HAPLESS HARVEST
CLIENT COUNSELING EXERCISE

Teaching Note

The Hapless Harvest Initial Client Interview Exercise and this Client Counseling Exercise were the starting points for the "Hapless Harvest Suite" included in this simulation repository. They were initially developed for my Client Counseling course in the 2005-6 time frame. In fact, this Client Counseling Exercise was initially fashioned as a prompt for a final exercise in the course. Student were given the prompt; I prepped various actors to play the client role; we recorded students' effort at the exercise, as I watched and coached, with the actor's assistance.

The prompt sets out a very difficult task: to give a client bad news - news they weren't expecting to hear, clearly explain some reasonably complex legal concepts for the client to understand why the news is bad, try to get the client to settle the case for an amount less than they would have anticipated before the meeting, and have the client still trust the lawyer as a competent, zealous advocate who is on their side. Although the elements need to accomplish this well were baked into the course, it nevertheless proved to be very difficult, time and time again. It was watching, coaching, and learning from the students' struggles and the actors' advice that prompted me to do additional research and then write Client Science: Advice for Lawyers on Counseling Clients Through Bad News and Other Legal Realities (Oxford 2012). Within the next year or so, I created clientsciencecourse.com, a website with all the course materials, a comprehensive instructor's guide, and a stand-alone piece titled: Client Science: Advice for Lawyers on Initial Client Interviews. (I think of it as a supplemental chapter.)

Within the course context, at some point I changed it from simply "Final Counseling Skills Exercise" to Final Counseling Skills Dress Rehearsal and Final Take." After all the course material had been covered, we would have a few weeks of break for the students to complete this exercise as well as related written memoranda and decision trees (another aspect of my course). Conducting an initial a "Dress Rehearsal" for coaching and feedback was consistent with the ABA's emphasis on interim feedback. Frankly it also improved the exercise for both students and the professor. Feedback and coaching were no longer tension inducing or received as criticism ("oh no, I won't get a high pass"). Instead, they were received as intended – as individualized, helpful attention to facilitate a successful final video as well as successful work with future practice.

If you were to use this as a stand-alone, I would suggest reviewing or assigning the following portions of Client Science: at least chapters one (focused on bad news), the section of chapter

five relating to framing around loss and risk, and perhaps chapter 3 titled "Meaning Truths." (Truth be told, it does work with the entire Client Science book; that should not be surprising given that the original prompt inspired the book.)

Having said that, there's no reason you couldn't simply use this prompt as a stand-alone exercise for client counseling. If so, you would want to provide and perhaps discuss the Client and Attorney Information from the Initial Client Interview of Jan Hapless. That's because this Client Counseling piece rests on the assumption that Jan Hapless conveyed basic information to the attorney in an initial interview and retained the attorney to sue Harvest Plenty grocery store for injuries Jan sustained in a slip and fall there. In the meanwhile, the lawyer did file suit and there has been some discovery. The lawyer has looked at the relevant law and had a brief conversation with defense counsel. As stated in the exercise, the lawyer now believes there's a large (70%) chance the case will be dismissed on Summary Judgment and, while better, the odds at trial are not terrific either. Possible contributory negligence and uncertainty about whether both claimed injuries will be attributed to the fall add risk and may reduce any damages.

The lawyer has not learned anything about Jan's circumstances since the initial interview. Jan doesn't know of summary judgment – what it is or why it is a (big) risk in her case. The reason is the "open and obvious" doctrine in Ohio law.

Truth be told, my *Client Science* book contains all the advice needed to do this exercise well. The first chapter is specifically targeted on delivering bad news, and even prescribe an order for the conversation. Each additional chapter is also directly relevant. These are not revisited in this teaching note. The following are just a few highlights:

As advised in *Client Science*, I look for the lawyers to "preface" the bad news before launching into the legal explanation. In some way, toward the outset, after greetings and before legal explanations, the lawyer is wise to say, in words or in substance that "I have some concerns … I see some legal hurdles that may be difficult to overcome." Something that prepares the client for the bad news to come. At the same time, it's good to provide reassurance about another option that could be positive.

Back to the challenge of explaining what the bad news is. The lawyer's challenge is to explain summary judgment and the open and obvious doctrine and why they will pose risks, despite arguments the lawyer could and would make to escape summary judgement under this doctrine. (Ohio's "open and obvious" doctrine is briefly described. in the lawyer's information for this client counseling exercise And, depending up on whether the client wants to know what might happen at trial, a lawyer may have to explain trial risks,

contributory negligence, and concerns about causation with respect to the back injury. (Once the client understands a 70% risk of losing on summary judgment, that may be enough. Discussion of trial may be unnecessary.)

