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TELLING STORIES AND KEEPING SECRETS

Abbe Smith*

INTRODUCTION: STORIES AND SECRETS

Nothing is better than a good story. You don't need to be a trial lawyer to know this, but you wouldn't be a very good trial lawyer if you didn't.¹ There is a reason trial lawyers are favored dinner party guests: if the food is a flop, the energy level low, and the people in attendance do not have much in common, there will at least be a good story for entertainment. Good trial lawyers have the gift of gab and a bounty of endless material.

Criminal trial lawyers have it even better. We don't just recount tales involving conflict and cash; our stories are about life and death and liberty. Ours are the stories of television shows and movies. How many of us secretly (or not so secretly) want to write that one great screenplay, and never have to see a client at the jail on a weekend again?

I often tell my eight-year-old son that an actual *experience* might be good—going on a school field trip, hanging out at the beach, visiting the Baseball Hall of Fame, picking out a puppy to take home—but the *story* about it will be even better. Yes, this is fun, it's great, we're enjoying ourselves—but wait until we tell someone about it! When all else fails—perhaps the outing wasn't as much fun as was hoped—there's the story.

As a criminal defense lawyer, I understand storytelling to be part of the criminal defender's personality.² I have always been an avid storyteller—which is partly why I was drawn to criminal defense³—and the culture of criminal defense reinforces those tendencies. There are no better storytellers than a table of defenders with a couple of pitchers of beer. Some defenders express the “storyteller within” beyond courtrooms, taverns, and dinner parties. A colleague of mine at the Defender's Association of Philadelphia—a talented career public de-

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1 See generally STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE* 1-14 (2d ed. 1997) (discussing trial stories).

2 See Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 UC DAVIS L. REV. 1203, 1216-18 (2004) (discussing the public defender personality type).

3 See Abbe Smith, *Carrying On in Criminal Court: When Criminal Defense is Not So Sexy and Other Grievances*, 1 CLIN. L. REV. 723, 730 (1995) (noting that among the reasons the author became a public defender was “a fondness for people and the stories they tell [and] a fondness for my own story-telling”).

fender who now tries mostly homicide cases (which, these days, means many capital cases)—is also a published writer of short stories.⁴

And then there is the ethic of lawyer-client trust and confidentiality.⁵ How can a criminal defender and compulsive storyteller live comfortably with an ethic that is destined, if not designed, to infringe on storytelling? There is a growing concern, in clinical legal education and elsewhere, about telling client stories,⁶ mostly because of the potential exploitation of clients and, secondarily, because it encroaches on client confidentiality. But, what makes these *client* stories, and not *lawyer* stories? So long as the lawyer is mindful of client privacy—by changing client names, dates, and places and altering other identifying details—I believe one can be an accomplished lawyer storyteller and still protect client confidences and secrets.

I confess that I can sometimes be glib about this. I have even been known to refer to the “Good Story Exception” to confidentiality. This “exception” is exactly what it sounds like: it relieves lawyers of the burdens of confidentiality when there is a good story. Of course, this is a narrowly drawn exception: if the story is run-of-the-mill, workaday, or otherwise not very compelling, the exception would not apply. This exception is in keeping with the increasing call for lawyers to violate client confidences in furtherance of the greater social good.⁷ But does protecting innocent human life necessarily have more social value than a really good story well told?

4 See, e.g., Marc Bookman, *Spotting Elvis*, 32:22 DESCANT (1992), cited in Smith, *Too Much Heart*, *supra* note 2 at 1235, n.182.

5 See generally MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 127-152 (2d ed. 2002).

6 See, e.g., Nina W. Tarr, *Clients' and Students' Stories: Avoiding Exploitation and Complying with the Law to Produce Scholarship with Integrity*, 5 CLIN. L. REV. 271 (1998); see also Jacqueline St. Joan & Stacy Salomonsen-Sautel, *The Clinic as Laboratory: Lessons from the First Year of Conducting Social Research in an Interdisciplinary Domestic Violence Clinic*, 47 LOY. L. REV. 317 (2002).

7 See, e.g., DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 106-115 (2000); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 54-62 (1998); MARVIN FRANKEL, *PARTISAN JUSTICE* 63-66, 82-86 (1980); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1090 (1985); see also Stephen Gillers, *A Duty to Warn*, N.Y. TIMES, July 26, 2001, at A25 (arguing that lawyers should be required to reveal client confidences in order to prevent reasonably certain death or substantial bodily harm, especially in a corporate context); *Enron and the Lawyers*, N.Y. TIMES, Jan. 28, 2002, at A14 (editorial arguing in favor of defeated American Bar Association proposal permitting lawyers to violate confidentiality to prevent fraud).

