

**Ethical Issues Raised in *Cherry Docs* and *Tone Clusters*  
Productions at Theatricum Botanicum**

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## **Ethical Issues Raised in *Cherry Docs* and *Tone Clusters* Productions at Theatricum Botanicum**

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### **Abstract**

The purpose of this analysis is to look at how ethical issues faced by attorneys are depicted in the arts, specifically two plays: *Cherry Docs* by David Gow and *Tone Clusters* by Joyce Carol Oates. These plays were presented at Theatricum Botanicum in Southern California as part of their 2012 and 2013 repertory seasons.

*Cherry Docs* is the story of a Jewish defense attorney who takes on the defense of a Skinhead charged with first-degree murder. The ethical issues that will be discussed include zealously advocating for a client whose social and moral views are completely at odds with those of the attorney, defining the scope of representation, at what point it is appropriate to withdraw, and how to be an advisor as well as an advocate in this highly charged situation. The ethical issues in *Tone Clusters* deal mainly with trial publicity. When the client's parents participate in an interview prior to the trial and make potentially damaging statements, what are the lawyer's responsibilities to his client, both in preventing this publicity and in dealing with it after the fact?

## **Ethical Issues Raised in *Cherry Docs* and *Tone Clusters* Productions at Theatricum Botanicum**

*“Paradox though it may seem . . . it is none the less true that life imitates art far more than art imitates life.”<sup>1</sup>*

The productions of *Cherry Docs* by David Gow and *Tone Clusters* by Joyce Carol Oates were presented at Theatricum Botanicum for CLE Ethics credits last year and this year. To earn the credits, lawyers attended the show and participated in a panel discussion led by the actors and one or more practicing attorneys. This essay is a review and analysis of those issues.

### **I. *Cherry Docs* by David Gow**

#### A. Brief Discussion of the Story<sup>2</sup>

*Cherry Docs* is the story of Daniel, a Jewish defense attorney, who is assigned by the court to defend Michael, a Skinhead who readily admits in their first meeting that he kicked a man for so hard and so long that he died from brain injuries. The name of the play comes from the cherry-colored steel-toed Doc Marten boots that Michael was wearing during the attack. The charge against Michael is first-degree murder, and Daniel’s job is to reduce the charge and lower the sentence, since Michael has confessed to the assault which led to the man’s death, but maintains that he never meant to kill him.

The story is told through scenes between the two of them, which are their client-attorney meetings throughout the trial where we see the relationship develop and change over time, and through monologues by each of them separately – Daniel at his home, and Michael in his cell – where they reveal information about their history, their thoughts and feelings, and how this trial is affecting them.

The playwright stated in his introduction to the play:

“The potential violence that threatens to erupt between Daniel and Michael in every scene is informed not just by the aftermath of one savage act, but by the memory of a thousand years of hatred...at the end of the play we are left in the uncomfortable position of wondering if the cost of saving Michael was worth the price that Daniel paid.”<sup>3</sup>

Daniel is confronted with many ethical issues over the course of the play, which lasts from the first attorney-client meeting through the end of the trial. Some of these issues

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<sup>1</sup> Oscar Wilde, *The Decay of Lying* (1897), <http://www.victorianweb.org/authors/wilde/decay.html>

<sup>2</sup> NOTE: Although this play is set in Canada, the analysis here will be based on the American Bar Association’s Model Rules of Professional Conduct.

<sup>3</sup> David Gow, *Cherry Docs*, production notes in Theatricum Botanicum program

are: zealously defending someone who had admitted to murder, getting past the very personalized cultural issues and hatred, and being a counselor as well as an advocate, to name a few.

### B. Taking on the Case: Conflicting Social and Moral Views

The first, and perhaps the most obvious, issue is whether Daniel should have accepted the representation in the first place. In California, the case might have been assigned to a public defender, or it might have been taken by a law firm as part of their pro bono program. Whether Daniel had been the public defender or the member of the firm assigned to the case, his first decision is always whether he will take on the case – does he reasonably believe that he will be able “to provide competent and diligent representation?”<sup>4</sup> In the very first client-attorney meeting, there is some question about whether Daniel really believes that. He tells Michael that he’ll represent him for the preliminary hearing, but won’t commit to the trial itself, because “I guess it’s a big challenge.”<sup>5</sup> This is not a particularly ringing endorsement of his ability to competently and diligently represent the client. But there is more to the question of whether Daniel should take on the case at all.

