notes 15-24 and accompanying text. The discretion to act in this way, as we have analyzed it, does not extend to avoiding explicit mention of facts that are staring the lawyer in the face—facts which, realistically, she already “knows”—but it does embrace techniques that limit the chance that the lawyer will ever come close to knowledge. One such technique might be a clear and pointed explanation of confidentiality exceptions early in the relationship. An immigration lawyer, for example, might say to her client:

I want to understand what happened to you, and our conversations about what happened to you are confidential. But when you file your application, you will have to give the government information about many of the same things that you and I will be discussing, and what you tell me about these things you may have to tell the government too.

This statement is accurate as far as it goes (it is still, of course, far from a comprehensive discussion of confidentiality limits), and it does not invite the client to lie, but it certainly might encourage such behavior. At the same time, we share Freedman's sense that this kind of advice at the start of a lawyer-client relationship may critically undermine the relationship itself. Freedman, *supra* note 5, at 109-13. This is a heavy price to pay and a further indication that conscientious lawyers should think long and hard before embarking on such a course.

happens, or seems likely to happen, the lawyers may have the obligation, or at least the discretion, to depart from confidentiality.⁸¹ At this point, we believe the lawyer should explain the matter to the client by giving the client advice that explicitly calls to his attention whatever limits on confidentiality are being approached. Otherwise, the lawyer may not only betray the client but do so behind his back.⁸²

We also believe, however, that the lawyer should aim to provide this supplemental advice about confidentiality *before* the breach of confidentiality becomes necessary. Doing so may, of course, teach the client to be more discreet and assist him in carrying out his plans without facing disclosure and obstruction—and perhaps selfishly protect the lawyer from facing a moral dilemma that needs to be faced. For example:

Client: I am so angry with my father about the way he's ruining our business that I just can't take it any more. I've just got to get my money out somehow. I think the only way I can do it is . . .

Lawyer: [Interrupting] I want you to understand that if you reveal information to me that indicates you are going to commit a crime I may have the right to reveal it to the authorities.

It may not really be possible to head off information this way, but in any case, we do not mean to suggest such a use of advice about confidentiality as a shield against knowledge. Indeed, this lawyer's crude intervention suggests that she is perilously near already "knowing" what she is trying not to hear. We recognize, however, that even if lawyers do not aim for this result, and do not aim their advice as this lawyer has, they may sometimes achieve the same result unintentionally. This we accept, in part because we believe lawyers should, in the words of the Model Code, "resolve reasonable doubts in favor of [their] client."⁸³ We also accept this risk because we see positive value in the lawyer-client conversations that such disclosures may trigger. Although we are very skeptical about the value of extensive dialogue regarding confidentiality limits at the start of the relationship, we think that lawyers' candid discussion of confidentiality exceptions—when they are really at issue in a

81. Determining when a confidentiality qualification comes into play is inevitably a matter for judgment. We offer two general caveats. First, lawyers should be very reluctant to infer the existence of such problems from generalizations alone (for instance, Rusty Sabich's assumption that all criminal defendants lie, *see supra* text accompanying notes 10-11); they should wait for developments in their particular case. Second, lawyers should not assume that the client's initially false, or implausible, story excludes him from the presumption of honesty; we presume that clients are capable of achieving honesty over time, not that they initially tell all.

82. We recognize that there are probably some cases where covert betrayal is in fact absolutely necessary and just—for example, where the lawyer discloses her client's intention to commit a murder and must do so in secret to avoid being murdered herself.

83. Model Code, *supra* note 14, EC 7-6.

particular case—may actually deepen the encounter between lawyer and client. We see such disclosure as potentially forming the starting point for the kind of “moral dialogue” between lawyer and client that may cause the client to refrain from the type of conduct that society needs disclosed and obstructed.⁸⁴

Finally, we see such disclosure to head off client misconduct as consistent with Model Rule 1.2(e). This provision obliges the lawyer who “knows that a client expects assistance not permitted by the rules of professional conduct or other law . . . [to] consult with the client regarding the relevant limitations on the lawyer’s conduct.”⁸⁵ As we have already indicated, we recommend disclosure not only when the lawyer anticipates being obliged to breach confidentiality, but also when she anticipates exercising an authorized discretion to do so. In both contexts, however, we see the lawyer as acting to prevent a rupture of the relationship before it becomes irrevocable. We hope for dialogues like this:

Client: I am so angry with my father about the way he’s ruining our business that I just can’t take it any more. I’ve just got to get my money out somehow. I think the only way I can do it is to start fiddling the books.

Lawyer: I think I understand how upsetting it must be to see what you’ve worked for being undermined. But do you really think fiddling the books is a solution?

Client: Yes! Yes, I do! I can do it, and no one will ever be the wiser.

Lawyer: I don’t think you can really count on that.

Client: Why not? You’re the only one who knows, and all you have to do is just not mention it in any of our documents.