Many lawyers resist these proposals. See Sarah Boxer, *Lawyers Are Asking, How Secret Is a Secret?*, N.Y. TIMES, Aug. 11, 2001, at B7 (noting that “[w]hile many lawyers are worried about the erosion of client trust, legal ethicists are worried about the public trust”); Jonathan D. Glater, *A Legal Uproar Over Proposals to Regulate the Profession*, N.Y. TIMES, Dec. 17, 2002, at C1 (describing lawyer resistance to SEC proposal that would require lawyers to take evidence of fraud to a company's top managers); William Glaberson, *Lawyers Consider Easing Restriction on Client Secrecy*, N.Y. TIMES, July 31, 2001, at A6 (reporting on the controversy surrounding ABA proposals allowing lawyers to reveal client confidences to prevent fraud, injury, or death).

Glibness aside, how does a professional storyteller—someone who makes a living telling tales and using whatever material is available in order to tell them—accommodate a professional requirement not to tell? How can I—someone who makes her living by talking to judges and juries, clients and witnesses, students and fellows—accommodate a professional requirement to keep my mouth shut? Odd combination though it is, I believe in both telling stories and keeping secrets. I believe that doing both is what good lawyers do. As much as I love a good story—and I love it absolutely—I am equally committed to keeping a secret and keeping it absolutely.

I. A STORYTELLER AND CONFIDENTIALITY ABSOLUTIST

Lawyers who believe that the ethical duty to protect client confidences is inviolable, no matter the social cost, are “confidentiality absolutists.” To these lawyers—and I am one—client trust is sacrosanct; all other values must give way to the principle of maintaining client trust and confidence. The words “as my client was saying” or “and then my client said” should never pass a lawyer’s lips.

In the course of writing this article, I saw the documentary *Capturing the Friedmans*,⁸ a powerful and disturbing film about the disintegration of a middle-class Jewish family in Great Neck, New York, when the father Arnold Friedman and the youngest son Jesse were charged with multiple counts of child sexual abuse. Although both Arnold and Jesse pleaded guilty, the charges seem questionable at best. The pleas were less the result of fact than fear (on the part of Jesse, a soft-spoken, guileless nineteen-year-old), shame (on the part of Arnold, a popular teacher who admitted having a longstanding interest in man-boy sex), and pragmatism (each faced more than a hundred counts of child abuse⁹ and life in prison in an era when allegations of child abuse sparked by sensationalist press often became witch hunts¹⁰) than fact.

For me, one of the most distressing things about the film was the appearance of Jesse’s lawyer, Peter Panaro, who practices in Massapequa, N.Y. In utter violation of lawyer-client confidentiality, Panaro comments at length about his representation of Jesse and his opinion about the outcome of the case.¹¹ Clearly not among those lawyers who believe there is a professional obligation to preserve

8 CAPTURING THE FRIEDMANS (HBO Documentary 2003).

9 Arnold was indicted on 107 counts, and Jesse faced 245 counts. See Karin Lipson, *Toward an Elusive. A Documentary Filmmaker Exploring the Abuse Cases Against a Great Neck Father and Son Lifts the Curtain on the Family’s Private Drama*, NEWSDAY, Jan. 16, 2003, at B7.

10 See generally PAUL EBERLE, *THE ABUSE OF INNOCENCE: THE McMARTIN PRESCHOOL TRIAL* (1993) (critically examining the 1983 McMartin PreSchool child sexual abuse case in California); see also Ruth Shalit, *Witch Hunt*, THE NEW REPUBLIC, June 19, 1995, at 14 (discussing the questionable law enforcement techniques in the 1985 Amirault/Fells Acre case in Malden, Massachusetts).

11 Arnold Friedman’s lawyer, Jerry Bernstein, is much more closed-mouthed in the film, which is consistent with previous behavior. See Alvin E. Bessent, *Sex Offenders in Open Letter: We’re Innocent; Victims’ Parents Irked*, NEWSDAY, May 4, 1990, at 6 (reporting that Bernstein refused to com-

client confidences and secrets in the broadest sense,¹² Panaro feels free to talk about everything from his revulsion toward Jesse's father to his belief that Jesse must have been guilty.

Among the things Panaro shares in the film is a plainly apocryphal story about visiting Arnold in federal prison. Panaro claims that, when he was interviewing Arnold about the case, Arnold asked to change tables because he felt "aroused" by a five or six-year-old boy who was being bounced on his father's knee nearby. Panaro claims he was disgusted by this. Aside from this disclosure being hurtful to Jesse, who loved his father, there was absolutely nothing in Arnold's history,¹³ personality,¹⁴ or what is known about pedophilia,¹⁵ to support such a tale. Worse is Panaro's account of Jesse's tearful "confession"—which Panaro demanded in order to allow his client to accept a plea offer for 6 to 18 years—that he indeed helped his father molest some boys in the basement of the Friedman home. In the film, Jesse denies his lawyer's account, and clearly did not give Panaro permission to say such a thing. The lawyer's conduct in the film is appallingly unethical.

