



**Implementing Best Practices & Educating Lawyers: Teaching Skills and Professionalism Across the Curriculum**

## Workshop 5E

# Exploring the Attorney-Client Dynamic in a 20-minute Counseling Exercise and Reflection

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A native of Wisconsin, Jerry Organ graduated magna cum laude from Miami University and attended Vanderbilt University Law School as a Patrick Wilson Scholar. At Vanderbilt, Organ served as an editor of the Vanderbilt Law Review and graduated as a member of the Order of the Coif. After clerking for Justice William G. Callow of the Wisconsin Supreme Court, Jerry entered private practice with Foley & Lardner in Milwaukee, where he practiced for five years, predominantly in the environmental law area.

In 1991, he joined the faculty of the University of Missouri-Columbia School of Law, where he taught property, environmental law, regulation of hazardous substances, land use controls, and client interviewing and counseling.

In 2001, he became one of the founding faculty members at the University of St. Thomas School of Law in Minneapolis, Minnesota, where he served as associate dean for Academic Affairs from 2005-2009.

Organ believes profoundly in the importance of law school as a formation experience and therefore tries to integrate the perspective of lawyer as problem-solver into all the substantive courses he teaches. Building on this, Organ has coauthored *Property and Lawyering*, a casebook for first year property that integrates lawyering skills and dispute resolution materials (coauthored with R. Wilson Freyermut (Missouri) and Alice Noble-Allgire (Southern Illinois)).

The casebook implemented some of the recommendations of the MacCrate Report and anticipated some of the suggestions in the Carnegie Report and Best Practices. This text and course received the 2003 CPR Institute of Dispute Resolution Award for Problem-Solving in the Law School.

Organ's scholarship initially focused on environmental law -- more efficient means of resolving environmental disputes and environmental federalism. More recently, he has begun to write about the culture of law schools and legal education. He currently is working on articles on law school scholarship assistance for students, law school missions, and performance enhancing drugs in law school, while also working on the third edition of the casebook.

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JUNE 23-24, 2009**

**EXPLORING THE ATTORNEY-CLIENT DYNAMIC  
IN A 20-MINUTE COUNSELING EXERCISE AND REFLECTION**

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**Description of the Counseling Exercise and Its Purpose**

**This is a counseling exercise that could be done in almost any class (recognizing that the factual scenarios might need to be changed). For our students, it was done during the “first week” – before other classes had started – while student were participating in a course designed, among other things, to begin to have students thinking about the role of the lawyer, the moral engagement of being a lawyer and the concept of the attorney-client relationship.**

**It involves pairing students so that each has the opportunity, with different factual scenarios, to have the experiences of being an attorney and a client engaged in a counseling exercise.**

**The counseling exercises themselves are short – ten minutes each, twenty minutes total. The students are then asked to reflect on the experience and to answer two questions in an email response to the professor by the end of the day. The professor reviews the email reflections, compiles some themes for discussion, and then “unpacks” the experience with a group discussion of some of the themes reflected in the email responses.**

**We will work through this in real-time, by engaging in the counseling exercise, taking a few minutes to reflect on the reflection questions, and then discuss the themes that were generated in the student responses to the reflection questions.**

## **Directions for the Counseling Exercises**

This exercise should be done in a high energy context – i.e., the students should only have about 20 minutes at the end of class to do the exercise. You should maintain a pretty rigid schedule and just keep things moving forward.

Have the students break into pairs and, ideally, arrange their chairs so they are facing directly at each other.

While they are arranging themselves, distribute the attached sheets so that one member of each pair has SIDE A and one member of each pair has SIDE B.

Ask each person to read the only the first scenario on the page (the attorney role for the Plant Closing case if SIDE A, the client role of the Plant closing case if SIDE B). They should be able to read the facts and be able to get into their roles in one or two minutes.

After one or two minutes to let them prepare, ask them to begin the counseling session by having the “attorney” engage in an “active listening” response. This means the attorney should begin by summarizing for the client what the attorney has “heard” (read). An active listening response might start – “If I understand correctly then, you are concerned about . . . and are trying to decide whether . . .” This should provide a fairly natural entry point into a brief conversation.

Allow the students 7-8 minutes to discuss the plant closing situation in their roles as attorney and client, then call it to a halt and ask them to spend one or two minutes reading the second scenario – Buyer/Seller. The attorney from the first scenario will now be the client and the client from the first scenario will now be the attorney.

Once again, the “attorney” should begin a counseling session by having the “attorney” engage in an “active listening” response. Allow them 7-8 minutes to discuss the Buyer/Seller situation in their roles as attorney and client, then call it to a halt.