How could a Jewish attorney represent someone whose belief system is so completely opposite to his own? How could he defend the actions of someone who would be happy to inflict the same punishment on him just for being Jewish? The Model Rules have an answer for those questions: “A lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”<sup>6</sup> Daniel must deal with this issue, though, saying, “I don’t like Skinheads, I don’t like neo-Nazis, and I’m not fond of tattoos. I think the crime you’re charged with is . . . ugly. So I’m not much inclined to like you.”<sup>7</sup> He must make peace for himself that just by accepting the appointment to represent Michael, he is not accepting Michael’s views as his own. This rule serves a very important purpose – it allows every person who commits a crime, no matter who they are or what they believe in, to be represented by counsel. However, there is a limit to every lawyer’s tolerance, and while they do not have to agree with their clients, they must still be able to reasonably believe they can represent them.

We turn again to the Model Rules to resolve that dilemma. The ABA Model Rules give lawyers an “out” – a way to avoid a court appointed client. In most cases, a lawyer cannot avoid that appointment, but there is an exception where there is good cause, such as when “the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.”<sup>8</sup> There is no question that this is the case here – Daniel even says as much in their first meeting, saying, “. . . a lot of this bullshit makes me very hot under the collar . . . I’m not sure that makes me the best person to argue your defense. Maybe there are lawyers in your movement who could

<sup>4</sup> ABA Model Rules 1.7(b)(1)

<sup>5</sup> Gow, *Cherry Docs*, First Day, Scene 3

<sup>6</sup> ABA Model Rules 1.2(b)

<sup>7</sup> Gow, *Cherry Docs*, First Day, Scene 3

<sup>8</sup> ABA Model Rules 6.2(c)

put forward your case more sympathetically.”<sup>9</sup> However, Michael responds by saying he is glad that Daniel has been assigned as his lawyer – even though “[i]n an ideal world I’d see you eliminated. In this world I need you more than anyone.”<sup>10</sup> Michael has thrown down the challenge of a lifetime for Daniel – can a Jewish lawyer, one who is also a liberal and a “humanist,” take up his cause? He asserts that Daniel is the only person who could help him because it is the only way that he will be tried as an individual for his own acts, rather than the jury convicting his “Cause.”

Ultimately, Daniel takes the case. Although he knows it will be an uphill battle, he nevertheless endeavors to zealously represent this distasteful client. While he considers Michael’s actions to be ugly, and he finds Michael’s opinions about Jews, blacks, Pakistanis, and other minority groups to be personally offensive, professional ethics do not require lawyers to turn down an appointment just because the client or cause is repugnant. The key is whether it is so repugnant that the lawyer will be unable to represent the client to the best of his ability. We see Daniel’s determination to succeed in this representation (as much as legally possible, given the confession) in his next monologue following the first meeting. Daniel tells us of going home, drawing a bath, but then being unable to relax because he is already consumed with the enormity of the task he has taken on. He starts digging through the paperwork on Michael’s case, saying “There’s gotta be something here” to help him find a way to reduce the charge. He goes on to pray, “Oh my God, my god, my god. ‘Show me an opening as small as the eye of a needle... and I will make way for carts and carriages to follow.’”<sup>11</sup> Daniel has committed to provide Michael with competent and diligent representation, by his words to Michael, and his actions at home.

### C. Representing the Client: Scope of Representation / Unauthorized Practice of Law

Once a lawyer has taken on a client, he must define the scope of the representation. The Model Rules give the lawyer reasonable discretion in defining the scope: “A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>12</sup> Daniel first states that he will take on Michael for the preliminary hearing only, but then following the hearing, he takes the case for the full trial. The play’s second day is a month or so after the first, just after the preliminary hearing. It is the first real work session between Daniel and Michael, where Daniel lays out the ground rules for how they’re going to work together. He tells Michael, “You’re going to be very involved in this, very involved or I will walk.”<sup>13</sup> Daniel appears to be walking a very fine line here, dictating the terms without giving Michael any input in how their working relationship is going to go. Even though Daniel has been assigned to Michael by the court, the client still must be given an opportunity to consent to how the scope representation will be limited, if at all. Michael expresses doubts about his ability to come up with anything useful several times during this conversation, but ultimately he

<sup>9</sup> Gow, *Cherry Docs*, First Day, Scene 3

<sup>10</sup> *Ibid.*

<sup>11</sup> Gow, *Cherry Docs*, Second Day, Scene 1

<sup>12</sup> ABA Model Rules 1.2(d)

<sup>13</sup> Gow, *Cherry Docs*, Second Day, Scene 3

agrees to look at the papers and try to come up with a plan, stating, “I’ll do my best.”<sup>14</sup> But even though he’s not sure about his ability, Michael does promise to read the papers and come up with some ideas for how to proceed, thereby agreeing to the terms.