Lawyer: Because fiddled books matter to people, and sooner or later those people come asking questions. Even if I could “just not mention it,” if you get in trouble with the IRS, say, because some income turns up missing, or your bankers can’t collect on a loan, and they come after you, well, they may come after me for information, and—remember when I told you at the start of our working together that there were some exceptions to lawyer-client confidentiality? Well, this is one.

Client: I can’t believe I’m hearing this.

84. See Stephen L. Pepper, *Autonomy, Community, and Lawyers’ Ethics*, 19 Cap. U. L. Rev. 939, 948-49 (1990) (supporting a lawyer-client moral dialogue that is “open and honest and leave[s] room for meaningful client decision”). We will discuss the proper contours of moral counseling elsewhere in our book. See *supra* note 1.

85. Model Rules, *supra* note 32, R. 1.2(e).

Lawyer: You don't have to like it, and for that matter I don't have to like it either. But it's the law. You can't be sure you'd get away with this idea, and that's one really good reason why you and I should try to figure out some better solution.

IV. ADVICE ABOUT THE LAW

The encounter between Ms. Washington and her client might have turned out very differently if she had responded to the revelation of his drug-related activities (first hinted at in C11 in the opening dialogue of this chapter) by explaining the relevant law. Perhaps the conversation would have proceeded like this:

L12*: Mr. Pojolan, this may be quite a sensitive matter for the INS. You see, they don't much care if you broke Iraq's economic laws, but they care a lot about some other matters.

C12*: Sure, but like I told you, it was basically just regular stuff.

L13*: Yes, I understand. But you should know that one thing the INS cares about a lot is drugs. If you were involved in some kind of drug crime, your chances of getting asylum go way, way down.

C13*: Do you mean if someone smoked a little pot he couldn't get asylum?

L14*: Even that would not be a plus. But what would be a big problem is if you ever helped sell any significant quantity of drugs, whether it was pot, LSD, heroin, or anything else along those lines.

C14*: Well, that sounds really unfair to me. But it doesn't matter, because I've never had anything to do with drugs.

The lawyer's role in this dialogue may actually be fairly guileless. The classic illustration of the use of legal advice to mold client testimony, however, features interviewing that is entirely strategic. In *Anatomy of a Murder*,⁸⁶ the defense attorney, Paul Biegler, has already heard his potential client, Lieutenant Manion, admit that he killed the dead man. As Biegler tells us:

I had reached a point where a few wrong answers to a few right questions would leave me with a client—if I took his case—whose cause was legally defenseless. Either I stopped now and begged off and let some other lawyer worry over it or I asked him the few fatal questions and let him hang himself. Or else, like any smart lawyer, I went into the Lecture.⁸⁷

Then Biegler explains “the Lecture”:

The Lecture is an ancient device that lawyers use to coach their

86. Robert Traver, *Anatomy of a Murder* (St Martin's Press 1958).

87. *Id.* at 32.

clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical and bad, very bad. Hence the Lecture, an artful device as old as the law itself⁸⁸

In this particular case, the Lecture consists of an explanation of the absolute necessity of presenting a plausible legal defense and the elimination, one by one, of all the available defenses except one—insanity. Lieutenant Manion takes the bait, and Biegler explains what an insanity claim is and how long someone acquitted on this basis might spend in a mental hospital. After one last enticement, in which Biegler appeals to his client's willingness to take a "calculated risk," Biegler is finished. He waits. His client utters the magic words: "Maybe," he said, "maybe I was insane."⁸⁹ After Manion manages, with some prompting, to provide suitable answers to the various questions entailed in this defense (for example, by "revealing" that he only assumes he killed the victim, because he can't remember the crucial moments), Biegler is satisfied that his client has a defense.⁹⁰

Interviewing of this sort has no place in a relationship in which the lawyer aims to learn the truth. But we cannot simply forbid lawyers to explain the law to their clients. On the contrary, lawyers are *supposed* to explain the law to their clients. In this context, we face an instance of a more general problem, namely the unfortunate truth that knowledge of the law may enable a client to violate it.⁹¹ Here, in

88. *Id.* at 35.

89. *Id.* at 46.

90. *Id.* at 48-49.

91. Both the Model Code and the Model Rules forbid lawyers from counseling or assisting their clients to commit at least some unlawful conduct. Model Code, *supra* note 14, DR 7-102(A)(7) (prohibiting the lawyer from assisting "conduct that the lawyer knows to be illegal or fraudulent"); Model Rules, *supra* note 32, R. 1.2(d) (forbidding the lawyer to assist "conduct that the lawyer knows is criminal or fraudulent"). As Stephen Pepper emphasizes, however, the Model Rule, but not its Code counterpart, also declares that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client." Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 Yale L.J. 1545, 1587 (1995) (quoting Model Rule 1.2(d)).

