Monograph Series

Volume 14—Legal Writing & Ethics

This article was originally published with the following citation:

Steven J. Johansen, *This is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L.J. 961 (2006).

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THIS IS NOT THE WHOLE TRUTH: The Ethics of Telling Stories to Clients

Steven J. Johansen†

I. INTRODUCTION

This is not the whole truth. Rather, it is a tale of deception. More precisely, it is a reflection on storytelling and the law. It begins from the premise that stories, by their nature, can never tell the whole truth. Stories are told from a point of view, and that point of view necessarily limits the story. If told from another point of view, the "truth" of the story would change. To at least some degree, then, stories are incomplete analytical tools, and as such, deceptive. Despite the incomplete nature of stories, they can be powerful tools of persuasion. This creates a dilemma: when does the deception inherent in storytelling make storytelling an inappropriate tool of persuasion in a legal context? This article seeks to define the limits of legal storytelling generally and of storytelling to clients in particular.

To find the ethical bounds of legal storytelling, this paper examines the convergence of three inquiries. First is the role of deception in lawyering. Part II explores how the American Bar Association ("ABA") not only tolerates deception, but in some cases requires it. (The clearest example being the criminal defense lawyer who presents evidence to suggest the innocence of a guilty client.)[1] However, contrary to popular stereotype, lawyers do not engage in carte blanche deception. *The Model Rules of Professional Conduct*[2] ("*Model Rules*") provide both practical and theoretical limits to deception designed to assure that ultimately, each legal conflict is resolved based upon appropriate understanding of the true nature of that dispute.[3] These limits inform, however obliquely, our efforts to identify the ethical limits of legal storytelling.

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† Associate Professor, Lewis & Clark Law School. Thanks to colleagues Daryl Ann Wilson, William Funk, Susan Mandiberg for their comments on earlier drafts of this work. Special thanks to Ruth Anne Robbins for her inspiration and insights throughout this project. Finally, this article would not have been possible without the superb research and reflections of my research assistant, Troy Payne.

1. *See infra* notes 41–45 and accompanying text.
2. MODEL RULES OF PROF'L CONDUCT (2006).
3. *See, e.g., id.* R. 3.1, 3.3, 4.1, 8.4(c).

The second inquiry, discussed in Part III, is storytelling's ability to inform and persuade in a way that rational analysis cannot. There is considerable scholarly interest in narrative in a variety of legal contexts,[4] and the persuasive power of storytelling seems relatively unquestioned. Part III of this paper explores how stories persuade through appealing to the listener's emotions, or, in Aristotelian terms, *pathos*.[5] Because stories rely on *pathos* as well as *logos*,[6] they can resonate with listeners in a different way than analytical reasoning. However, it is this very strength of storytelling that may make storytelling problematic in a legal context. Lawyers are trained to value analytical reasoning over emotion-based decision-making.[7] While most lawyers understand that emotions can strongly influence judges and juries, many also view analytical reasoning as a more legitimate approach to legal problem solving.[8] Because stories tend to emphasize emotions over analytical reasoning, some scholars question the appropriateness of storytelling in some legal contexts.[9] However, when used properly, stories can enhance, rather than conflict with, analytical reasoning and are appropriate decision-making tools.

The final inquiry regards lawyer-client relations. Part IV explores the inherent conflict between a lawyer's responsibility to counsel a client and a client's own autonomy. This conflict is especially evident where a client insists on acting against what her lawyer feels is in the client's best interest. In such a context, stories may enable the lawyer to persuade the client to make a different choice. But in doing so, does the lawyer infringe upon the client's autonomy? Some would say that a lawyer has no business trying to persuade her client to do anything.[10] The lawyer's role is to remain neutral and merely to inform the client of her legal options and the consequences of

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4. *See generally* RICHARD A. POSNER, LAW AND LITERATURE (rev. & enlarged ed. 1988) (reflecting on law as literature and law in literature); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991) (using narrative to reflect the legal outsider's voice); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001) (using techniques of fiction writing to improve written advocacy); Delia B. Conti, Comment, *Narrative Theory and the Law: A Rhetorician's Invitation to the Legal Academy*, 39 DUQ. L. REV. 457 (2001) (discussing how narrative theory informs persuasive strategies for lawyers).

5. ARISTOTLE, ON RHETORIC: A THEORY OF CIVIL DISCOURSE 119–24 (George A. Kennedy trans., Oxford Univ. Press 1991).

6. *Id.* at 38–39; *see also infra* notes 155–57 and accompanying text.

7. *See* Foley & Robbins, *supra* note 4, at 462–65.

8. *See id.* at 462.

9. *See, e.g.*, Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809 (1993); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 251–52 (1992).

10. DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 289 (2d ed. 2004).

those options.[11] Others suggest that the lawyer should play a more active role in counseling clients, including using his experience and judgment to inform, and if necessary persuade, the client to assure the client achieves the best resolution of her legal matter.[12] Where one falls on the client-centered lawyering versus the lawyer as counselor continuum will undoubtedly influence how one views the role of storytelling in advising clients.

The lawyer-client relationship is premised on trust.[13] When a lawyer deceives a client, that trust is undermined. This raises several questions—is it appropriate for a lawyer to tell fictional stories to a client if done to fully inform the client of her options? Is it appropriate to do so when the client seems intent on making a decision that is not in the client's best interest? Is it appropriate if the client believes a fictional story is actually true? Part IV addresses these questions and concludes that it is appropriate for lawyers to tell stories to their clients. However, to preserve the foundation of trust that is essential to the lawyer-client relationship, a lawyer must also be careful to place storytelling in an appropriate context.

Because this is a paper about storytelling, I have framed the paper around a series of short stories. My hope is that the stories will provide sufficient illustration and support for the conclusions I offer. Undoubtedly, other stories could illustrate conflicting conclusions. That, after all, is the point.

II. THE PRACTICE OF LAW: A PRACTICE IN DECEPTION?

"The Justified Deception"[14]

Daniel Gatti had a problem. His client had recently visited a chiropractor for an independent medical examination ("IME").[15] *That chiropractor, who worked for Comprehensive Medical Review ("CMR"), had recommended that the insurance company deny Gatti's client's claim.*[16] *Gatti had reason to believe that CMR was fraudulently denying such claims.*[17] *Of course, proving the fraud would be very difficult. So Gatti had to be creative.*

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11. *Id.* at 300–01.

12. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 64–66 (2000).

13. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2006) (explaining the confidentiality requirements for lawyers), R. 2.1 (discussing the lawyer's role as an advisor).

14. *See In re* Conduct of Gatti, 8 P.3d 966 (Or. 2000).

15. *Id.* at 970.

16. *Id.*

17. *Id.* at 969–70.

Gatti called CMR's Director of Operations, a Mr. Adams, and told him that he was interested in doing IMEs for CMR.[18] *While never specifically stating he was a chiropractor, Gatti carefully crafted his conversation with Adams to lead Adams to believe that he was indeed a medical doctor.*[19] *Gatti never mentioned that he was a lawyer.*[20]

A few weeks later, Gatti filed a lawsuit against CMR, alleging fraud and intentional interference with contractual relations.[21] *When Adams learned that Gatti was not a medical doctor, but rather a lawyer, he filed a complaint with the state bar.*[22] *In response to that complaint, Gatti asserted that any deception on his part was a necessary part of a fraud investigation and hence did not violate the bar's ethical rules.*[23]

A. Acceptable Deception to Courts, Juries, and Third Parties.

In most jurisdictions, witnesses must swear or affirm to tell the "whole truth" before they take the witness stand.[24] Lawyers take no such oath. To be sure, it is beyond dispute that lawyers should tell the truth. Indeed, the ABA *Model Rules* expressly prohibit lawyers from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."[25] And yet, lawyers routinely withhold information from courts, opposing parties, and others with whom they deal. To a layperson, withholding information—that is, telling something less than the "whole truth"—is deceptive. It may well be that such practices are why lawyers are held in such low esteem by the American public.[26]

Public sentiments aside, there is little doubt that lawyers stray from the "whole truth" in a variety of contexts. For example, in negotiations, lawyers posture, bluff, and sometimes outright lie in an effort to deceive the opposing party. While some experts may question the effectiveness of such tactics, few challenge them on ethical grounds.[27] Indeed, the ABA *Model*

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18. *Id.* at 970.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 970–71.
23. *Id.* at 971.
24. *See e.g.*, CAL. CIV. PROC. CODE § 2094 (West Supp. 2005); FLA. STAT. § 90.605(1) (1999); OR. REV. STAT. § 40.320 (2005); WIS. STAT. § 906.03 (2000).
25. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2006).
26. Gary A. Hengstler, *Vox Populi—The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 62 (finding that one in five people surveyed found the legal profession "honest and ethical").
27. *But see* Larry Lempert, *In Settlement Talks, Does Telling the Truth Have Its Limits?*, INSIDE LITIG., Mar. 1988, at 1, 19.