Confidentiality absolutists believe that attorney-client confidentiality, unlike doctor-patient confidentiality¹⁶ and/or psychotherapist-client confidentiality,¹⁷ is inviolate. In this regard, it is more like priest-penitent confidentiality. It is not

ment on the claim that Arnold Friedman had been pressured into pleading guilty, citing lawyer-client confidentiality). Bernstein's conduct is a refreshing contrast to Panaro's.

12 See, e.g., DC RULES OF PROFESSIONAL CONDUCT, Rule 1.6(a) ("A lawyer shall not knowingly reveal a confidence or secret of the lawyer's client; use a confidence or secret of the lawyer's client to the disadvantage of the client; use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person."). Under the DC RULES, "secret" is defined as "information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would likely be detrimental, to the client." Rule 1.6(b). The DC confidentiality rule takes a broad view of client confidences, requiring lawyers to be strongly protective of all information learned in the course of the professional relationship. As the Comments following the Rule states: "A fundamental principle in the client-lawyer relationship is that *the lawyer holds inviolate the client's secrets and confidences*. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." Rule 1.6, Comment 4 [emphasis added].

13 He admitted to being drawn to 8- to 12-year-old boys. CAPTURING THE FRIEDMANS, *supra* note 8.

14 He was ashamed about his interest in boys and spent his life hiding it. *Id.*

15 See generally DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 527-28 (4th ed. 1994) (noting that pedophiles who, like Arnold Friedman, are attracted to males are generally attracted to children older than 10).

16 See generally Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 CASE W. RES. L. REV. 177 (1986).

17 See, e.g., Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (1976); see also Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263 (1982).

that attorneys, like priests, are stand-ins for God,¹⁸ but that confidences shared in a lawyer's office, police office, or jail cell should be treated as if they were shared in the confessional.¹⁹ In the confessional, candor is essential and must be protected.

The concept of confidentiality has a long history dating back (ignominiously) to ancient Rome, where slaves were prohibited by law from revealing their master's secrets,²⁰ and (not so ignominiously) attorneys were not allowed to give testimony against clients.²¹ The attorney-client privilege was first recognized in England in the late sixteenth century, and provided the basis for the ethical duty of confidentiality in the common law and in various professional codes.²² The ethical obligation of client confidentiality was recognized in the United States at least by the middle of the nineteenth century.²³ Under the *Field Code of Procedure*, adopted in 1848 in New York, lawyers were required to "maintain inviolate the confidence and at every peril to himself, to preserve the secrets of . . . clients."²⁴ Under the influential 1887 *Alabama Code of Ethics*, the first formally adopted body of ethical rules, lawyers had "not only a legal duty to maintain the client's confidences under the attorney-client privilege, but . . . an absolute duty to maintain the secrets and confidences of the client at all costs as a matter of professional ethics."²⁵ The ABA's *Canons of Professional Ethics*, adopted in 1908, expressly protected clients' "secrets or confidences" in Canon 6.²⁶

There is a connection between the adversary system, the Bill of Rights, and the ethic of lawyer-client trust and confidence. Trust between lawyer and client has been called the "cornerstone of the adversary system and effective assistance of

18 See Russell G. Pearce, *To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose A Client Confidence*, 29 LOY. L.A. L. REV. 1771, 1772 (1996); see also Anthony Cardinal Bevilacqua, *Confidentiality Obligation of the Clergy from the Perspective of Roman Catholic Priests*, 29 LOY. L.A. L. REV. 1733 (1996) (noting that the sacramental seal of confession was divinely instituted by Jesus Christ).

19 See CATHOLIC CODE OF CANON LAW c.983, 1 (2003) (affirming that "it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever"). As in the attorney-client relationship, canon law asserts that confidentiality is essential to maintaining the relationship between priest and penitent. Penitents would not feel free to confess sins and seek spiritual counseling without absolute confidentiality. *Id.*

20 See Carol M. Langford, *Legal Ethics: Reflections on Confidentiality—A Practitioner's Response to Spaulding v. Zimmerman*, 2 J. INST. STUD. LEG. ETH. 183, 185 (1999).

21 See Moore, *supra* note 16, at 199, n.100. There is also a Jewish tradition of forbidding disclosure of confidential information. See Pearce, *supra* note 18, at 1772-76.

22 See *id.* at 199.

23 See FREEDMAN & SMITH, *supra* note 5, at 128-29.

24 L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L. J. 909, 911 n.6 (1980).

25 *Id.* at 935.