Pepper has argued that this proviso authorizes a lawyer to discuss the legal consequences of any course of action, including the practical likelihood or unlikelihood of sanctions, regardless of whether the result is in effect to encourage the client to violate the law. *Id.* at 1588-91. Whether or not this reading of the Model Rule is correct—and Pepper notes that some commentators have taken different views, *see id.* at 1589 n.89—he does not believe that lawyers *should* give any and all conceivable advice about law to their clients, regardless of the impact on the legal order. *See generally id.* at 1598-1610 (advocating a "rebuttable presumption that it is generally appropriate for the lawyer to educate the client concerning the law" and urging lawyers to consider the legal issues involved while also engaging the client in a discussion aimed at "assist[ing] the client as a person first and as a legal problem second"). We agree. We would not, for example, inform a perjurious client that one option available to him is to discharge us and find another lawyer to whom he can tell only his perjured story, nor—if the client raised this idea himself—would we inform

Anatomy of a Murder, the particular violation at issue is, essentially, perjury (or some related form of concealment of the truth in a legal context)—to say nothing of perhaps getting away with murder as a result.

As in the context of advice about confidentiality, however, we believe that the tension between truth-seeking and law-advising does not have to be resolved by favoring one value to the exclusion of the other.⁹² Instead, we suggest that, again, timing is crucial. As we will explain when we lay out the basics of interviewing elsewhere in our book,⁹³ the lawyer's first task in eliciting the truth is to hear the client's story as the client wishes to tell it. Her second task is to explore the details of the story the client has told, for example by getting the chronology clear and by looking for related points that the client has not initially mentioned.

In carrying out this second task, the lawyer can and must look for facts that will sustain, or block, particular legal theories that might be relevant to the case. Even this may signal to the client what he should "remember." For example, a lawyer interviewing the victim of an automobile accident will surely want to know the client's physical symptoms; when she asks the client, "By the way, do you have any lower back pain?" the client may speedily invent some.⁹⁴ We think this risk is worth running, because without such specific, and somewhat suggestive, questions, important facts may never be discovered. But we see no need, at this point, for the lawyer to compound the leading effect of her questions by buttressing them with a description of the legal rules she is testing.

Ms. Washington, in the version of the dialogue at the beginning of this chapter, pursues essentially this strategy. Here, the danger is not that the client will invent but that he will deny, and the danger is quite substantial, because it is evident and not surprising that the client

him that he would probably be able to get away with this scheme (even if that were so). But advice to a client about the substantive legal rules affecting his case is far from such danger zones.

92. As with the case with advice about confidentiality, *see supra* note 80, the resolution of the tension between truth-seeking and law-advising may be different if the lawyer is exercising her discretion, within the rules of ethics, not to aim for the truth. Even then, the advice Biegler gives would be unacceptable because it too nearly approaches, if indeed it does not cross, the line of subornation of perjury. On the other hand, the lawyer's advice in the dialogue in this Part (L13*, L14*) might be appropriate. The lawyer in this dialogue, unlike Biegler, does not have a clear indication of what the unpleasant truth actually is; she is by no means so plainly avoiding what she already virtually knows. Moreover, and again unlike Biegler, the lawyer here shows little artifice; she bluntly explains the law to her client but does not elaborately steer him around it.

93. *See supra* note 1.

94. My co-author Ann Shalleck has pointed out such a moment in the movie *Philadelphia*, (Columbia Tristar 1993), where the lawyer portrayed by Denzel Washington responds in this manner after accepting a rather weak personal injury claim.

already suspects drug transporting could be a big legal problem for him. Ms. Washington's job is to get past the client's resistance to telling the truth, and she accomplishes this by using various forms of pressure.⁹⁵ Her job would surely be harder if she first verified the client's suspicions about the legal peril he faced, by explaining exactly what the relevant law provided.

When all of this work is done, however, the process of interviewing and counseling the client is far from over. The client is entitled to know where he stands legally, and that will involve telling him what the facts he has laid out mean, and why. At this point, the client may offer new facts. Perhaps we should say that the client may offer new "facts," to emphasize that these new claims may be false. But we do not assume that all clients will respond by changing their stories. Nor do we assume that any new facts the clients do offer are necessarily false, even if they favor the client's story and contradict earlier accounts the client has given.⁹⁶ Memories are faulty and may actually be refreshed or restored over time. Even if the issue is not one of memory but of veracity, it has often been pointed out that clients may lie out of a misunderstanding of the law and reveal the truth only when they are informed of the law's true provisions.⁹⁷ More generally, we should recognize that clients may not initially trust their lawyers and therefore may lie first, only to tell the truth later.