Rules permit deception in negotiation,[28] and such tactics are nearly universally tolerated. Similarly, criminal defense lawyers routinely employ deceptive strategies designed to create doubt as to the guilt of clients they themselves believe to be guilty.[29] Of course, all lawyers must withhold information protected by the attorney-client privilege[30] or by the attorney's duty to maintain client confidences.[31] To the extent withholding such information distorts the "whole truth," lawyers are being deceptive.

There are, of course, acceptable limits to a lawyer's deception. *Gatti* explored those limits when it comes to covert investigations.[32] A similar issue has been raised with regard to using "testers" to investigate allegations of discrimination in housing and employment.[33] The Washington Supreme Court found a limit to lawyer deception even in the context of hard-fought litigation.[34] As is often the case with ethical issues, it is difficult to draw clear distinctions between when deceptive behavior is appropriate and when it is not. It is not the purpose of this section to determine where those distinctions should lie. Rather, it is to illustrate that it is common practice for lawyers to stray from the "whole truth." Furthermore, there are sound policy reasons for lawyers to engage in such deceptions.

1. The Easy Cases: Deception in Negotiations and to Protect Client Secrets.

Perhaps the clearest example of when we tolerate lawyer deception is in the negotiation context. It appears to be accepted wisdom that all negotiators, including lawyers, puff, bluff, and otherwise misrepresent what they believe to be true.[35] Even the *Model Rules* recognize that truth is a

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28. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2.

29. RICHARD ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER 40–48 (1999); W. William Hodes, *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and "Lying with an Explanation,"* 44 S. TEX. L. REV. 53, 67–71 (2002).

30. *See, e.g.*, FED. R. EVID. 503(b) (proposed July 1, 1973), *reprinted in* 171 F.R.D. 330, 526.

31. MODEL RULES OF PROF'L CONDUCT R. 1.6.

32. *In re* Conduct of Gatti, 8 P.3d 966, 972–80 (Or. 2000).

33. *See, e.g.*, David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the* Model Rules of Professional Conduct, 8 GEO. J. LEGAL ETHICS 791, 796–801 (1995).

34. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1084–85 (Wash. 1993).

35. For a discussion of why such behavior is appropriate, see James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 5 AM. B. FOUND. RES. J. 926, 928–31 (1980). For a different perspective, see ZITRIN & LANGFORD, *supra* note 29, at 161–83.

frequent victim in negotiation wars. However, rather than expressly permit deception in negotiation, the *Model Rules* simply change the definition of lying to permit deception in negotiation.

Model Rule 4.1 prohibits lawyers from, in the course of representing a client, making "a false statement of material fact or law to a third person."[36] On its face, Model Rule 4.1 appears to prohibit lying about material facts. However, Model Rule 4.1, comment two notes that, in negotiations, certain types of statements are not statements of material fact.[37] These include "[e]stimates of the price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim."[38] Of course, this is utter nonsense. In virtually all negotiations, the *most* material facts are the assumed value and the party's intentions as to settlement. Yet, by carving out this exception to the prohibition against making false statements, Model Rule 4.1, comment two opens the door to lawyer deception. We tolerate this kind of deception because the context provides appropriate counter-balances. In negotiations, both parties *expect* the other to be less than forthcoming. Because the context creates a skeptical audience, we tolerate a greater degree of deception.[39]

The ABA *Model Rules* also reflect the universal belief that protecting client confidences will often justify a lawyer's deception. ABA Model Rule 1.6 prohibits lawyers from disclosing client confidences in most situations,[40] even if doing so could prevent harm. The duty to keep client confidences often confounds laypeople, particularly when it comes to criminal defense work. When a lawyer knows her criminal defendant is, in fact, guilty of a crime, she must still work zealously to prevent his conviction.[41] Certainly, a criminal defense lawyer may require the state to prove every element of a crime,[42] even if that lawyer knows her client is, in fact, guilty. However, a lawyer may go beyond passively requiring the state to prove its case. She may attempt to discredit a truthful witness.[43] She may submit evidence that

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36. MODEL RULES OF PROF'L CONDUCT R. 4.1(a).

37. *Id.* R. 4.1 cmt. 2.

38. *Id.*

39. While Model Rule 4.1 is widely recognized by the states, comment two is not without its detractors. In one survey of fifteen academics, lawyers, and judges, six respondents opined that Model Rule 4.1 would not permit a lawyer to falsely state that they were not authorized to settle for an amount the plaintiff sought to recover. Lempert, *supra* note 27, at 1, 16. Seven respondents found no violation of Model Rule 4.1. *Id.*

40. MODEL RULES OF PROF'L CONDUCT R. 1.6(a).

41. ZITRIN & LANGFORD, *supra* note 29, at 34–35.

42. MODEL RULES OF PROF'L CONDUCT R. 3.1.

43. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 213–26 (2d ed. 2002).

suggests someone else is guilty.[44] She may even argue to the jury "do not convict this man, *because he did not commit this crime.*"[45] In other words, because of competing policy concerns, we allow, and indeed require, criminal defense lawyers to try to deceive triers of fact.

2. The Not So Easy Cases: Pushing the Limits of Deceiving Third Parties.

Daniel Gatti misrepresented himself.[46] Put bluntly, he lied. However, he did so as part of an investigation of fraud.[47] He did so in an effort to expose wrongdoers and to help his client.[48] In doing so, he committed no crime.[49] Did he act unethically? Certainly, Immanuel Kant would think so. As a moral philosopher, Kant posited the absolutist position that lying is always wrong.[50] Lying cannot be justified by showing that greater good will result from the lie.[51] More importantly to Gatti, the Oregon Supreme Court seemed to agree with Kant that, at least with respect to Oregon rules governing lawyers, lying is simply wrong.[52]

In an opinion that strikes close to the Kantian absolutist position, the court held that the *Oregon Code of Professional Responsibility* "does not permit recognition of an exception for *any* lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statement[]."[53] It refused to read into the rule an exception that would allow either private or government attorneys to conduct covert investigations through the use of dishonesty, deceit, or misrepresentation.[54]

Gatti touched off a firestorm of protests from the practicing bar.[55] The U.S. Attorney's Office expressed concern that *Gatti* would severely limit

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44. David McCord, *"But Perry Mason Made It Look So* Easy!*": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest That Someone Else Is Guilty*, 63 TENN. L. REV. 917, 919 (1996).

45. Hodes, *supra* note 29, at 69 (emphasis in original).

46. *In re* Conduct of Gatti, 8 P.3d 966, 970 (Or. 2000).

47. *Id.* at 969–70.

48. *Id.* at 970.

49. *Id.* at 973 (explaining that Gatti was charged only with violating ethical rules).

50. IMMANUEL KANT, *On a Supposed Right to Lie From Altruistic Motives, in* CRITIQUE OF PRACTICAL REASON 346 (Lewis White Beck ed. & trans., Univ. of Chi. Press 1949) (1797).

51. *Id.* at 347.

52. *Gatti*, 14 P.3d at 976.

53. *Id.* (emphasis in original).

54. *Id.*

55. Colleen E. McCullough, Note, *The Pursuit of a Prosecutorial Exception:* In re *Conduct of Gatti*, 27 J. LEGAL PROF. 217, 221–23 (2003)

legitimate sting operations.[56] The state legislature enacted legislation that overruled *Gatti*.[57] Eventually, the Oregon Supreme Court approved an amendment to the *Model Rules of Professional Conduct* to allow for legitimate covert investigations,[58] striking a blow against the Kantian ideal of absolute truth. In the end, practical necessity of covert investigations led the court to back away from its near-absolutist stance against lawyer deception.

Gatti drew so much attention in the legal community in part because the Oregon Supreme Court took such an extreme view about what many in the legal community view as a permissible deception.[59] No other court has expressly forbidden lawyers from directing deceptive sting operations. A related issue, the use of testers, raises a similar problem of deceiving third parties in the interest of serving a greater good.[60]

A tester is an undercover investigator who pretends to be an applicant for housing or employment.[61] A tester's purpose is to root out discriminatory practices through posing as a potential applicant.[62] Very often a tester will go to elaborate means to create a false identity as part of his ruse.[63] Isbell and Salvi provide a careful analysis of Model Rules 4.1, 5.3, 8.1, and 8.4 to argue that nothing in the *Model Rules* prohibits lawyers from, either directly or indirectly, posing as undercover testers to root out discrimination in housing and employment.[64] They argue that testers are acting as private citizens and not "*in the course of representing a client*" because testers are not "*acting in the capacity of a lawyer.*"[65] Furthermore, they argue that a lawyer may direct an investigator to misrepresent himself without violating Model Rules 5.3(c) or 8.4(a) because those rules only prohibit a lawyer from directing another to do something the lawyer could not do.[66] Because a lawyer acting as a tester is not acting as a lawyer, he could direct an investigator to also act as a tester.[67] In a rather stunning display of

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56. *Id.* at 222.

57. *See* OR. REV. STAT. § 9.528 (2005) (providing "[a]dvice on conducting court operations").