However, in defining the scope of the relationship, there are other rules that Daniel (and Michael) come up against. The ABA says that “. . . a lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued,”<sup>15</sup> but in the rules regarding law firms and associations, the ABA also tells us that “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”<sup>16</sup> Daniel has set up the relationship so that Michael knows that Daniel will be coming to him for direction – consulting with him regarding the means to achieve the goals. The question here is at what point does a client’s involvement in the case become the unauthorized practice of law, and did Daniel force Michael to cross that line?

In their second meeting, Daniel gives Michael copies of all the case files tells him, “You pick the direction. You review the material. You review your record, read everything, and tell me what’s the right way to go.”<sup>17</sup> When they meet again nearly three months later, Daniel asks Michael, “What do you think? Now. You have thirty days left to come up with a strategy.”<sup>18</sup> It seems as though Daniel is putting Michael in charge. . . or is he? Although in their interactions together, Daniel is pushing Michael to participate and direct the course of the case, in reality, Daniel is spending hours and hours, both at the office and at home, working on the case, looking for some sort of angle that will help him convince the jury that Michael should be convicted of something less than first-degree murder. Daniel tells the audience that he is “red lining it on this. I’m at the wall. I’m digging up all the case law that can be found anywhere, on race related offences. The hours going into it are incredible.”<sup>19</sup> Clearly Daniel has not turned the case over to Michael – he is fully in charge of the case, and supervising all aspects of it, while also giving Michael some say, some power over the outcome, much like the examples of client-centered lawyering in several of our course readings. “If we’re not a team, we both go down,”<sup>20</sup> Daniel says. This partnership is powerful, and ends up having a profound effect on both of them.

#### D. Withdrawal from Representation

There are several occasions during the several months depicted in this short play that Daniel could have reasonably petitioned to withdraw from representation. Keeping in mind the underlying duty to competently and diligently represent the client, the Model

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<sup>14</sup> *Ibid.*

<sup>15</sup> ABA Model Rules 1.2(a)

<sup>16</sup> ABA Model Rules 5.5(a)

<sup>17</sup> Gow, *Cherry Docs*, Second Day, Scene 3

<sup>18</sup> Gow, *Cherry Docs*, Third Day, Scene 3

<sup>19</sup> Gow, *Cherry Docs*, Fourth Day, Scene 1

<sup>20</sup> Gow, *Cherry Docs*, Second Day, Scene 3

Rules list several conditions under which a lawyer has the option to withdraw, provided the withdrawal can be accomplished “without material adverse effect on the interests of the client.”<sup>21</sup> Some of these conditions are when: “the client persists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; [or when] the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.”<sup>22</sup> There are many examples of these conditions arising at various times in the play.

At the preliminary hearing, a dozen members of Michael’s Skinhead group show up in the courtroom, making it very difficult for Daniel to argue that the assault was not racially motivated. During the meeting right after the hearing, he says, “You’re making me into a hack. A cheap stupid hack. I won’t have that,”<sup>23</sup> but doesn’t quit then. At this point he probably could have argued that withdrawal would not have materially affected Michael’s interests because the trial itself hadn’t yet begun.