26 See FREEDMAN & SMITH, *supra* note 5, at 130.

counsel.”²⁷ Just as the Bill of Rights protects individual freedom, lawyers who maintain client confidences protect individual privacy, dignity, and autonomy.²⁸

The ethic of lawyer-client confidentiality runs deep in the profession. It is fundamental whether it is called trust, fidelity,²⁹ or loyalty.³⁰ As David Luban writes:

Lawyers . . . are expected to keep their clients’ confidences. That is perhaps the most fundamental precept of lawyers’ ethics, the one over which to go to the mat, to take risks, to go to jail for contempt if the alternative is violating it. . . . There is a personal dimension to confidentiality: clients trust their lawyers, and lawyers want to deserve that trust. Any discussion of confidentiality that failed to acknowledge the core values of loyalty and trustworthiness would rightly be accused of lacking heart. And thus it is important to stress that in ordinary circumstances, a lawyer must keep the client’s confidences as a matter of elemental decency, just as we must keep the confidences of a friend.³¹

Lawyers must keep client confidences as a matter of “elemental decency”³² in ordinary and extraordinary circumstances. These circumstances include life as we know it after September 11, 2001. Since September 11, in the name of security and the war against terror, John Ashcroft’s Justice Department has led an attack on the Bill of Rights unlike anything ever seen before.³³ United States citizens and non-citizens alike are being investigated, jailed, interrogated, tried and pun-

27 *Linton v. Perrinni*, 656 F.2d 207, 212 (6th Cir. 1981) (quoted with approval in *Morris v. Slappy*, 461 U.S. 1, 21 (1983) (Brennan, J., concurring)).

28 See generally FREEDMAN & SMITH, *supra* note 5, at 127-152.

29 See Abbe Smith and William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 515-21 (1999) (discussing the “virtue of fidelity”).

30 See *United States v. Costen*, 38 F. 24 (C.C. Colo. 1889) (Justice David J. Brewer writing that the profession and the community can tolerate overzealousness by a lawyer on behalf of a client but “cannot tolerate for a moment . . . disloyalty on the part of a lawyer to his client.”).

31 DAVID LUBAN, *LAWYERS AND JUSTICE* 186 (1988). For a discussion of the sometimes invidious use of the judicial contempt power, see Louis Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power, Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 514 (1990).

32 *Id.*

33 See generally DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003); SAMUEL DASH, *THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT* (2004); see also Eric Lichtblau & Adam Liptak, *Threats and Responses; On Terror, Spying and Guns, Ashcroft Expands Reach*, N.Y. TIMES, Mar. 15, 2003, at 1 (noting the FBI’s broadened powers to conduct surveillance and use intelligence information under the USA Patriot Act, the Justice Department’s new authority to monitor jailhouse conversations between federal inmates and their lawyers, and the secrecy surrounding the detentions of prisoners at Guantanamo Bay and foreign nationals in the United States after the September 11 attacks); Matthew Purdy, *A Nation Challenged: The Law; Bush’s New Rules to Fight Terror Transform the Legal Landscape*, N.Y. TIMES, Nov. 25, 2001, at 1 (describing the changed legal landscape since September 11).

ished without the legal protections the United States Constitution (and/or international human rights law) affords.³⁴ Among other things, prison conversations between lawyers and their clients are routinely being monitored and taped,³⁵ as are phone conversations.³⁶ Good lawyers say no to this—and many have. A 2003 *New York Times* article reported that the Pentagon is having a hard time recruiting civilian lawyers to represent detainees held in Guantanamo Bay, Cuba, because “[i]t would be unethical for any attorney to agree to the conditions they’ve set.”³⁷

For those of us who believe that confidentiality is absolute, it is better to put oneself at peril rather than reveal a client confidence. One lawyer even has a name for this: “PYAL,” which stands for “Putting Your Ass on the Line for your client.”³⁸ Confidentiality is worth fighting for because lawyers wouldn’t be able to effectively represent clients without it. Confidentiality permits lawyers to routinely say to clients as we attempt to build a relationship, “trust me.”³⁹ Confidentiality permits clients to share with their lawyers facts which could be damaging to their cases or which show the clients in a bad light, without fear of disclosure.

34 See Charles Lane, *In Terror War, 2nd Track for Suspects; Those Designated “Combatants” Lose Legal Protections*, WASH. POST, Dec. 1, 2002, at 1.

35 See Lichtblau & Liptak, *supra* note 33, at 1.

36 See Seth Rosenfeld, *Looking Back, Looking Ahead; A Nation Remembers; Patriot Act’s Scope, Secrecy Ensnare Innocent, Critics Say*, SAN FRANCISCO CHRON., Sept. 8, 2002, at 1 (reporting that Ashcroft issued a new rule allowing FBI agents to monitor phone calls between lawyers and clients if there is “reasonable suspicion” the conversations may further terrorism).

37 Katharine Q. Seelye, *Aftereffects: Military Tribunals; U.S. Seeking Guantanamo Defense Staff*, N.Y. TIMES, May 23, 2003, at A16 (quoting Don Rehkopf, co-chair of the National Association of Criminal Defense Lawyers’ military law committee). Rehkopf is outraged by the government intrusion in the lawyer-client relationship: “You have to agree to waive the attorney-client privilege so that the government can monitor your conversations. It’s a total farce.” *Id.*

The Pentagon claims they will find the lawyers they need and provide fair trials to the detainees. See John Mintz, *Both Sides Say Tribunals Will Be Fair Trials*, WASH. POST, May 23, 2003, at A3 (quoting chief defense attorney and Air Force Colonel Will A. Gunn: “We’re going to be able to provide a zealous defense for all detainees brought before trial We’re looking for [defense lawyers who are] fighters . . .”).