58. OR. RULES OF PROF'L CONDUCT R. 8.4(b) (2006).

59. *See* McCullogh, *supra* note 55, at 222–25; Hodes, *supra* note 29, at 76–77.

60. *See* McCullogh, *supra* note 55, at 223.

61. *See* Alex S. Navarro, Note, *Bona Fide Damages for Tester Plaintiffs: An Economic Approach to Private Enforcement of the Antidiscrimination Statutes*, 81 GEO. L.J. 2727, 2728 (1993).

62. *Id.*

63. *See* Isbell & Salvi, *supra* note 33, at 798 n.20.

64. *Id.* at 811–820.

65. *Id.* at 815.

66. *Id.* at 818.

67. *Id.* at 817–18.

interpretive gymnastics, Isbell and Salvi also argue that testing does not violate Model Rule 8.4(c)'s prohibition against misrepresentation.[68] They reason that 8.4(c) only prohibits misrepresentations that are graver than those prohibited by Model Rule 4.1.[69] Because Rule 4.1 permits lawyers to act as testers, so must 8.4(c).[70]

Isbell and Salvi's reasoning is strained at best. Surely, lawyers directing investigators to misrepresent themselves will usually be doing so to further the interests of a current, or at least potential, client. Rule 8.4(a) prohibits lawyers from directing others to do what the *Model Rules* prohibit the lawyer from doing.[71] Rule 4.1 prohibits a lawyer from misrepresenting himself to third parties.[72] Despite Isbell and Salvi's arguments to the contrary, covert investigations, where the lawyer or his agent deceive a third party, run contrary to the letter of the *Model Rules*. Surely, in most cases, whether a lawyer or her investigator is doing the dirty work, the dirty work is being done "[i]n the course of representing a client."[73] When lawyers act as testers, or hire investigators to do so, they invariably are doing so to gather information for the benefit of a client.

Strained or not, however, Isbell and Salvi undoubtedly reach a generally accepted conclusion: in some instances, lawyers may misrepresent themselves to third parties.[74] Trouble ensues when one takes a more Kantian approach, as the Oregon Supreme Court did in *Gatti*. Competing policy considerations, such as rooting out insidious discrimination, or allowing prosecutors to participate in sting operations, outweigh the principle that attorneys do not deceive third parties. Put more bluntly, sometimes lawyers deceive—and that's okay.

3. Exceeding the Limits of Deception.

The tolerance for deception disappears when the context demands it. For example, in litigation, while the *Model Rules* require lawyers to disclose

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68. *Id.* at 816–18.
69. *Id.* at 817.
70. *Id.* at 817–18.
71. MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2006).
72. *Id.* R. 4.1(a).
73. *Id.* R. 4.1.
74. Isbell & Salvi, *supra* note 33, at 829. For additional support for the practice of testing, see generally Julian J. Moore, Comment, *Home Sweet Home: Examining the (Mis)Application of the Anti-Contact Rule to Housing Discrimination Testers*, 25 J. LEGAL PROF. 75, 93 (2001) (arguing that the use of testers does not violate Model Rule 4.2's prohibition against contact with represented persons).

adverse law to the court,[75] they do not require lawyers to disclose adverse facts. Instead, courts rely on each party to disclose favorable facts, leaving it to opposing counsel to raise adverse facts. This changes when, during *ex parte* proceedings, there is no opposing counsel to act as a counter balance. In *ex parte* proceedings, lawyers are required to disclose *all* relevant facts, including those that are adverse.[76]

To be sure, even in an adversarial context, there are limits to the legal system's tolerance of deception. Even where an adversarial process exists that can counterbalance the deception of a half-truth, a lawyer cannot out-and-out lie. *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*[77] illustrates how even in the hardball world of high stakes litigation, deceit in discovery can lead to sanctions.[78]

The underlying lawsuit in *Fisons Corp.* arose when a two-year-old girl suffered severe brain damage allegedly resulting from the use of a prescription asthma drug at a time when she was suffering from a viral infection.[79] The drug was Fisons' Somophyllin Oral Liquid.[80] Its main ingredient was theophylline.[81] The parents brought suit against both their pediatrician and Fisons.[82] The doctor, Dr. James Klicpera, cross-claimed against Fisons.[83]

Fisons withheld two "smoking gun" memos that showed it was aware that theophylline posed significant dangers to asthmatic children suffering from viral infections.[84] Rather than disclose the memos, Fisons responded that "[s]uch letters, *if any,* regarding Somophyllin Oral Liquid will be produced at a reasonable time and place convenient to Fisons and its counsel of record."[85] Fisons' counsel reasoned that this response implicitly put the plaintiffs on notice that Fisons objected to the discovery request with regard to any documents that did not mention the brand name "Somophyllin Oral Liquid."[86]

Ultimately, an anonymous whistle-blower disclosed the withheld documents to the plaintiffs.[87] Fisons quickly settled the child's claim for

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75. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2).
76. *Id.* R. 3.3(d).
77. 858 P.2d 1054 (Wash. 1993).
78. *See id.* at 1085.
79. *Id.* at 1058.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 1074–75.
85. *Id.* at 1081.
86. *See id.* at 1082.
87. *Id.* at 1058.

$6.9 million.[88] Dr. Klicpera, however, would not settle.[89] Furthermore, he sought sanctions against Fisons and its counsel for their abuse of discovery.[90] The Washington Supreme Court ruled that Fisons had indeed abused the discovery process,[91] and Fisons and its counsel settled the sanctions claim for $325,000.[92]

Fisons Corp. may be seen as an example of what is beyond the outer limits of permissible deception in litigation. Even where opposing counsel serves as a skeptical counter-balance to half-truths and deceptions, lawyers cannot push their deceit as far as Fisons' counsel did. As the court found, the "misleading nature of the drug company's responses . . . is contrary to the purposes of discovery . . . which is most damaging to the fairness of the litigation process."[93]

On the other hand, *Fisons Corp.* can just as easily be seen as evidence that the tolerance for deceit through half-truths in litigation may be quite extensive indeed. Fisons' counsel had no fewer than fourteen experts testify on its behalf, asserting that its conduct was consistent with practices in Washington state.[94] David Boerner, a legal ethics professor at the Seattle University School of Law wrote that "[t]endentious, narrow, and literal positions with regard to discovery are, in my opinion, both typical and expected in the civil discovery process."[95] Noted legal ethics scholar, Geoffrey Hazard, said that he found no evidence of discovery abuse.[96] Furthermore, he stated that "the rules do not require the responding party to be generous or to volunteer information that may be helpful to the other side."[97] In the twelve years since *Fisons Corp.*, only one court has elected to follow its holding with regard to discovery.[98]

The above examples illustrate that lawyers routinely tell less than the whole truth. In negotiation, litigation, and other interactions with third parties, the need for the whole truth gives way to countervailing considerations. In most such circumstances, other forces exist to keep damage to the truth at a minimum. The nature of negotiation assures that a lawyer will be heard by a skeptical audience that will be less inclined to be

88. *Id.* at 1059.
89. *Id.*
90. *Id.* at 1060.
91. *Id.* at 1084–85.
92. Stuart Taylor, Jr., *Sleazy in Seattle*, AM. LAW., Apr. 1994, at 5.
93. *Fisons Corp.*, 858 P.2d at 1079–80.
94. Taylor, *supra* note 92, at 5.
95. *Id.* at 78.
96. *Id.*
97. *Id.*
98. Fjelstad v. Montana, 883 P.2d 106, 114 (Mont. 1994).

duped by half-truths. In litigation, the adversarial system protects the truth by giving all parties the opportunity to present their own version of the truth. However, when we move into the attorney-client context, those protections against overreaching are less visible. As the next section explains, a lawyer has considerably less leeway in presenting deceptions to a client.

B. Deception of Clients

"For His Own Good" [99]

The lawyers for Ted Kaczynski had a problem. Their client, the alleged Unabomber, was on trial for the murder of three people. If convicted, he was almost certain to receive the death penalty. The lawyers were convinced that his only hope for avoiding execution was to establish that he was mentally impaired. Unfortunately, their client did not believe that he was mentally impaired. In fact, he insisted that he was not impaired, and he refused to cooperate with any defense that suggested he was mentally impaired.

The lawyers repeatedly tried to convince Kaczynski that the only way that he could avoid the death penalty was to submit to a psychiatric examination, but he refused. Finally, the lawyers told Kaczynski that any examination would be protected by the attorney-client privilege and that it could not be used in court without his permission. He then reluctantly agreed to be examined.

At Kaczynski's trial, his lawyers sought to introduce the psychiatric evidence to establish that he was a paranoid schizophrenic. Kaczynski objected and sought to replace his lawyers. Failing that, he sought to represent himself. The judge refused to allow Kaczynski to discharge his lawyers. Rather than allow his lawyers to present the mental impairment defense, Kaczynski agreed to change his plea to guilty and was sentenced to life in prison.