Another incident in the *Anatomy of a Murder* interview helps illuminate the lawyer's duty when a client's story changes. The defendant, Lieutenant Manion, having learned that killing his wife's rapist cannot be excused on grounds of provocation if the killing is only done when the rape is already in the past,⁹⁸ has an idea of his own for his defense:

The Lieutenant's eyes narrowed and flickered ever so little. "Maybe," he began, and cleared his throat. "On second thought, maybe I *did* catch Quill in the act. I've never precisely told the police one way or the other." His eyes regarded me quietly, steadily. . . .⁹⁹

Biegler rejects this revision of the story, and certainly he has good reason to believe that Manion is lying. But his reason should not be simply that Manion's second story differs from his first. We recognize that by postponing the discussion of the law until after the basic

95. For a discussion of techniques for eliciting the truth, see *infra* Part VI.

96. Contradiction is, of course, not inevitable; sometimes newly-reported facts may simply embellish the details already reported, and sometimes they may be inconsistent with the overall tenor of the earlier story but not actually contradict anything already said.

97. See, e.g., Freedman, *supra* note 5, at 109-10 (offering the example of a client who denied she had committed a killing, because she did not realize that the truthful account she later revealed would demonstrate that the killing was in self-defense).

98. Traver, *supra* note 86, at 37.

99. *Id.*

interviewing is over, the lawyer following our model may increase the chance that she will hear her client assert new facts whose veracity she will have some reason to doubt.¹⁰⁰ We believe it is better for lawyers to take this risk and evaluate their clients' claims with all the data at their disposal—including such features as the narrowing and flickering of the eyes—rather than invite the same possible fabrication to occur earlier or deny the client, later, an understanding of the law under which he lives.¹⁰¹

V. RESPECT AND INQUIRY

How skeptical should lawyers be of their clients' veracity? In the interview excerpt that begins this chapter, Ms. Washington does not set out to uncover the drug delivery problem. Her question about how Mr. Pojolan lived during the six months he waited to get out of Iraq (L10) seems entirely explicable as part of an effort to get a complete account of the hardships he has suffered. But when the

100. We also recognize that by withholding this information until this stage, the lawyer will put those clients who do not understand the law at a disadvantage compared with veterans of the legal system who do understand it. The veterans will be able to produce either relevant truthful information at once, thereby avoiding later questions about their veracity, or false "information" instead, but again more credibly. We do not believe, however, that this inequality should be remedied by routinely offering advice about the law that can so easily encourage people to lie and get away with it.

101. Our position on advice about the law—essentially, that such advice should be given but in a way that reduces the danger of abuse by the client—is also our position on a variety of other steps lawyers will rightly take to insure that their clients' testimony is as informed as possible. The proposed Restatement considers the following forms of witness preparation appropriate, and all of these have a role with those witnesses who are clients as well:

[D]iscussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet.

Restatement, *supra* note 8, § 176 cmt. b. For an example of how to employ such tools without distorting the truth—in this instance, by presenting another witness's account not all at once but through "successive questions that reveal one bit at a time, taking care not to reveal any more than is needed to refresh [the witness's] memory"—see Richard C. Wydick, *The Ethics of Witness Coaching*, 17 *Cardozo L. Rev.* 1, 40-41 (1995).

It deserves emphasis, however, that preparing a client to testify is not the same as interviewing him (though there is certainly some overlap between the two tasks). Some steps that the proposed Restatement also approves, such as "rehearsal of testimony" and "suggest[ing] choice of words that might be employed to make the witness's meaning clear," Restatement, *supra* note 8, § 176 cmt. b, clearly do not have a place in an initial interview aimed at truth, and the same may be true of a number of the other methods cited above.

client responds with his quasi-admission of carrying some stuff that wasn't "regular," Ms. Washington pursues the issue and refuses to let go of it until she has extracted what turns out to be a disastrous admission of drug transporting. Should she have let up earlier?

In many interviews—and to some extent in this one—the question of whether to press or not to press the client probably does not arise. Good interviewing entails hearing the client's story and eliciting relevant details he may have omitted or forgotten. To some extent, such interviewing inevitably tests the client's credibility, for such questioning tests whether the client's original story and subsequent elaborations have the ring of truth. But questions of this sort would be necessary whether or not there was a client credibility issue, so they require no special justification in terms of the principle of respect for client honesty. Ms. Washington, for example, having heard her prospective client strongly hint that he had sometimes transported some sort of illegal goods, could hardly have omitted an inquiry into what these goods were; to realize that the client engaged in some sort of illegal conduct but not check what the conduct was would simply be incomplete.