38 See LUBAN, *supra* note 31, at 185 (quoting Francis Belge, one of two lawyers involved in the famous Lake Pleasant Bodies Case). In the Lake Pleasant Bodies Case, a man, who was accused of killing a student camping near Lake Pleasant, told his lawyers of two other murders. The lawyers found and photographed the bodies of these other victims but kept the information secret for months notwithstanding a plea from the father of one of the murder victims to reveal her location. See *id.* at 53-54.

39 See Abbe Smith, *The Difference in Criminal Defense and the Difference it Makes*, 11 WASH. U. J. LAW & POL’Y 83, 119-122 (2003) [hereinafter Smith, *The Difference in Criminal Defense*] (discussing the challenges criminal lawyers face in establishing a relationship of trust with clients); see also Eva Nilsen, *Disclose or Not: The Client with a False Identity* in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 214, 225 n.39 (Rodney J. Uphoff ed. 1995) (“[D]isclosure of a client’s confidences can wreak havoc on the client, leaving him feeling betrayed by a lawyer who began the relationship with what now seems like an empty promise of loyalty”).

This allows lawyers to obtain information they need to represent clients effectively.⁴⁰

On the other hand, confidentiality absolutists, like our less absolute colleagues, do what we can to avoid putting ourselves and our clients at peril.⁴¹ Often, we use our storytelling abilities to get out of telling client secrets. When a judge asks whether an accused has a criminal record and the lawyer representing the accused knows only from his or her client that the answer is yes, the smart lawyer might tell a story. "Judge," the lawyer might begin, "this is so typical. It's just like the Pretrial Services Agency not to have that information available. My client has been locked up for more than 24 hours now, supposedly because the people at Pretrial Services need to interview him and assemble information. The last time this happened with another client, it literally took days for them to get their act together. Let me tell you about that case"

Confidentiality absolutists also believe in our ability to use persuasive storytelling, along with other methods, to get clients to do the right thing. Although trial lawyers like to think of themselves as *trial* lawyers, the bulk of what litigators and non-litigators do is counsel clients. In the aphorism attributed to Elihu Root, "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."⁴² Thus, most lawyers prefer to rely on their own counseling skills even in difficult situations rather than abdicate their lawyer role and "call the cops." Lawyers who believe in confidentiality feel that, even when the client threatens harm to a third party, lawyers should counsel the client against carrying out such threats rather than contacting the authorities and divulging client confidences.⁴³

40 See FREEDMAN & SMITH, *supra* note 5, at 127-28; LUBAN, *supra* note 31, at 181; see also Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

41 One commentator describes the defense lawyers' competing obligations to protect the client and be candid to the court as a "difficult and delicate balancing act." Rodney J. Uphoff, *Confidentiality and Defense Counsel's Duty to Disclose* in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER, *supra* note 39, at 132.

42 MARY ANN GLENDON, A NATION UNDER LAWYERS 37 (1994) (quoting aphorism attributed to Elihu Root); see also Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1082 (1979). Lehman notes that people "widely look to lawyers as worthy advisers and take seriously what they have to say. Surely every lawyer has at some time dissuaded a client from some wasteful or destructive pursuit." *Id.*

43 This is so not only in the United States. See *The Law Report* (AUSTRALIAN BROADCAST CORPORATION radio broadcast, Dec. 11, 2002) (criminal defense lawyers discussing *The Ethics of Criminal Defense Lawyers*). In the discussion, Australian defense lawyer Michael Clark stressed the importance of confidentiality: "Confidentiality is paramount. The system doesn't work if that confidentiality isn't maintained, and as difficult as it might be morally, you've just got to wear that." *Id.* When asked what he would do if a client threatened to "get" a prosecution witness, Clark's compatriot Geoff Vickridge replied, "[I]f I believed that there was any credence to be given to what they said . . . the first tack I'd probably take would be to try and scare the client . . . [and] I'd certainly try and point out that it wouldn't be a very smart idea." *Id.* This is the sort of answer you would get from

Those of us who believe in absolute confidentiality argue that such counseling works. There is substantial evidence to back this up.⁴⁴ In the *Model Rules*, for example, the American Bar Association affirms that “[b]ased upon experience, lawyers know that almost all clients follow the advice given”⁴⁵ With respect to perjury in criminal cases, “experienced defense lawyers have pointed out time and again that, if permitted to continue to counsel . . . their criminal clients up to the very hour of the client’s proposed testimony, they almost always were successful in persuading the client not to take the stand to testify falsely.”⁴⁶

II. THE HARD CASES

There are always hard cases. Law practice wouldn’t be nearly as interesting if there weren’t hard cases raising difficult moral dilemmas.⁴⁷ For me, the hard cases are (1) the hypothetical client who confesses to a murder for which the wrong man is about to be executed; (2) the real-life client who confides in his lawyer about judicial corruption; and (3) corporate clients who confide in lawyers about wrongful and/or criminal conduct that will likely pose danger to others. The matter of client perjury is not a difficult case for me, so I will not discuss it here.⁴⁸

A. *The Wrong Inmate About to be Executed*

I became a criminal lawyer because, among other reasons, I wanted to help make sure that no innocent people (at least on my watch) are convicted and imprisoned or put to death. My commitment to this goal—and my life-long opposition to the death penalty—make the “execution of the wrong man” hypothetical especially difficult for me. It would be painful if I ever had to confront this situation in the flesh.

an assembly of American public defenders. At most, they might send in an office investigator (preferably a former police officer) to scare the client.