Deceiving clients is much more problematic than deceiving third parties. Indeed, as noted above, the legal system not only tolerates deceiving third parties, in some situations, it requires it.[100] It is part of the nature of the adversarial system. But we are not adversaries of our clients. Trust is

99. The facts of this story are taken from Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417 (2000).

100. *See supra* notes 27–31 and accompanying text.

essential to the lawyer-client relationship. Thus, if there is ever a reason to deceive a client, it should be pretty compelling.

Of course, most lawyers would agree that deceiving a client is rarely, if ever justified. This does not mean that lawyers rarely do so. In fact, Lisa G. Lerman's study suggests that lawyers routinely deceive, and outright lie to clients.[101] Most of the time lawyers lie or deceive to cover their own mistakes, to justify excessive billing, or for similarly self-interested reasons.[102] While such deceptions may be commonplace, they are clearly unethical and inappropriate. One cannot imagine anyone making a serious argument that deceiving a client for one's own self-interest can be justified.

A more difficult question arises when a lawyer acts not out of her own self-interest, but out of her perception of her client's interest. Such was the situation Ted Kaczynski's lawyers found themselves in.[103] Their objective was to save their client from execution.[104] Their client, perhaps because of a mental impairment, was unwilling to allow them to do so.[105] Faced with the difficult choice of allowing their client to be executed or lying to the client to save him, they chose the latter.[106] Was theirs the ethical choice? The answer may depend on how one views the role of attorneys vis-à-vis their clients.

Those who take a client-centered approach to lawyering place primary emphasis on client autonomy.[107] That is, a lawyer's role is to advise her client as to her legal options. It is not the lawyer's role to substitute her preferences for those of her client.[108] After all, it is the client's case. This is particularly so when it comes to instrumental decisions, such as whether to settle or whether to pursue an appeal.[109]

At the heart of the client-centered approach is a belief that a fully-informed client will best be able to make the best decisions for that client.[110] While the lawyer may have expertise in the law, the client necessarily has greater expertise as to what the client wants.[111] Thus, the lawyer should

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101. Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 663 n.9 (1990).
102. *Id.* at 699–744.
103. *See supra* note 99 and accompanying text.
104. *Id.*
105. *Id.*
106. *Id.*
107. BINDER ET AL., *supra* note 10, at 4–5.
108. Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 509–10 (1990).
109. *Id.* at 539.
110. *See id.* at 507.
111. *See id.*

remain a neutral advisor—informing the client as to her options and then following the client's direction as to which option to pursue.[112]

On the other hand, a contextualist approach to lawyering places greater authority in the hands of the lawyer, at the expense of some client autonomy.[113] A contextualist perspective would look not only at the client's personal interests, but also to the impact the client's decision might have on third parties and society in general.[114] When a client chooses to act badly, it is the lawyer's proper role to go beyond offering the client legal advice to provide a broader spectrum of counseling.[115] The contextualist may be more likely to adopt the principles of Model Rule 2.1 that expressly encourage lawyers to refer not just to law but to "moral, economic, social, and political factors" when advising clients.[116] To a contextualist, a lawyer is not just a hired gun. Rather, the lawyer has a responsibility to more fully counsel her client, even to the point of trying to convince the client to change his conduct when that conduct may harm others, even if that conduct is otherwise legal.[117]

Yet a third approach to lawyering is the "lawyer as friend" perspective.[118] This approach may fall in between the client-centered and contextualist approach. Simply put, lawyers should view their clients as friends.[119] We certainly respect our friends' autonomy and generally support their decisions. However, where we see friends making serious mistakes, we also feel a responsibility to offer advice and to counsel them to consider the consequences of their decisions.

While these separate and differing approaches to lawyering are helpful analytical tools, I suspect that most lawyers actually practice something of a blended approach. A lawyer must exercise judgment as to when to defer to her client's wishes and when to push a little harder in trying to convince a client to take a particular course of action. That is, most lawyers regularly slide up and down the continuum of lawyer as moral counselor.

So where does that leave our assessment of Kaczynski's lawyers? Were they justified in deceiving him to prevent an almost certain death sentence? Were they justified in acting contrary to his express wishes? From a client-

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112. *See id.* at 507–08.

113. Deborah L. Rhode, *Ethics in Counseling*, 30 PEPP. L. REV. 591, 603–04 (2003).

114. *Id.* at 603.

115. *Id.*

116. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2006).

117. *See* Mitchell M. Simon, *Navigating Troubled Waters: Dealing with Personal Values When Representing Others*, 43 BRANDEIS L.J. 415, 420 (2005).

118. *See generally* Thomas L. Shaffer, *The Virtue of Friendship in Legal Counseling*, 30 PEPP. L. REV. 626, 626 (2003).

119. *Id.*

centered perspective, this is an easy case. The lawyers should not have betrayed Kaczynski's trust.[120] The lawyers were obligated to present Kaczynski's case as he wanted it presented. When he made it clear that, despite the risks involved, he did not want to put on a mental impairment defense, the lawyers should have accepted that decision, even if they knew it would fail. Under a client-centered approach, lawyers must allow their clients to make bad decisions.

For a contextualist or the lawyer-friend, this is a more difficult case. If he refused the psychiatric examination, Kaczynski was almost certain to be sentenced to death. If ever a lawyer should try to override a client's decision, this would be the time. Furthermore, for these lawyers, their client's life was not all that was at stake. As ardent opponents to the death penalty, this case presented a moral concern—preventing state-sanctioned killing of a potentially mentally impaired person—that extended beyond the specific concerns of Ted Kaczynski.

The Kaczynski lawyers, however, did not just use their power of moral suasion to convince Kaczynski to cooperate with the psychiatrist. They actively and knowingly deceived him. In doing so, many would say they crossed the line of appropriate counseling. Even though these lawyers did so for a legitimate purpose—to save their client's life—the deceit abrogated the client's autonomy to such a degree that their client lost his ability to control his own legal problem.[121]

The Kaczynski case illustrates how context affects the level of tolerable deception in the legal community. Had his lawyers misled the prosecution in a similar way, few would question their conduct. We not only tolerate withholding trial strategy from opposing counsel, but encourage it. But Kaczynski's lawyers did not deceive opposing counsel. Nor did they tell a half-truth to the jury. They deceived their own client. Even though the legal system tolerates, or even demands, deception in other contexts, deception of clients is not appropriate, even if done for a compelling purpose.

The Kaczynski case asks another question for the contextualist school: would you lie to a client if necessary to protect the client from his own bad decision? Perhaps some of us would and some of us would not. But however we view our relationship to our clients, most lawyers would be

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120. For a thoughtful and thorough critique of Kaczynski's lawyers, see *supra* note 99 and accompanying text.

121. Some might argue that because Kaczynski was in fact mentally impaired, he was unable to act in his own best interest and hence his lawyers acted appropriately in substituting their judgment for his. However, this is not a lawyer's proper role. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14(a). If the lawyers believed Kaczynski was unable to manage his own affairs, they should have sought appointment of a guardian. *See id.* R. 1.14(b).

more willing to deceive others on behalf of their clients (within the bounds of the *Model Rules of Professional Conduct*), than they would to deceive their clients.

If deceiving our clients, even if acting in their best interests, gives us ethical pause, where does that leave storytelling? Part III explores how stories are inherently deceptive. That is, even a story honestly told can only retell one version of reality. Stories do not tell the whole truth. On the other hand, stories are powerful tools of persuasion. Thus when we tell stories to clients, we are likely to persuade our clients, but we do so through a process that is inherently deceptive.

III. THE NATURE OF STORYTELLING

The Curious Incident of the Dog in the Night-Time:[122]

The policeman squatted down beside me and said, "Would you like to tell me what's going on here, young man?"

I sat up and said, "The dog is dead."

"I'd got that far," he said.

I said, "I think someone killed the dog."

"How old are you?" he asked.

I replied, "I am 15 years and 3 months and 2 days."

"And what, precisely, were you doing in the garden?" he asked.

"I was holding the dog," I replied.

"And why were you holding the dog?" he asked.

. . . .

He was asking too many questions and he was asking them too quickly. They were stacking up in my head like loaves in the factory where Uncle Terry works. The factory is a bakery and he operates the slicing machines. And sometimes a slicer is not working fast enough but the bread keeps coming and there is a blockage. I sometimes think of my mind as a machine, but not always as a bread-slicing machine. It makes it easier to explain to other people what is going on inside it.

The policeman said, "I am going to ask you once again . . . ."

I rolled back onto the lawn and pressed my forehead to the ground again and made the noise that Father calls groaning. I make this noise when there is too much information coming into my head from the outside world. It is like when you are upset and you hold the radio against your ear and you

122. MARK HADDON, THE CURIOUS INCIDENT OF THE DOG IN THE NIGHT-TIME (Vintage Books 2003).

tune it halfway between two stations so that all you get is white noise and then you turn the volume right up so that this is all you can hear and then you know you are safe because you cannot hear anything else.

The policeman took hold of my arm and lifted me onto my feet.

I didn't like him touching me like this.