In many interviews, however, there are probably points at which the client offers information that might or might not be complete. Here, for example, when Ms. Washington presses Mr. Pojolan to clarify what kind of "stuff" he was transporting (L12), he answers, "Well, mostly it was just food, clothes, rugs—really all right, perfectly legal." (C13). This statement is quite clearly incomplete, and Mr. Pojolan goes on to fill in the gaps. But suppose he had answered Ms. Washington's question about his work (L11) by saying: "I drove a truck for them, making pick-ups and deliveries. We carried a bunch of stuff, mostly food and clothes, also some rugs." This answer could be complete and responsive. If that was how it sounded to the lawyer, and if there were no related loose ends that needed further inquiry as a matter of thorough, normal interviewing, then we believe that Ms. Washington would have no reason to press the matter further. She would not need to respond, for example, "All that is no problem. But did you transport any drugs?" because she would have no reason to suspect that he did. Having no reason for such a question, in fact, she probably ought *not* to ask it, both because time is limited, and because random probing for impropriety is disrespectful to the client.¹⁰²

102. We would not, however, consider it "random probing" for her to ask her client, at some concluding point in the interview, whether there are any other problems in his case of which he is aware. Nor, of course, is it random probing to ask a question—for example, "Have you ever been engaged in drug trafficking?"—if the client will probably or definitely have to answer that same question from the other side. But the reason for asking the question in such a context is that someone else is going to ask it anyway, not that some aspect of the client's story independently would have called for further inquiry by his own lawyer. The time and manner of asking questions of this sort might also be different from the approach the lawyer takes to

In taking this position, we agree with Geoffrey Hazard and W. William Hodes who argue in their Model Rules handbook, *The Law of Lawyering*, that normally a lawyer

gives advice, negotiates, and helps consummate transactions on the basis of the facts presented to her by her client, not the facts that a thoroughgoing hostile investigation might reveal. Even where there is room for doubt about some of the details, a lawyer ordinarily demonstrates proper loyalty and zeal by giving a client the benefit of that doubt.¹⁰³

The Model Code suggests a similar principle (though there is no counterpart provision in the Model Rules), when it declares that “[i]n many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.”¹⁰⁴ Put differently, we might say that the lawyer’s duty to the truth requires her to seek it even from her client, but her duty to her client ordinarily requires her not to transmute that search into a search for *lies*.

We also agree with Hazard and Hodes, however, that there is a point at which the failure to recognize a fact becomes a deliberate evasion of knowledge, and at that point, the lawyer is acting improperly.¹⁰⁵ Moreover, there is surely a substantial area between the extremes of treating one’s own client as an adversary and giving him a license to lie. In this substantial area, we believe lawyers have discretion to inquire and generally should do so when they feel they have significant grounds for uneasiness about their client’s account. In other words, while we agree that lawyers should resolve reasonable doubts in favor of their clients, we do not believe that lawyers should passively accept whatever account their client gives so long as it is not definitively proven to be false. They should, in general, ask questions first and give the benefit of the doubt afterwards.¹⁰⁶

In the opening dialogue, Ms. Washington was probably operating in this zone of discretion almost from the moment the topic of the “[ir]regular” shipments came up. The client’s almost immediate request for reassurance about confidentiality signaled his own anxiety

the core task of understanding what has happened to her client.

103. Geoffrey C. Hazard, Jr. & W. William Hodes, 1 *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 403, at INTRO-27 (2d ed. Supp. 1998).

104. Model Code, *supra* note 14, EC 7-6.

105. Hazard & Hodes, *supra* note 103, § 402 at INTRO-26.

106. Here we may differ from Hazard and Hodes. Professor Hodes has written elsewhere that “the lawyer should trust the client all the way up to the point of knowledge that the client is up to no good.” W. William Hodes, *The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of the Law*, 30 *Tex. Tech L. Rev.* 1343, 1355 (1999). We would not see trust as something to be turned on and off in the way this statement might imply; instead, our view is that the lawyer should trust her client to be capable of telling the truth and work with the client to help him do so.

(C12), and the incomplete, but pregnant, answer he gave after receiving this reassurance would not have reassured his lawyer (C13). His response to her next question (C14)—telling her that the truck owner never told him what was in the truck—seems to offer a potential escape from the problem (namely, a defense of ignorance), but the lawyer's next question (L15)—a leading question that tries to lock that defense in¹⁰⁷—elicits the unwelcome news that Mr. Pojolan *does* know what he was carrying. We think a failure to follow up further at this point would have amounted to a deliberate avoidance of knowledge. In short, we believe Ms. Washington was right to pursue this matter, even though her focus on it surely implied that she did not fully accept her client's honesty or entirely accord him the respect an honest person would merit.¹⁰⁸

VI. TECHNIQUES FOR PURSUING THE TRUTH

We come now to the question of techniques for inquiry. When the lawyer believes she must press the client for the truth, how should she do it? In the opening dialogue, Ms. Washington employs several techniques. She reassures her client about confidentiality (more than she should have, as we have explained) (L13, L19). She asks her questions repeatedly, resisting her client's efforts to get her to accept half-answers (L12, L16-L18, and L23). She asks very specific

107. Her question is not ferociously leading. She might have said, for example, "Now this is a very important point. You really don't know what you were carrying, do you, since you were never told?" But what the lawyer does ask is still a leading question, on a point that is far from clear when she asks about it. As such, her question does not fit well in an interview aimed at truth.