44 See FREEDMAN & SMITH, *supra* note 5, at 128.

45 MODEL RULES OF PROF’L CONDUCT, Rule 1.6 cmt. (2000) [hereinafter MODEL RULES].

46 James G. Exum, Jr., *The Perjurious Criminal Defendant: A Solution to His Lawyer’s Dilemma*, VI SOC. RESP. 16, 20 (1980). James Exum is not a defense lawyer, but the Chief Justice of the North Carolina Supreme Court.

47 Some law scholars would like to reconcile these dilemmas and offer an easier and more “moral” life for lawyers. See, e.g., Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. AND MARY L. REV. 1303 (1995). I prefer to struggle through dilemmas and “do good” by doing what I can to achieve my client’s needs and interests.

48 See generally FREEDMAN & SMITH, *supra* note 5, at 153-190. I remain much more concerned about the extent and impact of police perjury than client perjury. See Smith, *The Difference in Criminal Defense*, *supra* note 39, at 98, n.71; see also MONROE FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 91-93 (1975); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994); Stanley Z. Fisher, “*Just the Facts, Ma’am*”: *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992).

Still, if a client came to me and revealed that he had committed a crime for which an innocent man had been sent to death row, I would use all my powers of persuasion to try to get the client to do the right thing. If the client refused, I would counsel him further. If he refused again, resisted all entreaties, and I were forced to conclude that he could not be moved, I would leave him be and keep his trust. It would not be easy, but I would manage it. In the aftermath, I would do what I could not to take it all on myself—though I imagine I would feel aggrieved and guilt-ridden about the wrongful loss of life—by cursing the incompetence of the police and prosecution and the inherent injustice of the death penalty.

In order to soothe my guilty conscience, I would likely point out that there is no guarantee, if I divulge such a confidence, that it would have any effect on the fate of the wrongly convicted man. The criminal justice system is deeply flawed, and this would be just one more wrongful conviction and punishment.⁴⁹ I might say that lawyers are not the only ones placed in this position, and that countless “true perpetrators” have probably unburdened themselves—to their mothers, sisters, lovers, friends—and their secrets have been safe.⁵⁰ Probably, these thoughts would provide comfort for a time.

In the rare case where a lawyer feels he or she *must* disclose confidential information to save a life (something I acknowledge might one day happen to me, so I can sympathize with the opposing viewpoint here⁵¹), I believe he or she will do so even if it means violating professional ethics. In such a case, I doubt the lawyer would be disciplined, or if there is discipline, it probably wouldn't be harsh. I believe it is more important to maintain and preserve the principle of confidentiality—no matter how difficult the circumstance—than it is to affirm individual lawyer morality. I also worry that lawyers will be more likely to exercise their discretion to “save a life” when the clients are indigent criminal defendants or simply indigent.⁵² Hence, there will be an even greater divide between the kind of representation afforded some clients and the representation afforded others.⁵³

I also worry that there will be a significant spillover to the rest of us from lawyers who too readily disclose client information. There is already a prevalent

49 See, e.g., Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485 (2000).

50 See Nancy J. Moore, “*In the Interests of Justice*”: *Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 FORDHAM L. REV. 1775, 1785-86 (2002) (noting that private citizens have no obligation to disclose confidential information in order to protect the lives, health, or financial safety of third parties).

51 See FREEDMAN & SMITH, *supra* note 5, at 145-47.

52 See *Purcell v. District Attorney*, 676 N.E.2d 436 (Mass. 1997). In *Purcell*, a legal services lawyer advised the police that his client planned to burn down an apartment building. The police were able to prevent the crime, saving the lives of the people in the building. The Supreme Judicial Court approved the lawyer's conduct, but ruled that the prosecutor could not call the lawyer as a witness against the client in the attempted arson case.

53 See generally FREEDMAN & SMITH, *supra* note 5, at 147.

view that court-appointed lawyers (or legal services lawyers, or public defenders) are not to be trusted—that they are in cahoots with the judge or prosecutor, they don't care about their clients, and you “get what you pay for.” Once lawyers start “ratting out” their indigent clients, those clients will stop disclosing information to lawyers altogether. Frankly, they would be wise to do so.