**FOUNDATIONS OF JUSTICE -- FALL 2008**  
**Counseling Scenarios – SIDE A**

**ATTORNEY INFORMATION -- Plant Closing**

Your client is a privately held manufacturing company – ABC Manufacturing – that needs your help with some cost-cutting corporate restructuring. It has asked for your advice on whether to close the manufacturing plant in Small Town (where the business started over two generations ago) or the plant in Big City.

Closing the plant in Big City could be a challenge because ABC Manufacturing may be obligated to reimburse Big City for tax breaks it received when it built the plant there over ten years ago. The Small Town plant, by contrast, could be closed easily because ABC has never committed to stay there for any length of time and has not received any tax breaks. ABC would save \$1 million each year by closing the Small Town plant. Closing the Big City plant would save zero in the first year (because of the tax reimbursement), then \$1 million each year after that. ABC is the only significant employer in Small Town; Small Town's economy would be devastated by the closing. In Big City, by contrast, the economy is thriving, and there are many manufacturers and other employers who are looking to hire.

*Your client's general counsel asks, "Which plant should we close?" How do you respond?*

**CLIENT (SELLER'S) INFORMATION – Buyer/Seller**

You have asked Attorney to advise you on a contract issue involving the sale of a house. You had entered into an earnest money contract for the sale of the house with a price of \$250,000. Buyer made a down payment of 10% or \$25,000. Buyer had a financing contingency in place such that Buyer could get out of the contract if the Buyer was not able to obtain a mortgage with an affordable rate and payment term. Buyer, however, waived the financing contingency after arranging for a mortgage for the balance of \$225,000 through the Midwest Mortgage Bank, LLC. The closing is set for two weeks from now. Yesterday, Buyer called to say that Buyer may not be in a position to close on the sale of the house because Buyer's wife lost her job. With four young children, Buyer and his wife already are struggling financially, even without taking on the new mortgage that the house purchase would require. If Buyer's wife does not find a job, they may have to choose between keeping the house (were they to buy it) or sending their three oldest kids to the Lutheran Grade School to which they have gone the last five years).

Buyer would like to extend the closing date by a month to give Buyer and his wife a chance to explore 1) whether Buyer's wife can find another job, or 2) whether they simply need to pull the plug on the deal because prospects for making the deal work just aren't there. You want to know two things – 1) Does you have to give Buyer a one-month extension on the closing?, 2) If the Buyer does not close, can you keep all of the \$25,000 down payment even if even if you can sell the house for the same or more? (Both questions are of significance to you because you were contacted last week by Possible Purchaser who has indicated an interest in buying your house for \$260,000 cash.)

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**FOUNDATIONS OF JUSTICE - FALL 2008**  
**Counseling Scenarios – SIDE B**

**CLIENT INFORMATION – Plant Closing**

You are General Counsel for a privately held manufacturing company – ABC Manufacturing -- that is looking at a cost-cutting corporate restructuring. You are consulting with your attorney regarding whether to close the manufacturing plant in Small Town or in Big City.

Closing the plant in Big City could be a challenge because ABC Manufacturing may be obligated to reimburse Big City for tax breaks it received when it built the plant there over ten years ago. The Small Town plant, by contrast, could be closed easily because ABC has never committed to stay there for any length of time and has not received any tax breaks. ABC would save \$1 million each year by closing the Small Town plant. Closing the Big City plant would save zero in the first year (because of the tax reimbursement), then \$1 million each year after that. ABC is the only significant employer in Small Town; Small Town's economy would be devastated by the closing. In Big City, by contrast, the economy is thriving, and there are many manufacturers and other employers who are looking to hire.

You and your sister are the third generation to be involved with ABC Manufacturing. Your father is the President and CEO. You grew up in Small Town (where your father still lives) and where there is a park and a school named after your grandfather, who founded the company. You and your sister live in Big City and would not necessarily be excited about moving back to Small Town, although you anticipate that your father would prefer to keep open the Small Town plant given the family's history with the community.

**ATTORNEY INFORMATION – Buyer/Seller**

You have been asked by Seller to advise on a contract issue involving the sale of a house. Buyer and Seller had entered into an earnest money contract for the sale of the house with a price of \$250,000. Buyer made a down payment of 10% or \$25,000. Buyer had a financing contingency in place such that Buyer could get out of the contract if the Buyer was not able to obtain a mortgage with an affordable rate and payment term. Buyer, however, waived the financing contingency after arranging for a mortgage for the balance of \$225,000 through the Midwest Mortgage Bank, LLC. The closing is set for two weeks from now. Yesterday, Buyer called to say that Buyer may not be in a position to close on the sale of the house because Buyer's wife lost her job. With four young children, Buyer and his wife already are struggling financially, even without taking on the new mortgage that the house purchase would require. If Buyer's wife does not find a job, they may have to choose between keeping the house (were they to buy it) or sending their three oldest kids to the Lutheran Grade School to which they have gone the last five years).