Even without resorting to leading questions, lawyers can influence their clients' answers by shading the questions they ask. Wydick reports social scientific findings demonstrating that even slight variations in the phrasing of questions can influence the answers. Wydick, *supra* note 101, at 43. While we do not believe lawyers should ordinarily shape their questions so as to press the client in particular directions, we do not endorse "neutral" phrasing as completely as Wydick may. *See id.* Suppose, for example, that a client says, "I was in a terrible crash. This guy's car slammed into me." A thoroughly neutral, disengaged follow-up question might be, "Can you estimate the speed of the other car at the time of the accident?" But that question might imply that the lawyer does not accept the client's statement that he was in a "crash." The lawyer who wants her client to feel heard and believed needs to respond in the key in which the client has spoken: for example, "How fast was the car going when it crashed into you?" She may need to go on and ask a series of follow-up questions to appraise the client's basis for giving whatever estimate he gave, but her route to the truth should also be a route to a productive relationship with her client.

108. A lawyer who has decided to exercise her discretion to skirt the truth might handle the issues discussed in this part quite differently. She might be slower to inquire about matters on which she is skeptical and correspondingly quicker to resolve doubts in her client's favor. If she did inquire, she might do so in a deliberately slanted way, hoping to elicit the answers she needs rather than those she fears. Such steps have many potential costs, but conscientious lawyers may sometimes believe these costs are less severe than the alternative of eliciting information whose discovery will lead to injustice.

questions (for example, "And how much? How much each time?" (L22)) and sometimes uses closed-ended questions, calling for yes-or-no answers (L17). She asks her questions emphatically when she feels her client is being particularly evasive (L17, L23). Her approach to her client grows less friendly as the client continues to stall on admitting the full truth. When she begins these inquiries, she offers a little reassurance and even a hint of apology for her questions ("I'm not sure I understand. Was some of the stuff you were carrying not what you call 'regular stuff'?" (L12)), but by the end she is peppering her client with specific, grim questions. Near the end she adds sarcasm ("Did you get paid extra for this favor?" (L26)).

Broadly speaking, we approve of all these techniques. When the lawyer feels she must pursue the possibility that her client is lying or evading, she must reckon with the likelihood of client resistance, and her methods of overcoming that resistance may have to be firm or even aggressive. Ms. Washington certainly had ample reason to conclude that her client was being evasive. Moreover, while Ms. Washington was not gentle with her client, she also did not break faith with him. She used no tricks, offered no false promises (except for her unqualified assurances of confidentiality), and made no threats that she could not properly have carried out.¹⁰⁹

While the kinds of techniques Ms. Washington uses are legitimate, we think she could have done a better job. She elicited the truth, but perhaps not the whole truth; conceivably there were mitigating circumstances surrounding Mr. Pojolan's drug transporting or other related immigration issues that would have been worth ascertaining in support of his asylum application, but Ms. Washington's focus seems to have shifted from building his case to demonstrating that he didn't have one.¹¹⁰ Had she avoided that unconscious shift in orientation, she might have learned more by using techniques that were somewhat less prosecutorial in style.

We do not suggest that gentler approaches are always right, because they are not. They do, however, have a great virtue: they are less likely to disrupt the emotional relationship between lawyer and client. Sometimes, a gentler method may also be more effective; some clients may respond only to a lawyer whom they perceive as an ally and may shrink back from revelations to anyone who acts like something else. Additionally, we suspect that a practice of adopting aggressive approaches to one's own client may reflect, or promote, a disposition

109. Her threat not to take the case if the client did not tell her the truth is certainly one she could have carried out, at least unless she were the "last lawyer in town." Lawyers have broad discretion to take or decline cases. See Model Code, *supra* note 14, EC 2-26; Model Rules, *supra* note 32, R. 6.2 cmt.

110. Even if the information Ms. Washington uncovers happens to be fatal, most of the harmful information lawyers learn is probably not fatal, only damaging, and lawyers need to know it in order to mitigate the damage.

not to believe him, and we see that disposition as imperiling the lawyer's performance of her duty to resolve reasonable doubts in the client's favor. We think these considerations support a general preference for using gentler, less confrontational techniques first, rather than methods more characteristic of cross-examination or even interrogation. We do not believe, however, that any techniques consistent with good faith can be ruled out altogether. Instead, we believe that the lawyer should have a broad repertoire of techniques and choose from them in light of the situation before her. We offer here a brief catalogue of such techniques:

(a) *Testing the hypothesis that the client is lying*: Normal, basic interviewing elicits the client's story and then pursues various hypotheses guided by the lawyer's tentative legal theories.¹¹¹ If the issue in a particular case is whether the client can demonstrate that the contractor who built his garage was negligent, for instance, the lawyer would then ask the client about facts that would tend to demonstrate or disprove this theory (for example, how often did the client see the contractor actually on the site, supervising his employees?). Normally in such questioning, the lawyer is not directly seeking to test the hypothesis that the client is lying, but if need be, that can become a central part of the lawyer's focus.