And this is when I hit him.[123]

No one should be surprised that "[e]veryone has been writing stories these days."[124] It has always been so. We suspect people have told stories from the earliest times of people gathering around campfires. Humans are unquestionably storytelling animals.[125] The idea that stories can persuade is not a new one. Using stories in a legal context is not a new idea either.[126] However, while the tradition of storytelling can be traced back through millennia, the scholarly exploration of the use and abuse of stories, particularly in a legal context, is relatively new. This exploration confirms what we intuitively already know: a good story can be a powerful form of persuasion.

That stories play an important role in legal discourse is not debatable. However, what that role *should* be is subject to considerable debate. Before one can fairly join that debate, however, one must first explore the nature of storytelling. That is, we must examine how stories affect our audience to assess whether the impact of storytelling fits appropriately within the legitimate goals of legal discourse. That impact may be appropriate in some legal contexts while not in others. For example, few question the appropriateness of using stories to connect with juries.[127] On the other hand, there is considerable debate about the appropriateness of storytelling in

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123. *Id.* at 6–8.

124. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2411 (1989). The interest in storytelling has not ebbed since Delgado's observation: Indeed, storytelling routinely appears in a variety of legal contexts. *See, e.g.*, Edward J. Larson, *The* Scopes *Trial and the Evolving Concept of Freedom*, 85 VA. L. REV. 503 (1999); Louis J. Sirico, Jr., *Life and Death: Stories of a Heart Transplant Patient*, 37 REAL PROP. PROB. & TR. J. 553 (2002); Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CAL. L. REV. 981 (1994).

125. Steven Hartwell, *Classes and Collections: How Clinicians Feel Differently*, 9 CLINICAL L. REV. 463, 473 (2002).

126. *See generally* K.N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941) (discussing case studies of Cheyenne dispute settlements).

127. For a thorough discussion of the value of storytelling in litigation, see Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 9–20 (2005).

legal scholarship.[128] To date, there has been scant, if any, discussion of the appropriateness of telling stories to clients.[129] This article seeks to begin that discussion.

All stories have five necessary elements: character, conflict, resolution, organization, and point of view.[130] A point of view is of particular importance to the ethics of storytelling.[131] Every story is told from a particular character's point of view. If the point of view changes, the very nature of the story changes.

For example, *The Curious Incident of the Dog in the Night-Time* is told from the point of view of a 15-year-old autistic boy.[132] From his point of view, we see him as an intelligent, thoughtful, and caring person whose disability creates special challenges that he accepts and works to overcome. Told from a different point of view, he could appear as an irrational, unpredictable, and violent young man who is beyond his parents' control. This would have been a very different story had it been told from the perspective of the policeman instead of the 15-year-old autistic boy.

Perhaps the best example of how point of view changes a story is Ryunosuke Akutagawa's story *Rashomon*,[133] retold in Akira Kurasawa's classic film.[134] The story tells of a rape and a murder from the point of view of the attacker, the rape victim, the murder victim, and a bystander.[135] In doing so, the film powerfully shows how each character experiences the same event in a way starkly different from the others. [136]

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128. For the appropriateness of storytelling in legal scholarship, see Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1862–64 (1994) (discussing how outsider stories can effectively confront pre-existing perceptions of non-outsiders). *See also* Delgado, *supra* note 124. For a challenge to legal storytelling, see Arthur Austin, *Deconstructing Voice Scholarship,* 30 HOUS. L. REV. 1671, 1672–76 (1993) (arguing that voice scholarship mistakenly values author identity over substance). *See generally* Farber & Sherry, *supra* note 9 (questioning whether outsiders' stories belong in legal discourse).

129. Binny Miller has written about the ethics of telling stories *about* clients. Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1, 3 (2000).

130. Foley & Robbins, *supra* note 4, at 465.

131. *See id.* at 478–80.

132. *See generally* HADDON, *supra* note 122.

133. RYUNOSUKE AKUTAGAWA, RASHOMON AND OTHER STORIES 34–44 (Takashi Kojima trans., Liveright Publ'g. Corp. 1952).

134. RASHOMON (Daiei Motion Picture Co. Ltd. 1950).

135. AKUTAGAWA, *supra* note 133, at 34–44.

136. RASHOMON, *supra* note 134.

Some would say that *Rashomon* captures the inherent weakness of stories in legal discourse.[137] Law is predicated on a principle of neutrality and rationality. That is, in law, we seek to determine an objective understanding of a conflict to which we can apply objective, neutral principles that will lead to a fair result. That objectivity is essential to the fair result. A bias toward one party to the conflict, or legal principles that are unfairly biased toward one party, will not lead to a fair result.

Stories, because they necessarily are told from a particular point of view, are necessarily biased—and hence limiting.[138] That is, a story can never provide a complete picture of a conflict.[139] Consequently, some, those whom Baron and Epstein call foundationalists, reject narratives as "just" stories—unpersuasive because they merely reflect a position rather than "[getting to] the 'truth of the matter.'"[140] Put another way, stories do not reveal the whole truth. To those who believe an objective truth exists, a story can only be anecdotal. At best, a story can reveal only one perspective on the truth.[141] But a rational analysis would require additional evidence to determine if the story is in fact truthful. Thus, while a story may have a powerful appeal on an emotional level, it is of little use in reaching a rational, and hence fair, decision.[142]

Others embrace stories precisely because they reveal a particular point of view.[143] These "anti-foundationalists" view objective truth, or more precisely, our ability to perceive objective truth, as a far more slippery concept than do foundationalists.[144] Indeed, anti-foundationalists embrace stories because through stories, they understand that there is not one "objective" truth, but many truths that may vary widely depending on one's point of view.[145] That which foundationalists seek as an objective truth is, in reality, merely the "dominant truth," or the point of view of the majority.[146]

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137. Most of the debate about the value of stories in legal discourse has developed in the context of narrative in legal scholarship. *See supra* note 128 and accompanying text. Criticism of storytelling in litigation has been considerably more muted. *See* Alper et al., *supra* note 127, at 4–9.

138. *See* Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 269–70 (1994).

139. *See id.*

140. Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 171 (1997).

141. *See id.*

142. *See id.* at 172.

143. *See id.* at 173.

144. *Id.* at 172–73.

145. *Id.* at 173.

146. *See, e.g.*, Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 674 (1993) ("[M]any of the dominant narratives incorporate a majoritarian perspective, [and] the requirement that outsider storytellers adhere to these versions on penalty of being labelled untruthful comes perilously close to requiring them to reject their own culture.") (footnote omitted).

But, stories told from different points of view, in particular from the point of view of outsiders, offer insights beyond the dominant truth and thus expose the listener to a richer understanding of our world that might otherwise be overlooked.[147] To the anti-foundationalist, stories open legal discourse to a broader perspective by introducing the point of view that may otherwise be silent or undervalued in a purely rational analysis.[148]

While foundationalists argue that a story cannot be wholly true, anti-foundationalists would say that neither can it be wholly false. It may conflict with the dominant perspective, but it reveals a different point of view.[149] Even if that point of view is fictional, it may enlighten the analysis by requiring one to reconsider that which one accepts as true. Asking whether a story is true or not is beside the point. A story merely reflects a point of view of reality.

It is not the purpose of this paper to resolve the debate between foundationalists and anti-foundationalists. Rather, the debate is raised to illustrate a characteristic of stories that is generally accepted: stories are necessarily told from a point of view. Whether that point of view is of the insider, the outsider, or some other perspective, it is necessarily limited. A story can only reveal the reality that is perceived from its point of view.

While stories cannot reveal the whole truth, they certainly can persuade. Why stories persuade is a more difficult question. Classical Aristotelian rhetoric identifies three bases of persuasion, *ethos, pathos,* and *logos.*[150] Most lawyers are trained to persuade by *logos.*[151] Typical legal arguments rely on deductive or inductive reasoning. In this kind of analytical reasoning, appeals to emotion, i.e., *pathos*, are less relevant.[152]

Although lawyers are trained to value *logos* over *pathos*, juries and clients are not.[153] Thus, a litigator who relies solely on analytical reasoning may fail to persuade non-lawyers as effectively as one who incorporates *pathos* into her strategies.[154] No matter how logically sound an argument

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147. *See id.* at 675–76.

148. *See* Baron & Epstein, *supra* note 140, at 172–73.

149. Baron, *supra* note 138, at 269–70.

150. ARISTOTLE, *supra* note 5, at 36–44.

151. For a concise, coherent explanation of classical Aristotelian rhetoric, see Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. LEGAL WRITING 61 (2002).

152. *Id.* at 76 ("Useful as *ethos* and *pathos* are, Aristotle is most concerned with *logos*—persuasion through the use of logical arguments.").

153. Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 85–86 (1994).

154. For an illustration of how one skilled advocate used *pathos* to persuade a jury see Jennifer Kruse Hanrahan, Comment, *Truth in Action: Revitalizing Classical Rhetoric as a Tool for Teaching Oral Advocacy in American Law Schools*, 2003 BYU EDUC. & L.J. 299, 321–23

may be, juries or clients will tend to discount it if it does not resonate with them. Stories are one way a lawyer can bridge that reasoning gap through *pathos*, the emotion-based reasoning that strictly logic-based analytical reasoning overlooks.