Buyer would like to extend the closing date by a month to give Buyer and his wife a chance to explore 1) whether Buyer's wife can find another job, or 2) whether they simply need to pull the plug on the deal because prospects for making the deal work just aren't there. Seller wants to know two things – 1) Does seller have to give Buyer a one-month extension on the closing?, 2) If the Buyer does not close, can Seller keep all of the \$25,000 down payment even if Seller can sell the house for the same or more?

THE ANSWERS ARE -- No, Seller is not legally obligated to extend closing, but it is common to do so to facilitate keeping the deal together. 2. Yes, assuming Buyer has no legal grounds for getting out of the contract (and on these facts there would not appear to be any such legal grounds), because the earnest money deposit generally is viewed as "liquidated damages," a reasonable estimate by the parties of what the damages might be, it generally is enforced even if Seller finds another Purchaser willing to purchase at the same price.

Organ/Vischer – FOJ – UST

## FOLLOWUP TO THE COUNSELING EXERCISE – REFLECTION QUESTIONS

After the students conclude the counseling scenarios, send them an email in which you ask them to respond to the following reflection questions in one or two short paragraphs:

- As attorney, did you feel like you were engaging the client about questions related to things *you* wanted the client to think about or about questions *you thought the client* wanted to think about? Did you feel uncomfortable with your advice or with the client's inclination about how to proceed?
- As client, did you feel like the attorney helped you better understand your situation and helped you make a more informed decision or did you feel like the attorney was imposing the attorney's perspective on you?

## DISCUSSION POINTS BASED ON RESPONSES TO REFLECTION QUESTIONS

Based on the responses from my students several themes emerged that became the outline of our debriefing conversation the next day in class (roughly 45 minutes to an hour)

COMFORT ZONE OR NOT? First, a number of students reflected that having moral conversations was not that hard because it was apparent pretty quickly that the attorney and client had shared perspectives. But others observed the challenge of engaging such conversations when the client (or the attorney) seems to have a different "instincts" or "predispositions" about which option to pursue. Did anyone have either of these experiences – shared perspective or different perspective?

WHAT'S THE POINT? – We are going to encounter all kinds of clients – some who view the world the way I do and some who don't. The conversations with each client are going to be different.

IMPOSING OR NOT? HOW CAN WE TELL? Second, while many students felt the conversations had a natural feel and flow in which various considerations were brought on the table without undue pressure, a number of students felt either that they were imposed upon (pushed one way or the other) or were imposing their own views on the client (pushing one way or the other). Note that a couple of people recognized that as the attorney they could have done this, but been much more subtle about how they did it -- through the way they asked questions or the information they chose to emphasize (or not). Did anyone have either of these experiences – feeling like you were pushing or feeling like you were being pushed?

- I felt like I was imposing.
- I felt like the attorney was being very respectful of my views.
- “I guess it depends upon how good/subtle you are when imposing your views.”

WHAT'S THE POINT? – What is your relationship with your client? Are you client-centered or not? What does that mean? Should you decide what is best for your client and guide your client toward that decision or should you facilitate your client evaluating a range of options and making a decision that is in his or her best interest? How self-aware are you of when you might be guiding rather than facilitating?

WHAT SHOULD I DO? Third, some felt that the attorney failed to offer them advice (and one noted that the client wasn't listening!). One point that seemed to be a concern for people is what to do when the client asks -- what should I do? A few people noted that sometimes clients want the attorney to "make the decision" because then the client doesn't have to take responsibility. (And it is easy to take responsibility when someone offers you the option and respects your opinion.) But the reality is that the client has to live with the decision, not the attorney, so it should be the client's decision. Did anyone have this problem – of having the client ask “what should I do?”

WHAT'S THE POINT? When the client asks -- what should I do? -- there is some latent ambiguity regarding how to answer. Do you answer "as the client" -- trying to put yourself in the shoes of the client (something you can't really do)? Do you answer as yourself (while noting that you are not the client and may not view things the same way as the client does)? Do you not answer (and cause frustration for the client who wants direction)? The fact that the client has invited your opinion does not negate the risk that you might be "imposing" your views -- but if you don't offer any "advice" -- the client may feel that you really haven't been helpful at all.

NORMATIVE ASSUMPTIONS AND INDIVIDUALITY? Fourth, sometimes client's need to know that what they want to do is okay -- they want to know that while they legally can do something they are not legally obligated to do that.

WHAT'S THE POINT? Clients need not conform to your or anyone else's views of what is normative. Sometimes they need to know that they are free to make an independent choice and are not obligated to do what others might do. Are you prepared to give them that freedom or are you inclined to foreclose such possibilities because of your tendency to be normative?