Suppose, for example, that a defendant says he was beaten repeatedly by the police, and the lawyer is uneasy about the truth of this claim. She might reason that if the client really was beaten repeatedly, he should be able to tell a story of, for example, which rooms he was beaten in, by whom, and how many times. Certainly the client's memory of these details may be fuzzy, but if he can offer no details at all, there may be cause for doubting the client's allegations. Similarly, she might reason that an asylum client who says he was tortured during months of confinement in a prison known for its bad sanitation should be able to remember not just his torture but also either the abominable smell that would have assailed him constantly, or the daily routine of the prison; the client who remembers none of this may never have been imprisoned at all.¹¹² The lawyer should not put absolute faith in such inferences, but she should not ignore them either. Techniques such as these may be quite effective, both because they are not bluntly confrontational and because they approach the client's story from angles that a lying client might not anticipate.

(b) *Empathy and Reassurance*: As a general proposition, we believe that a positive relationship between lawyer and client improves communication between them. Broadly, a lawyer is more likely to hear the truth if the client trusts her to stay on his side and not to add

111. For a thoughtful articulation of the ways that lawyers can formulate the hypotheses that will guide their questioning, see David A. Binder et al., *Lawyers as Counselors: A Client-Centered Approach* 145-64 (1991).

112. This example was suggested to me by an INS asylum supervisor.

her condemnation to the judgments of the client's adversaries or of society at large. This remains true even when the required communications become more painful. Building such a relationship is, of course, the function of interviewing and counseling tools, such as empathy. Paying personal attention to the client's well-being can contribute to such trust.¹¹³ Offering nonjudgmental empathetic regard can have a powerful impact as well.¹¹⁴ Expressing approval of, or agreement with, the client's perspectives can also be helpful, though it has important pitfalls.¹¹⁵ Providing clearly-phrased and sympathetically-reasoned explanations of why the lawyer feels the client is not telling the truth, and of how falsehoods may damage the client's interests, may also be valuable. These are important techniques of ordinary interaction with clients, and they are no less important here.

(c) *Role-play and other techniques for client participation:* The techniques mentioned in the previous section build connections between lawyer and client, but they share a common feature that is not necessarily a strength: all of them turn on what the lawyer says to the client. We are impressed with the power of techniques that enable clients to say more, both as tools to affect clients' thinking and as ways to empower the clients in their own cases.¹¹⁶ The lawyer might, for example, ask the client how he would respond to the client's own story if he were on the other side; this is the technique Rusty Sabich's lawyer uses in the excerpt quoted earlier.¹¹⁷ The client might just articulate the arguments, or he might deliver them in role—taking the part of the prosecutor, for example, in an upcoming arraignment.¹¹⁸ Alternatively, the client might be asked to play himself for an audience that he accepts as disinterested, so that he can experience, in the safety of the lawyer's office, the likely reaction to his performance. In all of these settings, clients who may be unable to come to grips with their situation in back-and-forth discussions with the lawyer may find deeper resources of performance and understanding.

113. Amsterdam, *supra* note 70, §§ 77, 79, 88.

114. Binder et al., *supra* note 111, at 40-42; see Thomas L. Shaffer & James R. Elkins, *Legal Interviewing and Counseling in a Nutshell* 65-72 (3d ed. 1997).

115. See generally Stephen Ellmann, *Empathy and Approval*, 43 *Hastings L.J.* 991 (1992) (analyzing the value of expressing "approval" as a tool in building lawyer-client relationships, and suggesting guidelines for its use).

116. See generally Mary Marsh Zulack, *Rediscovering Client Decisionmaking: The Impact of Role-Playing*, 1 *Clinical L. Rev.* 593 (1995) (examining the impact of role-playing on client decision-making and client capacity for action).

117. See *supra* notes 10-11 and accompanying text. A related technique is for the lawyer to identify the problems in the client's story, but to do so in the role of the adversary—thereby somewhat increasing the chance that the client will not resent his own lawyer who is actually speaking, but the adversary whose words the lawyer imagines and delivers. Still another variation, one that might insulate the lawyer herself from the resentment that even a simulation could engender, is to have the adversary played by one of the lawyer's colleagues.

118. See Zulack, *supra* note 116, at 631 n.42.

(d) *Cross-examination and confrontation*: Many of the techniques Ms. Washington uses fall into this category. Techniques with the flavor of cross-examination include the use of narrow and leading questions; short, fast, and insistent series of questions; questions that confront the answerer with his own prior inconsistencies; and questions that confront the answerer with the inconsistent evidence of other sources.¹¹⁹

On a somewhat different dimension, questioners may seek to convey their skepticism and disbelief through the way they ask their questions and the way they connect to, or pull back from, the client. The lawyer might move back in her seat, stand up and pace, roll her eyes, or—a technique mentioned by Anthony Amsterdam—silently write extended notes while not looking at the client, in response to some remark she finds implausible.¹²⁰ In general, good interviewing normally includes feedback and encouragement as well as connection on many different levels with the client, but the lawyer may also need to turn off all these sources of reassurance and approval. More bluntly, the lawyer may say to the client, in so many words, “Don’t bullshit me.”