In the monologue before his next visit with Michael, it is clear that this representation is starting to take a mental toll on Daniel, heading in the direction of making it “unreasonably difficult.” On the way to the jail, a group of kids surround Daniel’s car and try to get him to give them a ride. It rattles Daniel, and it bothers him that it rattled him, so much so that “I’m thinking about hitting him, and maybe knocking some sense into him.”<sup>24</sup> During their meeting, Daniel discovers that Michael has not come up with any ideas in the last three months that will help them in the trial. Daniel berates Michael for not trying hard enough and not being aware of how difficult this case will be, given the nature of the assault, Michael’s confession, and the jury’s likely pre-conceived notions about the violent tendencies of Skinheads. When Michael’s complaints and excuses become too much, on top of the experience he had on the way to the jail, Daniel erupts, accusing Michael’s Skinhead friends of being “a tribe of ill-educated white-trash-sons-of-bitches . . . who would prefer to wipe out my race, for nothing more than blood sport . . .”<sup>25</sup> Here we can see how hard it is for Daniel to zealously represent someone with whom he has fundamental differences, we can see how much he is fighting with himself in order to give his client a fair shot.

Is he still able to reasonably believe that he can represent Michael competently and diligently? During the scene on this “day” in the play, we see both Michael and Daniel get irritated and intense, but then also both are able to calm down and carry on with the work they need to do. At this point it still seems to be something that is controllable. When Daniel says to Michael that he wants to knock some sense and logic into him, Michael diffuses the situation by standing up and telling Daniel to hit him because “it’ll get rid of the feeling.” But Daniel declines, worried that if he started hitting Michael, he wouldn’t be able to stop. But rather than providing the basis for withdrawal, this

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<sup>21</sup> ABA Model Rules 1.16(b)

<sup>22</sup> *Ibid.*

<sup>23</sup> Gow, *Cherry Docs*, Second Day, Scene 3

<sup>24</sup> Gow, *Cherry Docs*, Third Day, Scene 2

<sup>25</sup> *Ibid.*

exchange brings a level of understanding between client and lawyer, when Michael responds by telling him, “Now you know how it feels. That’s my starting place.”<sup>26</sup>

Another way that Daniel could reasonably withdraw is due to financial burden. This is a pro bono case for him, and it has become his primary case due to the difficulty. He spends most of his working (and waking) hours on the case, to the exclusion of all else, for several months. He tells Michael, “I do my job. I do it every day. I do it at the expense of my home and life where necessary.”<sup>27</sup> Daniel’s wife leaves him, his partners make fun of him for being a crusader, and all the time, he is not being paid for the representation. Surely it would be a reasonable request to withdraw, and yet he doesn’t. And as the case continues, it becomes less and less likely that a court would grant the request, because after some period of time and some amount of work, it would be materially adverse to Michael’s interests to have to start over with a new attorney.

As long as Daniel is able to keep his emotions in check, which he still is able to do, these interactions actually are helping build the partnership that Daniel asked for in the beginning. So although Daniel could probably reasonably request withdrawal, he sees the possibility of something – a difference he could make – and doesn’t make that request.

#### E. Lawyer as Advisor

Lawyers have the opportunity to be both advocate and advisor for their clients, and Daniel is an example of that. Over the course of the trial depicted here, he helps Michael go from an angry young man to one who has hope for a future of tolerance and love. Now, this may be going above and beyond what is appropriate for a lawyer, but it makes for a good story. Although, one thing that many of us really want is to make a difference for people while helping them achieve their legal goals, so perhaps Daniel doesn’t go too far here.

The Model Rules tell us that “. . . a lawyer shall . . . render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”<sup>28</sup> The question is whether the advice that Daniel gave was relevant to Michael’s situation or was beyond the bounds of what was relevant. Some may argue that Daniel was not actively advising Michael, but rather teaching by example and pushing Michael in a direction where he would end up a more compassionate human being. Most people, not to mention most lawyers, would not have done that for someone who so clearly hated them in the beginning, and this probably tells us more about what kind of person Daniel is than what kind of lawyer he is.

Sometimes Daniel is gentle in his advising, pointing out the “nice old world full process work” that went into making his father’s briefcase that he loans to Michael in an effort to

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<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> ABA Model Rules 2.1

get him interested in helping himself.<sup>29</sup> But sometimes Daniel is tough with Michael, in order to get him to see beyond his own world view and look at it from the victim's point of view, or just to shake him up out of his automatic responses to questions. During the preparation for cross-examination, in order to impress upon Michael the seriousness of the situation after Michael has given several flippant responses, Daniel's lines are in all capital letters in the script, indicating that he is yelling at Michael: "DON'T GET SMART WITH ME. YOU'RE GOING TO GO TO JAIL FOR TWENTY YEARS."<sup>30</sup> As the realization sinks in, Michael starts to have a breakdown, retreating to his training as a foot soldier in the "Great Aryan Resistance," and Daniel finds a way to reach him, by playing the role of an officer. In that role, Daniel finally gets Michael to read out loud the victim's statement of forgiveness and hope that Michael can be rehabilitated to the point of being able to live in "a society with many colours." Michael realizes that the man had begged him to stop and he couldn't, and then he begins to really understand the impact of his actions. Daniel then has him read the statement again, because, "I am taking you through the eye of a needle, you are the thread. Once you've gone through that eye, you can decide . . . what part of the fabric you want to be."<sup>31</sup>