Many rhetoricians see the art of persuasion as somewhat more complex: *ethos, pathos,* and *logos* are not distinct rhetorical tools, but rather overlapping concepts that interact to create persuasive argument.[155] *Logos* and *pathos* work together, combining analytical reasoning with specific narrative examples to create a more complete persuasive argument.[156] *Logos* and *pathos* are not distinct modes of persuasion, but components of a unified rhetoric.[157]

From the perspective of this unified rhetoric, the persuasive power of stories is clear. Stories do what analytical reasoning alone cannot: resonate with a listener's emotion. This resonance makes an argument more complete, and hence, more persuasive than one based on analytical reasoning alone.

Of course, not all stories have the ability to persuade. To resonate with a listener, a story must have narrative coherence and narrative fidelity.[158] By narrative coherence, we mean that a story must "hang together."[159] That is, the structure of the story must fit with other stories the listener has heard[160] —sometimes referred to as "stock stories."[161] Furthermore, the story must materially cohere in that all parts of the story are present and fit together. Finally, the people in the story must act consistently with their character. As Hartwell explains, "[i]f bad guys suddenly claim to become good guys, we need a lot of persuasive sub-plots about their lives to explain the transformation."[162]

(exploring Johnnie Cochran's appeals to emotion in his closing argument in defense of O.J. Simpson).

155. Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN'S L. REV. 23, 24–25 (1996); Erin Ryan, *The Discourse Beneath: Emotional Epistemology In Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 252–53 (2005).

156. Peter Brandon Bayer, *Not Interaction but Melding—The "Russian Dressing" Theory of Emotions: An Explanation of the Phenomenology of Emotions and Rationality with Suggested Related Maxims for Judges and Other Legal Decision Makers*, 52 MERCER L. REV. 1033, 1058–70 (2001).

157. *Id.*

158. Conti, *supra* note 4, at 458.

159. Hartwell, *supra* note 125, at 475–76.

160. WALTER R. FISHER, HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE, AND ACTION 47 (1987).

161. Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 5–9 (1984).

162. Hartwell, *supra* note 125, at 476.

Fisher explains that narrative fidelity deals with the listener's assessment of the plausibility of the story.[163] The listener may consider whether the purported "facts" are reliable and whether the conclusions make sense.[164] However, the test for narrative fidelity is based as much on values as it is on reasoning.[165] In other words, the fidelity of the story is measured by its consistency with the listener's expectations and experience. To be persuasive, the story must ring true with the listener's own sense of how the story should play out.

What a story does not need, however, is to be literally true.[166] Indeed, a clearly fictional story may be powerfully persuasive even though the audience knows the story cannot actually be true.[167] On the other hand, literally true stories often contain contradictions or missing pieces that undermine their narrative coherence or fidelity. We all know that truth is stranger than fiction. It is also considerably less tidy. Thus, whether a story is literally true is not an accurate measure of its persuasiveness.

This notion creates an obvious conflict for lawyers who wish to use stories to persuade. Very often, the most persuasive story will not be literally true, and it most certainly will not be the "whole truth." Whether telling a client's story to a jury, one's own story to colleagues, or someone else's story to a client, a lawyer may have strong incentive to embellish or modify the literal truth. One may even consider creating a completely fictional, but persuasive, story out of whole cloth. How far one may travel on that slippery slope may well depend on the context in which the story is told.

It is perhaps the slipperiness of stories that most affects their acceptability in different contexts. The law, of course, is an adversarial profession. Thus, in many contexts, if a lawyer uses a story to persuade, there is an adversary to assure that the story remains in proper context. Thus, in litigation, we expect lawyers to tell a story from their clients' perspective. All listeners, be they judge, jury, or opposing counsel, know

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163. FISHER, *supra* note 160, at 105–09.

164. *Id.*

165. *Id.* at 105.

166. As discussed in Part II, stories only tell us a point of view, and in that sense can never tell the "whole truth." By literally true, I mean a story that reflects the teller's actual point of view of events that actually happened. This contrasts with a fictional story—one that the teller does not believe to retell actual events. Of course, the literal truth and fiction are merely points along a continuum—with many blurry points lying between them.

167. For example, as Hartwell notes, the Harry Potter stories pass the test of narrative fidelity because once the reader accepts its major premise—that magic exists, the rest of the stories remain consistent with the reader's expectations. *See* Hartwell, *supra* note 125, at 476 n.64.

the stories are told from that point of view. Furthermore, we know that opposing counsel will tell the story from a different point of view. Because the listeners will hear multiple points of view, they will be able to sort out the different perspectives and determine the most likely version of the "whole truth." Thus, we can allow considerable leeway when it comes to storytelling in litigation. While we do not allow storytellers to outright lie, we do allow them, indeed expect them, to mold their story to fit a particular point of view. We do not expect a disinterested telling of a story.

As noted above, narrative has also become increasingly common in legal scholarship. In particular, legal academics have used narrative to tell outsider stories of women and people of color.[168] Frequently, legal academics have retold their own stories as a way of expressing to a broader audience the experiences of people of color and the perspective of those who see themselves as "the others" in American society.[169] Such scholarship has stirred considerable controversy as academics debate its appropriateness, how to evaluate such scholarship, and whether such narratives are intellectually honest.[170]

Those who question narrative scholarship argue that anecdotes do not form a solid basis for legal reasoning.[171] Furthermore, they question the veracity of at least some of the stories that are portrayed as literally true.[172] On the other hand, those who support narrative scholarship emphasize the importance of illuminating points of view not often heard in academia.[173] Stories are a more effective way to view the law as seen by the outsider. Furthermore, the literalness of such stories is of secondary importance. Stories relating the experiences of discrimination, whether literally true, composites, or outright fictions, can best communicate the sense of frustration, alienation, and distrust of those in power that is at the heart of the authors' purpose in writing.[174] The story of one's own rape is far more powerful than an abstract analysis of the crime.[175] That power is not lost by

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168. Delgado, *supra* note 124, at 2412–13.

169. *See generally id.*; DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 127–28 (1987).

170. Delgado, *supra* note 146, at 673–75; Farber & Sherry, *supra* note 9, at 807–10. *See generally* Arthur Austin, *Evaluating Storytelling as a Type of Nontraditional Scholarship*, 74 NEB. L. REV. 479 (1995).

171. Farber & Sherry, *supra* note 9, at 849.

172. *Id.* at 832–35 (suggesting that some narrative scholarship creates, at the very least, unintentional distortions).

173. *See generally* Baron, *supra* note 138.

174. Delgado, *supra* note 124, at 2435–41.

175. *See generally, e.g.*, Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

the fact that the story is only one person's experience. While an empirical study of physical and psychological trauma suffered by rape victims may present a more rational analysis of the consequences of rape, it cannot match the persuasive power of a personal story of a single rape victim.

It is not my purpose to resolve the debate about narrative scholarship. It seems almost certain that narrative scholarship will continue and that some in academia will disapprove of it. Those stories that are offered will invite responses and careful critique of the contentions they support. In that sense, storytelling in the academy is like storytelling in court: it is subject to critical review by those with different points of view. Those stories that ring true will withstand the scrutiny, and those that do not will pass into the dusty corners of the marketplace of ideas. Because the academy is a marketplace open to all, it, like the courtroom, is a place that can welcome the telling of personal or anecdotal stories. The audience of such stories read them with the knowledge that the author is trying to persuade. The audience also has other points of view available to it. In such a setting, where the audience knows the author is not obligated to tell the "whole truth," we can accept the limitations of storytelling in exchange for the benefits it brings. While we may not get the "whole truth," we gain a richer sense of a particular, and often underrepresented, point of view.

Stories are powerful tools of persuasion. Lawyers tell stories to juries. Law professors tell stories to students. And legal academics tell stories to each other. While stories in these contexts have some potential to cross ethical boundaries, we generally accept stories as appropriate persuasive tools in the legal context. What remains unexplored is the ethical limits of telling stories to clients. Surely, stories can be as persuasive when told to clients as when told to juries, students, or academics. However, the special relationship between lawyer and clients demands we examine just how "persuasive" a lawyer should be when advising a client.

IV. TELLING STORIES TO CLIENTS.

A lawyer's relationship with her client is different than her relation to a jury or a scholar's relation to the academy. A lawyer does not have an adversarial relationship with her clients.[176] Rather, a lawyer has a fiduciary

176. Of course, this is not entirely correct. For example, a lawyer has an adversarial relationship with her client with regard to her fees. However, the Rules of Professional Responsibility attempt to limit conflicts of interest in this area, and lawyers are expected to restrain their own self-interest to protect their clients. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.5 (2006).

relationship with her clients.[177] Trust is a necessary element of the lawyer-client relationship. In addition, a client is unlikely to have another advisor to balance against a lawyer. Because the lawyer-client relationship is not adversarial, a client is much less likely than a juror to question a lawyer's story. Furthermore, those who accept the client-centered approach to lawyering would argue that the job of a lawyer is to inform rather than to try to persuade a client.[178]

Inherent in fully advising a client is the recognition of the role that emotion may play in client decision-making.[179] Empathy with a client's perspective, including the client's emotional perspective, allows a lawyer to better understand and hence better inform and advise that client.[180] However, rational analysis of a client's emotions can be a tricky task indeed. Stories, however, can often resonate with a client in a way that rational analysis cannot. Through stories, we may be able to empathize with clients and hence better advise them.