B. *Judicial Corruption*

In 1992, Douglas Schafer, a lawyer in Tacoma, Washington, had a conversation with a client named William Hamilton. Hamilton told Schafer that Grant Anderson, who was about to become a Superior Court judge, was going to engage in improprieties as the trustee of a decedent's estate. Soon afterward, Hamilton bought a bowling alley owned by the estate at a below-market price, and, at around the same time, gave Judge Anderson a Cadillac. Hamilton shared this information with Schafer, who, outraged by such blatant judicial corruption, disclosed it to the authorities.⁵⁴ Schafer's disclosure had impact. In 1999, in response to the information Schafer conveyed, the Washington Supreme Court removed Judge Anderson from the bench for “a pattern of dishonest behavior unbecoming a judge.”⁵⁵ He was also suspended from law practice for two years.

In 2003, attorney Schafer—regarded by some as a whistle-blower willing to risk his career to unveil judicial corruption, and by others as an opportunist motivated by sour grapes⁵⁶—was suspended from law practice for six months for the “willful, unnecessary and repeated violation of his ethical duty not to betray his client's trust.”⁵⁷ The ruling by the Washington Supreme Court prompted outcry on the order of “no good deed goes unpunished.”⁵⁸

This is a hard case for me because, to my mind, there is no greater problem in our justice system than judicial corruption. Judicial corruption strikes at the heart of our system of justice; one instance of corruption is enough to taint the whole thing. We give judges enormous power and rely on them to use it wisely. The integrity of our judicial system rests with judges.

It is hard enough for most judges to resist the corruption of vanity and self-importance. We clothe them in ceremonial robes, seat them above us, rise when they enter a room, and address them with honorifics. When judges are found to

54 See Adam Liptak, *Lawyer Whose Disclosure Brought Down a Judge Is Punished*, N.Y. TIMES, Apr. 20, 2003, at A14.

55 *Id.*

56 *Id.* (noting that Schafer did not inform the authorities of Judge Anderson's misconduct until three years after his client confided in him—when the judge sanctioned him for bringing a frivolous lawsuit in 1995).

57 *Id.*

58 Maggie Mulvihill, *At the Bar: State JC won't let good deed go unpunished*, BOSTON HERALD, Apr. 22, 2003 (calling the Washington Supreme Court decision “mind-twisting”).

have engaged in corrupt conduct—whether as judges or lawyers—they ought to be brought down, and brought down hard.

Still, whatever Schafer's motive,⁵⁹ I have no problem with his being disciplined.⁶⁰ Schafer should not have divulged his client's confidences, no matter what sort of shenanigans his client was involved in. As Professor Steven Lubet remarked about the Schafer case, "The public has a lot of trouble understanding that lawyers keep secrets for guilty people, but it is important for the functioning of the legal system."⁶¹ Instead, Schafer should have counseled his client to do the right thing: either Hamilton should have gone to the authorities himself or he should have released Schafer to do it. Schafer should have put considerable time and energy into talking to Hamilton about the immorality and illegality of the scheme.

It is important to remember that the client confidences Schafer divulged put his client in jeopardy as well as a corrupt judge. Hamilton's insider deal with his Cadillac *quid pro quo* was surely not lawful. It is also important to note that, according to the record, Hamilton begged his lawyer not to violate lawyer-client confidentiality by going to the authorities.⁶²

I think Schafer's punishment was a bit steep. But I am glad the ethical duty of maintaining client confidences lives in Washington State.

C. Corporate Clients

A number of legal scholars distinguish between corporate lawyers and criminal defense lawyers when it comes to confidentiality.⁶³ I am sympathetic to this view

59 I am not entirely persuaded by the "sour grapes" theory. It appears that Anderson may not only have been a corrupt judge, but an incompetent one. See David Postman, *Whistle-Blower in Judge's Removal Faces Investigation*, SEATTLE TIMES, July 31, 1999, at A1 (reporting that Schafer first took an interest in Anderson in 1995 when he appeared before the judge and the experience "'caused me to doubt his competency as a judge.'"); see also *Letters to the Editor: Attorney-Client Privilege – When a Client Uses a Lawyer in Crime or Fraud, no Privilege*, SEATTLE TIMES, Aug. 16, 1999, at B5 (Schafer stating: "In reporting Judge Anderson's fraud, I was not being heroic. I was just fulfilling the duty that I believe all lawyers have to report serious misconduct by their peers, particularly those who wear judicial robes. If lawyers won't report corrupt judges, who else will?").

60 The *Seattle Times* reported that Schafer set out to build a case against Judge Anderson after a bad experience with the judge. The judge's rulings in an estate case Schafer was handling caused him to recall what Hamilton had told him about Anderson "milking" an estate he was supposed to be overseeing. Schafer then sought out Hamilton for more information about the judge even though Hamilton repeatedly warned his lawyer not to divulge the confidences he had shared. See Postman, *supra* note 59, at A1.