We see that Daniel wants to do more than just win at trial. He wants to help Michael be a better person. We see that this has been part of the goal from the beginning, when he had Michael take an active role in coming up with the strategy. And ultimately Daniel succeeds. In Michael's final monologue, a few months after the end of the trial, he talks about his fifteen minutes of fame and how he used it to promote tolerance and love. He realized that if someone like Daniel, someone who he had once thought wasn't fit to live on the planet just because of his religion, was willing to help him, perhaps his ideas were wrong. He says he would "gladly give [his] life" to "stop one young person from going down the road [he] went on," and although he is still in jail, he has hope.<sup>32</sup>

## II. *Tone Clusters* by Joyce Carol Oates

### A. Brief Discussion of the Story

The story in *Tone Clusters* centers around a couple from a quiet New Jersey neighborhood whose son Carl is arrested for the murder of a teenage girl who lived down the street. The girl was found brutally murdered in the family's basement, but the son claimed that he was out riding his bike when at the estimated time of death. Frank and Emily Gulick, the parents, proclaim their son's innocence throughout the play, albeit with varying degrees of certainty toward the end.

In the play, Frank and Emily are onstage, and a "Voice" offstage asks them questions. The way this production was directed, the voice was meant to be a talk show host interviewing them on live television. Between scenes, we see images on the screen behind Frank and Emily – sometimes photos of the neighborhood or their son, "crime

<sup>29</sup> Gow, *Cherry Docs*, Second Day, Scene 3

<sup>30</sup> Gow, *Cherry Docs*, Fourth Day, Scene 4

<sup>31</sup> *Ibid.*

<sup>32</sup> Gow, *Cherry Docs*, Seventh Day, Scene 2

scene” video, and clips of the cable news shows that are on 24 hours a day, seven days a week. The “interview” takes place prior to their son’s grand jury hearing, but after they have retained counsel for him. Over the course of the roughly 60 minutes, the interview turns into something more like an interrogation and Frank and Emily get tripped up in their answers to questions, forgetting what they have said before, being confused about which of their children did what, and sometimes questioning their beliefs about their son’s innocence (although they never verbalize that particular doubt).

The questions asked by the unseen voice sometimes are related to the specifics of their son’s case, but sometimes are abstract questions about a variety of topics, confusing the Gulicks. This technique is making a statement about the nature of the news media in the modern world, but it also highlights one of the ethical issues that lawyers must deal with – how to manage their conversations and their clients’ conversations so as not to harm their client’s case.

### B. Communication / Trial Publicity

As an advocate, a lawyer has a duty to ensure that statements are not made outside of the courtroom that would prejudice either side. The Model Rules prohibit a lawyer from making “an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”<sup>33</sup> On the other hand, if others have made public statements that could be harmful to his/her client, then the lawyer can try to lessen any damage by making “a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. . . .”<sup>34</sup>

In *Tone Clusters*, we are faced with the situation where neither the lawyer nor the client is making statements publicly – the client’s parents are. On the one hand, Frank and Emily speak about Mr. Filco, the attorney, who has advised them to some extent. While the Mr. Filco is not making statements to this media outlet, he had enough contact with the Gulicks to recommend that they not go on television to talk about their son. Both of the parents were on medication, and both had a tendency to say things that could be taken in a way that would not help their son (his client), so Mr. Filco reasonably should have known that information could get out that would be prejudicial later on. Since this was probably a highly publicized case, being the murder of a teenage girl by a teenage boy in a middle-class white neighborhood, the kind of case the media flocks to, Mr. Filco should have known that things could very easily get blown out of proportion. By not advising Frank and Emily to stay away from the media until the trial was over, Mr. Filco failed in his duty to advocate for their son in this respect.