However, as discussed above, a story does not reveal the "whole truth."[181] While it may resonate with a client on an emotional level, it may also enable a lawyer to overreach, substituting her own judgment for her client's. To the extent that telling a story is intended to persuade (or worse yet, to coerce) a client, a lawyer may be overstepping her bounds. Such overreaching is particularly problematic because in the lawyer-client relationship, there is less likely to be an opposing voice to counter-balance the lawyer. Thus, when a lawyer tells a client a story, she should do so with considerably more restraint than she would were she telling a story to a jury or to legal scholars.

This section considers how the special relationship between lawyers and clients must temper a lawyer's storytelling. Stories that inform a client—that is, those that allow the client to more fully understand her options—can be valuable and appropriate lawyering tools. However, even literal stories reveal less than the "whole truth."[182] Because of the special trust relationship between lawyers and clients, lawyers must provide their clients with sufficient context to assure that the clients are aware of the story's limitation. When lawyers fail to do so, stories become deceptive and

177. *See, e.g.*, Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2d. Cir. 1994) (finding that lawyers occupy an "unique position of trust and confidence" toward clients).

178. BINDER ET AL., *supra* note 10, at 4.

179. Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 234–38 (2002).

180. *Id.* at 205–06; Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1576–77 (1987).

181. BINDER ET AL., *supra* note 10, at 23–27.

182. *Id.*

lawyers overstep the role as advisor and may undermine their client's autonomy.

A. Within the Bounds: Stories That Inform "The Unsettled Client"[183]

Tess Dement had a problem. Dement is a lawyer who always tries to do what is best for her clients. Before going to law school, Dement earned her Masters in Social Work, though she never worked as a social worker, deciding that she could better serve the community through her law practice. She has been practicing as a sole practitioner since graduating from law school in 2000.

Six months ago, Dement was representing Goldie Digger, the young widow of Robert "Bud" Digger, a wealthy industrialist. Goldie and Bud met twelve years ago and were married after a six-week whirlwind romance. Despite the fifty-six-year difference in their ages, Goldie insists that they were deeply in love. In the last five years of his life, Bud suffered from emphysema, and Goldie cared for him and provided him with great comfort throughout his illness.

Not surprisingly, Bud's children were not as fond of Goldie as Bud apparently was. They are contesting his will, which he last revised three months before his death. At that time, he repudiated his prenuptial agreement with Goldie and left the bulk of his $30 million estate to Goldie. He left $10,000 to each of his three children, who under his previous will stood to receive $10 million apiece.

Because of the circumstances of Bud's final will, Dement was concerned that Bud's children may be able to successfully challenge the will. On the other hand, Goldie did care for Bud after he got sick, and they were married for over twelve years. Dement received an offer from the children's attorney, offering to pay Goldie $3 million, leaving the bulk of the estate to the children. While this was a lot of money, Dement was certain that this was just an opening offer. Furthermore, Goldie was in a position of strength since the burden was on the children to successfully challenge the will. Nonetheless, she conveyed the offer to Goldie, assuring her that it was a lowball offer and that she should reject it. Dement told Goldie that the offer was really just a starting point in the negotiation and that she was

183. The problem presented in this story is patterned after the problem "Accept the Offer" presented in Stephen Gillers, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 79–80 (7th ed., Aspen 2005).

certain the children were expecting a counter offer from Goldie. She further explained that while the children could tie up the estate for some time, she was certain that Goldie would ultimately prevail if the case went to trial.

Goldie, however, wanted to accept the offer. She told Dement that "our marriage was never about the money. I can certainly live comfortably on $3 million, and I told Bud at the time that he should not be so cruel to his kids— even though they were never nice to me. Maybe if I settle, Bud's kids will finally accept me. I want to accept the offer."

Dement was stunned. First of all, she knew that Goldie had adapted quite nicely to the jet-set lifestyle she had been living for twelve years. She suspected that she had no idea how much it cost to maintain six homes on four continents, nor how quickly she could burn though $3 million. Dement spent three hours trying to explain the consequences of accepting the offer, but Goldie was insistent.

Finally, in one last effort to convince Goldie to reject the offer, Dement said to her, "Let me tell you a story." She then told her the story of another client in a similar situation. This client (whose husband had considerably less money than Bud), had been quick to settle with her husband's estranged children. Unfortunately, the children spent their inheritance recklessly and exhausted the entire estate in a matter of months. The client tried to undo what she had done, but it was too late. Because she had settled for less money than she needed to meet her financial needs, she ended up virtually broke and her ungrateful step children would have nothing to do with her.

Dement was a masterful storyteller. Her story of her previous client was compelling, insightful, and deeply moving. So moving, in fact, that it did what hours of discussion could not—it changed Goldie's mind and she decided to reject the offer.

The Unsettled Client story illustrates the use of storytelling that I suspect few would find objectionable: Mary Dement, faced with a client whose emotions were preventing her from fully assessing the alternatives available to her, sought to present those alternatives in a different way. By telling the story of another client in a similar situation, Dement gave Goldie a fuller picture of the situation. The story allowed Goldie to reevaluate her personal stock story. That is, she was better able to evaluate her assumption that the only thing preventing her stepchildren from accepting her was the money in Bud's estate. Even though Dement had explained that the offer was just a starting point in the negotiation, Goldie was convinced that countering the offer would turn her stepchildren against her. It was only through the story that Goldie was able to more fully appreciate that her wish for

reconciliation could not be so easily achieved. Thus, the story provided her with more information (or perhaps more accurately, provided a different mode of conveying similar information). It melded her emotional reasoning with rational analysis to present a fuller picture of her options. Put another way, the story helped reveal more of the "whole truth" of her situation, and allowed her to make a better decision (that is, a decision more in line with her own objectives).

But even if we accept that Dement's story more fully informed Goldie, and led to a good result, it may give us an ethical pause. After all, the story, while true was merely anecdotal. Logic tells us that what happened to one client need not necessarily happen to Goldie. Even if the settlement offer was unfair financially to Goldie, she may have had other valid reasons to accept it. That she could not clearly articulate those reasons does not make them any less valid. In telling the story, Dement manipulated Goldie into acting as Dement thought best. Thus, the story could be seen as a subtle "lawyer trick" to allow Dement to usurp Goldie's right to control her own legal matter. This risk is exacerbated by Goldie's apparently fragile state. Combining the persuasive power of the story with Goldie's susceptibility and Dement's position of authority, it is possible to conclude that the story-telling overwhelmed Goldie's ability to make an independent judgment.

By this line of reasoning, in telling the story Dement infringed on her client's autonomy. If so, it is no defense that Dement was merely retelling a literal story. Whether Dement believed the story to be a complete and accurate retelling of actual events is of no import. The story persuaded (or coerced) Goldie, not because it was true, but because it had narrative coherence and fidelity. That is, it rang true to its audience—it was plausible. Goldie connected with the experience of the former client. In doing so, she was able to recognize what she previously could not—that her dispute with her stepchildren was not only about money and that the settlement was no guarantee of reconciliation. After all, what happened to the former client could happen to her.

Of course, Goldie's connection is based on a flawed, or at least tenuous, premise. That Dement had one client who made a poor decision does not mean that the same decision would be wrong for Goldie. The deception at work is the deception inherent in all stories: metaphors are unreliable predictors of future events. Even if Dement's story is "literal," it is only one story, told from one perspective. Thus, while the story is true, it was still deceptive at least to some degree.

While this may give one pause, it does not make the telling of the story unethical or unprofessional. The deceit of the story was, literally, beside the point. Surely, the story was no more deceptive than any story. More

importantly, Goldie understood the story as it was intended—as merely an example of what *could* happen to her. The "deception" was merely the obvious limitation of all stories. Furthermore, the value of the story—allowing Goldie to more accurately evaluate her options—outweighed the concern about the story's deceptive nature.

B. Falling Below the Ethical Floor: Stories that Deceive.

"Saying Goodbye"

Dash Croft had a problem. Croft is an experienced litigator who is also active in his state's Death With Dignity movement. He recently met with Mr. and Mrs. Show, who have a small farm in the rural part of the state. The Shows' daughter, Violet, was critically injured in an automobile accident thirteen years ago. She suffered extensive brain damage and has been in a permanent vegetative state ever since. She is on a respirator and receives nutrition through a feeding tube.

The Shows have come to Croft to discuss the legal process for removing the feeding tube and respirator. After thirteen years, they have accepted all the doctors' diagnoses that Violet will never recover. While they are certain that Violet would not want to continue to live in a vegetative state, they are very concerned about the potential publicity if they seek to have a court order her feeding tube removed. They are also unable to afford the extensive litigation that they fear would be necessary.