When explaining the legal hurdles, as stated in Chapter One of Client Science, it's best if the lawyer presents their client's arguments and perspective first, before presenting the arguments of the other side, and why these are more likely to succeed.

At some point, the lawyer must present the fact that there has been a preliminary discussion about settlement with defense counsel. It's tricky: if the offer formally made - $5,000 - is presented without a preface, an explanation that the other lawyers know it won't be acceptable, they are just using it to start, the client is likely to be angry and insulted. On the other hand, when referencing the $40,000 figure, the lawyer must be careful to present it as presented: the other lawyer believes they could get their client's authority to settle for $40,000. They do not yet have that authority.

When teaching or coaching students through this exercise, I focus on the importance of framing around loss and gain. Actors playing the Jan Hapless role are instructed to say, about the $40,000 figure: "But that's so low. I thought we were going to trial and get $250,000. Now I find out we're not going to trial. I might end up with $40,000. I feel like I walked in here today and just lost $200,000!" The best approach is to take this on. Empathy is fine, but the lawyer is wise to reframe this $40,000 as a gain instead of a loss. This is done by noting, in words or in substance: "The $250,000 wasn't something we ever had; it was the most we could ever get if everything went our way." (This is an effort to shift away from $250,000 as an anchor against which the offer is measured.). Instead, the lawyer is wise to reference that, at this point, or if summary judgement is granted, they will have $0. And right now, the plaintiff has actual out-of-pocket losses of approximately $23,000. A settlement in the $40,000 range will cover those losses.

One nuanced observation to make has to do with the lawyer's stance – their relationship to the $ offer. First, the lawyer should never make it seem like a settlement in the $40,000 range was their idea, or vaguely arising from their discussion with opposing counsel. Instead, it's important to attribute that $40,000 to the other lawyer (perhaps after this lawyer's insistence on an offer more serious than the $5,000). Jan Hapless' lawyer is wise to position themselves as pushing the number higher – negotiating to get it as high as possible, empathizing with the client's disappointment. It's not wise to like the offer too much or seem to be selling it. Yet the lawyer, as the client's counselor, is advising them to consider it in light of the legal risks and the financial realities.

A final piece of the session relates to what settlement means for the client. Part of the lawyer's goal is to help the client feel comfortable with their decision (and of course, to have a satisfied client). Often, a client will get to the point where they understand the analysis – the risks and the consequences and the rational choice – but hesitate because of what settlement means. The client wanted their day in court so that people would know, so that Harvest Plenty will be punished. Jan Hapless may want to know that the store will undertake future safety measures so that no one else will fall. They may feel like the settlement is just "shooing me away". The question of meaning is addressed more fully in chapter 3 of *Client Science.* Sufficed to say here that the lawyer should be prepared to address the question of what settlement means to the client. Depending upon the client's expressed concerns, the lawyer may provide reassurance: "Even without trial, you did take action. You filed a lawsuit. That's a matter of public record." "In the settlement negotiations, we can talk with them about the conditions in their store. After all, it doesn't help Harvest plenty to have people falling and getting injured there." "Actually, an offer in the $40,000 range might be seen as Harvest Plenty's acknowledgement that you were injured and that it shouldn't have happened. They are attempting at least to cover your costs." "Politics is local and so are grocery stores. Even if Harvest Plenty is a large company, each store and each store manager is judged by the community and the company. No doubt, the manager in this Harvest Plenty store knows about this, and the $40,000 it will cost them. They have to know if they keep an unsafe store, it will keep costing. That has an impact. You will have an impact." And so on.

I am more than pleased to report that there is a video of a "By the Book" and "Not by the Book" Client Counseling session, showing contrasting approaches. Support for this video was provided by the University of Cincinnati's College of Law and Suffolk University Law School's Dispute Resolution Program (thanks to Professor Dwight Golann). This is available for legal educators on clientsciencecourse.com (password is "educator"). Just the "By the Book" or pretty-darned-good practice is on the ABA/Suffolk ADR Teaching Video site: https://www.adrvideo.org/client-counseling/
Password is "adrteacher123".

The case materials also include a copy of the memo I provide to actors or students playing the client role in this exercise.