While we believe that techniques drawn from the realm of cross-examination do have a place in pursuing the truth with a client, we suggest two guidelines about their use. First, few witnesses welcome cross-examination, and few clients will feel warmer towards their lawyer as a result of experiencing cross-examination at her hands. The more direct the confrontation, in general, the greater the risk. Second, courtroom advocacy is aimed at convincing the finder of fact, but in the interview room there is no finder of fact except the lawyer and the client. Their task, if possible, is to come to a shared understanding about the truth of the case. While a cross-examiner may be delighted to elicit evidence that can later be used to demonstrate the witness’s falsity to the jury and may deliberately avoid putting that inference to the witness so as to avoid having the witness somehow defuse it, there is little point in such maneuvering with one’s own client. The lawyer who discerns falsity will ultimately need to discuss it openly with her client.

(e) *Coercion*: We might hesitate to include “coercion” in a list of techniques that lawyers can use on their own clients. No less an authority than the Supreme Court, however, has made it clear that coercion in the service of preventing client perjury can be the lawyer’s duty. In *Nix v. Whiteside*,¹²¹ the Supreme Court considered Whiteside’s claim that his criminal defense lawyer breached his Sixth

119. For useful guidance on these and other techniques of cross-examination, see Marilyn J. Berger et al., *Trial Advocacy: Planning, Analysis and Strategy* 356-66 (1989).

120. Amsterdam, *supra* note 70, § 81.

121. 475 U.S. 157 (1986).

Amendment right to counsel by forcing him not to give testimony that would have supported his claim of killing in self-defense. According to the Court:

Until shortly before trial, Whiteside consistently stated to Robinson [his attorney] that he had not actually seen a gun, but that he was convinced that Love [whom Robinson had stabbed to death] had a gun in his hand. About a week before trial, during preparation for direct examination, Whiteside for the first time told Robinson . . . that he had seen something “metallic” in Love’s hand. When asked about this, Whiteside responded:

“[I]n Howard Cook’s case there was a gun. If I don’t say I saw a gun, I’m dead.”

Robinson told Whiteside that such testimony would be perjury and repeated that it was not necessary to prove that a gun was available but only that Whiteside reasonably believed that he was in danger. On Whiteside’s insisting that he would testify that he saw “something metallic” Robinson told him, according to Robinson’s testimony:

“[W]e could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it; . . . 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.”

Robinson also indicated that he would seek to withdraw from the representation if Whiteside insisted on committing perjury.¹²²

Whiteside ultimately took the stand but omitted the testimony his lawyer felt would have been perjury.¹²³

In short, Whiteside’s lawyer threatened to inform the judge that he felt Whiteside was committing perjury, to attempt to impeach Whiteside’s testimony himself, and if need be to seek to withdraw from the case, which was about to go to trial. Whiteside yielded to these threats and to his counsel’s argument that the testimony he had in mind was unnecessary. All of this the Supreme Court approved:

Whether Robinson’s conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a “threat” to withdraw from representation and disclose the illegal scheme, Robinson’s representation of Whiteside falls well within accepted standards of professional conduct and the range of

122. *Id.* at 160-61 (citation omitted).

123. *Id.* at 161-62.

reasonable professional conduct acceptable under [the Sixth Amendment]¹²⁴

If such tactics are considered legitimate ones to use in the effort to dissuade perjury, we infer that similar means must also be considered legitimate in trying to elicit the truth from the client in the first instance. We do not find this shocking. Seeking the truth from one's client is important and at times may be very difficult indeed. Nevertheless, we do not find tactics such as these desirable. They inevitably breed resentment on the client's part, and may poison the attorney-client relationship irreparably. They may also be used mistakenly. Although we are inclined to agree that Whiteside's lawyer knew his client was contemplating perjury, even in this case there is still some room for doubt. Finally, and most importantly, we do not assume that the difficulties of eliciting the truth are best resolved by coercion. Building a stronger and more trusting attorney-client relationship is surely preferable whenever it can be accomplished.

CONCLUSION

We have concluded with a discussion of techniques for eliciting the truth from reluctant clients. Many of these techniques are somewhat troubling to lawyers accustomed to the ethics of respect for clients and client-centeredness. We share that discomfort, and we do not list these techniques in order to recommend their frequent use. Instead, our hope is that the techniques of normal interviewing described elsewhere in our book,¹²⁵ and the particular techniques of truth-seeking described earlier in this chapter, such as proper advice about confidentiality and proper discussion of the applicable law, will enable most lawyers and most clients to communicate effectively, and truthfully, without resort to more intrusive techniques. Nonetheless, difficult situations are among the situations lawyers face, and we should not shrink from understanding the techniques necessary to deal with them.

124. *Id.* at 171.

125. *See supra* note 1.

Notes & Observations