Croft has met with the Shows several times over the course of three months. He has agreed to represent them pro bono if they decide to go forward with litigation. With each meeting, the Shows appeared to lean more and more toward going forward, until finally, last week, the Shows instructed Croft to begin the process.

This morning, just before Croft was to file a motion seeking an injunction, he received a visit from the Shows. They had changed their minds. They were fearful that the media would hound them and their two older children. They were unsure that they could endure the years of litigation that would likely ensue. Their family had been through too much already.

The Shows' change of heart surprised Croft. They had talked extensively about all of these issues. He was unsure whether they would change their minds again, but he was certainly going to respect their wishes. In an effort

to offer them comfort, he told them about Long Goodbye,[184] *a book he recently read about the Nancy Cruzan case. He told them about how the Cruzans had a daughter who, like Violet, was in a vegetative state.*[185] *He told them about how the Cruzans, and their lawyer, had to work for years to finally get the right to remove their daughter's feeding tube.*[186] *He told them that while the Cruzans' struggle was difficult, it also brought their family closer together—and that eventually, they succeeded and were able to let their daughter die peacefully.*[187]

The Cruzans' story seemed to give the Shows a new perspective. Knowing that other families had faced a similar challenge and succeeded gave them strength. After another long and thoughtful discussion, they told Croft to go ahead with the motion.

What Croft neglected to tell the Shows was that shortly after Nancy Cruzan's peaceful death, her father, Joe Cruzan, committed suicide—apparently unable to deal with the aftermath of his long legal struggle.[188]

The *Saying Goodbye* story is more problematic than *The Unsettled Client.*[189] Croft told a literal story—the story of the Cruzan family. However, he left out a critical part of the story—that while the litigation ultimately succeeded, Joe Cruzan was so overwhelmed by the ordeal of the legal struggle that he killed himself.[190] This omission goes to the very purpose of telling the story. Croft claimed to be helping his clients assess their own difficult choices by showing them how the Cruzans dealt with a similar struggle. But the emotional toll of the struggle was what gave his clients pause. To omit Joe Cruzan's suicide is deceptive in a way that Dement's story to Goldie was not. Croft's deception was central to the purpose of the story—it gave a misleading representation of the challenge of such litigation. This did not more fully inform the client. Rather, it distorted the clients' consideration of options and enabled Croft to substitute his judgment for his clients'.

Unlike Dement, Croft has fallen below the ethical floor. While Dement's story was deceptive to a degree, her client understood that deception. Croft's story was also deceptive, but that deception made the story fundamentally misleading, because his clients were not aware of the

184. WILLIAM H. COLBY, LONG GOODBYE: THE DEATH OF NANCY CRUZAN (Hay House, Inc. 2002).

185. *Id.* at 17–44.

186. *Id.* at 53–389.

187. *Id.* at 385–89.

188. *Id.* at 393.

189. *See supra* note 183 and accompanying text.

190. COLBY, *supra* note 184, at 393.

deliberately untold part of the story. The question remains, however, where does the ethical floor lie? When does storytelling stop being merely informative or enlightening and become unacceptably coercive? To answer that question, let us add another twist to *The Unsettled Client*[191] story.

Assume the story Dement told was not true; the client she portrayed never existed. Now the story takes on an added deception: Dement knows that the story, while plausible, is not literally true. She also knows that Goldie mistakenly believes the story is true. Does the weight of this added deception sink Dement below the ethical floor?

Arguably, this change makes the telling of the story no less ethical. The *purpose* of the story—to allow Goldie to more accurately assess her options—has not changed. Whether the story is true or not, it remains just as plausible. Its value to Goldie remains the same. So long as she believes the story is plausible, i.e., so long as the story has narrative coherence and fidelity, its value as an evaluative tool remains unchanged. Put another way, whether the story is literally true should be irrelevant to Goldie. Just as she should understand that a literally true story may or may not reflect what will happen to her, she should also understand that a fictional (but plausible) story may or may not reflect what will happen to her. The point of the story is not that it is literally true, but that it is illustrative of what *could* happen to Goldie. It is illustrative because it is plausible, not because it is true. More importantly, it resonates with Goldie not because she believes it is literally true, but because she connects with it emotionally. In the words of Aristotle, it persuades through *pathos* not *logos.*[192]

One problem with this reasoning, however, is that it ignores the third leg of Aristotle's rhetorical stool, *ethos*, the reputation of the speaker.[193] When Dement tells Goldie her story, Goldie believes Dement because she trusts Dement. If Goldie learns that Dement's story was fictional, she will trust her less. As Aristoteleans recognize, *logos, pathos,* and *ethos* are not distinct analytical tools.[194] Rather, they are overlapping tools that, in combination, form the basis of persuasion.[195] When one relies solely on the emotional appeal of a story, but does so deceitfully, the damage to one's reputation will undermine the persuasive power of the story. Whether the

191. *See supra* note 183 and accompanying text.

192. ARISTOTLE, *supra* note 5, at 38–39.

193. Robert F. Blomquist, *Ten Vital Virtues for American Public Lawyers*, 39 IND. L. REV. 493, 507 (2006); Michael H. Frost, *With* Amici *Like These: Cicero, Quintilian, and the Importance of Stylistic Demeanor,* 3 J. ASS'N LEGAL WRITING DIRS. 5, 12 (2006).

194. *See* Nussbaum, *supra* note 155, at 24–25; Ryan, *supra* note 155, at 252–53.

195. *See* Bayer, *supra* note 156, at 1058–70.

story is plausible or not, the listener is more likely to dismiss the story if the listener does not trust the storyteller.

As with most ethical dilemmas, it is difficult to draw a bright line as to when storytelling becomes so deceptive as to be unethical. But perhaps a good starting point would be to consider whether the client would feel betrayed if presented with more of the "whole truth." That is, if the lawyer presented a different point of view, would it undermine the persuasiveness of the story? For example, how would Goldie or the Shows react if their lawyers closed their stories with the following caveats?:

"By the way, Goldie, you should remember that this is just one story. Your situation might be different."

or

"One more thing, Goldie, that story about my other client? I made it up."

or

"Did I forget to mention that after years of struggle, once the Cruzans finally won their case, Joe was so distraught, he killed himself?"

Dement's first caveat is likely to have minimal effect on Goldie's assessment of her own situation. A reasonable client would not object to learning that the story of another client may not reflect her own experience. Goldie would probably perceive Dement's caution as further evidence of her honesty and may even value the story more. On the other hand, the second caveat undermines Dement's credibility and is much more likely to cause Goldie to reject the story, even though its narrative coherence and fidelity remain unchanged. Likewise, if the Shows learned of Joe Cruzan's suicide, they most certainly would be upset with Croft's intentional omission.

Of course, as noted above, the stories *should* be just as effective with or without the caveats. The literal truth of the stories was not what gave them value. But a client expects her lawyer to be truthful. Deception, even if harmless in one sense, undermines the client's trust in her lawyer. Thus Dement's deception about the literalness of the story affects the client in much the same way as Croft's deception by omission.

V. CONCLUSION

It is neither novel nor particularly controversial to assert that lawyers often attempt to persuade by deception. Whether spinning the facts in a closing argument, bluffing in negotiations, or advocating for a change in the law in an academic article, lawyers routinely argue from a limited point of view. Left unchecked, such deception could be disruptive of our legal system. However, it is not left unchecked. Our adversarial system assures

that someone else—be it opposing counsel in litigation or other scholars in the academic community—will offer a different point of view. Listeners can sift through the conflicting point of view and fairly evaluate which point of view is most appropriate.

In this context, storytelling can play a valuable role. Stories have the ability to persuade listeners through *pathos* in a way that analytical reasoning cannot. However, stories are necessarily told from a limited point of view and are hence incomplete. But again, when the listener is both aware of the storyteller's advocacy role, and is given the opportunity to hear conflicting points of view form other advocates, a story's failure to reveal the "whole truth" is tempered. That tempering may be lost, however, in the context of lawyers telling stories to clients.

This is not to say that lawyers should not tell stories to their clients. As noted above, stories can be especially helpful to clients to the extent that they resonate with the client's decision-making in a way that analytical reasoning alone cannot. Indeed, lawyers may embellish literal stories or even tell fictional stories to clients. In doing so, lawyers must take care to assure that their clients are receiving the story with the same understanding as the lawyer is telling it. When telling stories to clients, it is not enough that the story retains narrative coherence and fidelity. Rather, the lawyer should take steps to assure that the client is able to put the story in the proper perspective as she attempts to understand and assess the whole truth.

As a final note, throughout this article, I have used stories to illustrate my theses. Some of these stories are literal, some are wholly fictional. Most, but not all, center around legal issues. All raise conflicts between legitimate competing values. I chose these particular stories because I felt they reflected the point of view I wished to put forth. Undoubtedly, other stories could reveal different and conflicting points of view. Those other stories may reveal other insights about lawyer-client relations that suggest other limits for telling stories to clients. And through the telling of those stories, we will gain a better understanding of the whole truth.

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