61 Liptak, *supra* note 54, at A14.

62 See Nicole Brodeur, *In Hot Water for Exposing Injustice*, SEATTLE TIMES, Aug. 5, 1999, at B1 (quoting University of Washington law professor Deborah Maranville: "'I would hope that this would be one of the situations where you prosecute the guy . . . [b]ut you take into account the circumstances and don't impose a heavy penalty.'").

63 See, e.g., LUBAN, *supra* note 31, at 219 (noting that an organization "does not have human dignity, because it is not human."); see also RHODE, *supra* note 7, at 107, 111; Gillers, *supra* note 7;

and wish I could agree that a principled line can be drawn.⁶⁴ Corporate clients are wealthy and bent on becoming wealthier. The dignity and autonomy interests of corporations and their CEO's are less compelling to me than those of individual criminal defendants.⁶⁵ They are motivated by greed, not misfortune or need.⁶⁶

On the other hand, there is a compelling argument that lawyers ought to balance their professional obligations more heavily on the side of the public interest in a corporate context.⁶⁷ Corporations are powerful entities. They can do real harm, whether we are talking about product safety, environmental hazards, tax evasion, or fraud.⁶⁸ The traditional concern about individual rights is not an effective rejoinder to the claim that confidentiality has been used to shield organizational misconduct.⁶⁹

Still, I believe that lawyers can use their powers of persuasion and more—their social standing⁷⁰—in a corporate context, too. There is a long tradition of the corporate lawyer as “wise counselor.”⁷¹ Corporations do not have court-appointed lawyers; they choose their counsel. No doubt they choose their counsel based on many attributes, including the lawyer's value system. This is all the more reason for these lawyers to engage in moral as well as legal counseling with

Laurie Morin, *Broken Trust and Divided Loyalties: The Paradox of Confidentiality in Corporate Representation*, in this volume.

64 See generally Smith, *The Difference in Criminal Defense*, *supra* note 39 (arguing that, notwithstanding the differences in criminal defense, there ought not be different ethical standards for criminal and civil attorneys).

65 See LUBAN, *supra* note 31, at 218-220.

66 See generally STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996).

67 See generally Deborah Rhode, *What Does it Mean to Practice Law “In the Interests of Justice” in the Twenty-First Century?*, 70 *FORDHAM L. REV.* 1543 (2002); but see Monroe Freedman, *How Lawyers Act in the Interests of Justice*, 70 *FORDHAM L. REV.* 1717, 1725 (2002) (arguing that Rhode's call for “greater moral responsibility” leads to a double standard whereby lawyer conduct deemed as “moral” in one setting is denounced when “done on behalf of clients for whom she lacks sympathy”).

68 Upon leaving public defender practice for a large law firm representing tobacco companies, a long-time defender was reputed to have said, “I've represented individual murderers. Now, I'll represent mass murderers.”

69 See RHODE, *supra* note 7, at 110.

70 Corporate clients and their lawyers are often in the same social milieu. Sometimes, corporate client and lawyer have a personal as well as professional relationship. I always believed this sort of friendship was the genesis of Charles Fried's theory of the lawyer-client relationship. See generally Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relations*, 85 *YALE L.J.* 1060 (1976).

71 See generally Bruce A. Green, *Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the “Wise Counselor” Given Way to the “Hired Gun”?*, 51 *DEPAUL L. REV.* 407 (2001); see also ANTHONY KRONMAN, *THE LOST LAWYER* 14-17 (1993) (discussing the lawyer-statesman ideal and “leadership” and “character”).

their clients.⁷² They should do everything they can to get these clients to do the right thing.

CONCLUSION

It could be that, in the end, I don't have much faith in lawyers. I don't want them to exercise their own moral discretion about whether to disclose client confidences.⁷³ I don't want to give lawyers the authority to determine when it is in the public interest to divulge confidences, even if they were allowed to do so only under limited circumstances, such as "where necessary to avoid 'substantial injustice.'"⁷⁴ I worry about lawyers acting as a "self-appointed moral elite,"⁷⁵ overlooking or overriding longstanding ethical standards in order to advance their own views of justice.

But, I do believe in the power of lawyer storytelling. I believe that a lawyer's gifts as a storyteller are helpful not only at dinner parties but in courtroom advocacy and client counseling. Ironically, it turns out that telling stories and keeping secrets go quite nicely together. But don't tell anyone.

72 See FREEDMAN & SMITH, *supra* note 5, at 60-62; see also Freedman, *How Lawyers Act in the Interests of Justice*, *supra* note 67, at 1723.

73 Freedman, *How Lawyers Act in the Interests of Justice*, *supra* note 67, at 1726 (raising a concern that under a regime giving lawyers more individual discretion to "act on the basis of their own principled convictions," many will "inventively find evasive strategies to help their clients to despoil the environment, to evade taxes," and to defeat legitimate product liability claims).

74 SIMON, *supra* note 7, at 62 (describing the "alternative confidentiality standard suggested by the Contextual View").

75 Freedman, *How Lawyers Act in the Interests of Justice*, *supra* note 67, at 1724.