During the course of the interview, a number of things get said by the Gulicks that could be damaging. When asked about whether human identity is determined by chance or

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<sup>33</sup> ABA Model Rules 3.6(a)

<sup>34</sup> ABA Model Rules 3.6(c)

genetic determination, they hedge a little, first saying, “you try your best,” and getting to, “Sometimes there is a chance, the way they turn out, but also what they *are*,”<sup>35</sup> as if to say that they are not responsible for how Carl turned out. This is the first chink in their conviction that there is no way he could have committed the crime. When asked to describe Carl and the pictures of him that are shown on the screen, they talk about him weight-lifting, working in a butcher shop, loading and unloading deliveries at Sears, all of which show that he had the capability to carry a girl down to the basement and cut her up, the way the neighbor girl was found.<sup>36</sup> Later they talk about how he’d been out of work, which was what made him available to help with the search for the girl that went on before they found her in the Gulicks’ basement, and they talk about how people called him shiftless. They say that the handprint on the wall, which in the “crime scene video” we can see is a bloody handprint, is Carl’s, but they explain it as being from when Carl was helping the police.<sup>37</sup> They confirm that he had military and pornographic magazines, knives, switchblades, and a bayonet, and Nazi memorabilia in his room.<sup>38</sup> They talk about how he had a temper and was prone to get into fights with the boys in the neighborhood.<sup>39</sup> While none of these statements goes so far as to be enough to convince a jury of Carl’s guilt beyond a reasonable doubt, they are all damaging and could cause potential jurors to presume guilt before hearing any evidence during the trial itself.

An additional damaging thing is that we see Emily, and to some extent Frank, lose their certainty of the facts over the course of the interview/interrogation. Emily begins mixing up Carl with their other son Denny, and Frank remarks “you forget what you remember” because they have told the police (and others) their story so many times.<sup>40</sup> This could make these potentially valuable character witnesses far less credible, further damaging Carl’s defense.

Having not prevented the Gulicks from going on this program, what is Mr. Filco to do now? According to the Model Rules, he can – and should – make a statement to the press to do some damage control. This statement must only be what is reasonably necessary to protect Carl’s interest. There is a little grey area because the rules state that the lawyer can do this sort of damage control only when the publicity was not initiated by the lawyer or the client, and the publicity here was initiated by the client’s parents. If they went on the program without Carl’s knowledge and without Mr. Filco’s knowledge, then that may create enough distance for it not to be considered initiated by the client.

### C. Competence

Given what the Gulicks have said about their financial situation, it appears that Mr. Filco is a public defender. Even though neither Carl nor the Gulicks is paying his salary, he still must provide competent representation, which “requires the legal knowledge, skill,

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<sup>35</sup> Joyce Carol Oates, *Tone Clusters*, Scene 2

<sup>36</sup> Oates, *Tone Clusters*, Scene 4

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Oates, *Tone Clusters*, Scene 7

<sup>40</sup> *Ibid.*

thoroughness, and preparation reasonably necessary for the representation.”<sup>41</sup> We don’t know much about Mr. Filco’s experience and legal knowledge, but this is a high-profile murder case, likely to lead to the possibility of the death penalty. Is a public defender prepared for that?

Not much is said about what Mr. Filco does, other than telling the Gulicks that the circumstantial evidence that the state has probably isn’t enough to convict Carl. However, from all that the Gulicks say in the interview, there seems to be quite a lot of this circumstantial evidence, possibly enough to convince a jury of Carl’s guilt beyond a reasonable doubt. If Mr. Filco is relying on the lack of evidence, rather than helping to build a more concrete defense, he could be failing in his duty of competent representation.

Additionally, if Mr. Filco knew about this interview before Frank and Emily went to do it, he should have had some idea that they would say more than they should. A competent lawyer would have either attempted to dissuade them from going on the show, or at the very least advised them what they should and should not say and gone to the taping with them to stop it if it got out of hand. By not being there, he was not able to check the questions before hand to make sure they didn’t elicit information that would materially prejudice his client, and he was not able to halt the interview when it became clear that the Gulicks were having difficulty keeping their stories straight.

While this production’s ethical issues were not as clear as those in *Cherry Docs*, *Tone Clusters* still provided some thoughtful discussion about how to zealously advocate for one’s client in the modern world of sensationalized media coverage.

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<sup>41</sup> ABA Model Rules 1.1