What Do Clients Want? What Do Lawyers Do?

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INTRODUCTION

A serious discussion of "what do clients want?" requires an understanding of the particular situation clients find themselves in when meeting with their attorneys. Consideration of emotional and financial stress, the stakes and complexity of the conflict, relations between opposing parties, a client's view of law and her lawyer, and differences between ordinary language and the language of the law are among the many factors that shape the ability of clients to articulate exactly what they want from their lawyers. Indeed, some clients do not know what they want and rely instead on their lawyers to tell them what they should do. Clients may also change their goals during the course of legal representation. Constructing client goals is a social process throughout which lawyers influence the defining of issues, the framing of the case, the formulating of alternatives, as well as many other decisions potentially affecting the outcome.

To what extent should the lawyer control the client? Should she exercise independent, objective judgment about the case and attempt to persuade the client of her view, or should she simply seek to implement the client's expressed position, so long as it is within the bounds of the law? The question, more or less, is which role appropriately defines "professional" conduct for lawyers? Many scholars advocate an independent role,¹ as evidenced by the

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use of terms such as "professional" instead of "agent" when referring to the role of the lawyer.² Yet others see lawyer independence not as professional conduct but as authoritarian manipulation and domineering paternalism, and argue that professionalism should be defined by a more client-centered approach.³

What is a good lawyer to do? A consensus does not exist in either the formal bar rules or the academic literature. Such ambivalence about the appropriate role for lawyers is not new. As Fred Zacharias has noted, even the famous English statement of client loyalty (Lord Brougham's admonition that the lawyer "knows but one person in all the world, and that person is his client") was qualified by the belief that lawyers would of course also exercise their own objective moral judgment.⁴ Given the delicate balancing of client interests and public interests that is required of lawyers, it is not surprising that both roles have dominated at different points in history. Where one generation has urged lawyers to serve as partisan advocates for their clients, the next generation has instead favored the independent advisor role.⁵ In this Article, I explore what we know about the lawyer-client relationship in different areas of legal practice in an effort to elucidate the normative debate.

Part I provides a brief review of the central points in the legal academic literature about what role lawyers should play for their clients. This section also notes that current rules of professional conduct reflect the scholarly ambivalence on this issue, since the rules can be read by lawyers to condone either an independent or a client-centered stance. Part II explores recent work on professionalism in practice, that is, on the norms that emerge from communities of lawyers who regularly interact with one another in different areas of legal practice. This section then summarizes the empirical research depicting what role lawyers actually play with their clients. As a social scientist, I believe that good description can lead to better prescription. Hence, understanding what lawyers do for their clients and why, may help in

⁴ Zacharias, supra note 1, at 1315-16.
⁵ See id. at 1314-27.
clarifying and improving normative standards for lawyers' conduct. As Part II of this Article suggests, significant variation exists across and within legal specialties in the extent to which attorneys see their role as enacting what clients want rather than providing independent advice. It is clear that the "problem" of lawyers riding roughshod over their clients' wishes looks quite different when the clients are powerful corporations like Microsoft or Lincoln Savings & Loan rather than individuals facing criminal prosecution, struggling through a divorce, or seeking compensation for an injury. Part III summarizes the factors that appear to explain the conditions under which lawyers choose one of the two professional roles. I conclude with some speculation about possible responses to variation in lawyers' role by areas of practice and type of clients.

I. SHOULD LAWYERS GIVE CLIENTS WHAT THEY WANT?

When a lawyer takes a client-centered approach to representation, she is often castigated for acting as a "hired gun" or "mouthpiece." Yet the ethical rules of conduct promulgated by the bar support this role. The American Bar Association's (ABA) Model Code of Professional Responsibility (Model Code) states, for example, that other than in certain minor areas, "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."\(^6\) In the revised guidelines for lawyers, the newer Model Rules of Professional Conduct (Model Rules), the ABA states 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."\(^7\) Although the Model Rules set up what at first glance seems to be a straightforward division between objectives and means (allowing the client to set the objectives and the lawyer to determine the means),\(^8\) legal academics and the ABA's own comments underscore how the two often become blurred. As the comment to this rule acknowledges, a "clear distinction between objectives and means sometimes cannot be drawn . . ."\(^9\) As a result, support for the client-centered approach from the ethical rules is weaker than it initially appears.

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\(^6\) Model Code of Prof'l Responsibility EC 7-7.
\(^7\) Model Rules of Prof'l Conduct R. 1.2(a).
\(^9\) Model Rules of Prof'l Conduct R. 1.2 cmt.
Other language in the rules suggests that lawyers should follow a more lawyer-centered role in representation. The Model Rules state that “a lawyer shall exercise independent professional judgment and render candid advice.” The Model Rules also allow a lawyer to withdraw from representation if “a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.” These statements certainly encourage lawyer independence and challenge a client-centered approach. One can meticulously go through the rules searching for guidance and come up empty-handed. The rules themselves are vague, contradictory, and ambiguous and thus do not tell lawyers how, as professionals, they should behave in representing clients.

Ambiguity in the ethical rules mirrors the ambivalence and debate in the academic literature over the appropriate role for lawyers. A traditional argument in favor of lawyers acting as faithful agents for their clients rests on the nature of the adversary system. In a system with third-party adjudication, each side must have a partisan advocate who will nonjudgmentally argue its position. According to this “standard” view of legal representation, a lawyer should not judge her own client, but rather should advocate and defend the client’s objectives. Judging is the job of the judge. The job of the lawyer is to advocate zealously for her client regardless of whether the client’s goals are realistic or worthy. As one scholar has noted, “it is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of his client’s interests—that it is right that a professional put the interests of his client above some idea, however valid, of the collective interest.”

A more recent argument in favor of lawyer deference to clients rests on the importance of client autonomy and self-determination. Thus, “a client-centered practice takes the principle of client decision-making seriously,” and

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10 Id. R. 2.1.
11 Id. R. 1.16(b)(3).
12 See, e.g., Paul G. Haskell, Why Lawyers Behave As They Do 86 (arguing that “the professional rules permit the lawyer to practice in accordance with the hired gun model or the independent lawyer model, as he chooses”); Uphoff & Wood, supra note 8, at 15 (arguing that vagueness and inconsistencies in the Model Rules “leave the lawyer basically free to decide this question as he sees fit”). For a broader critique of the professional rules as effective guides to lawyers’ conduct, see, for example, Heidi Li Feldman, Codes And Virtues: Can Good Lawyers Be Good Ethical Deliberators?, 69 S. Cal. L. Rev. 885 (1996); David B. Wilkins, Legal Realism for Lawyers, 104 Harv. L. Rev. 468 (1990).
13 Luban, supra note 3, at 393.
14 Freedman, supra note 3.
encourages lawyers to act in ways that will maximize client autonomy. Lawyers should help clients make their own decisions, not by overpowering them with authority and technical expertise, but by engaging in sensitive client interviewing to provide support and any necessary information to enable clients to make their own decisions. A “participatory” model of the lawyer-client relationship depicts clients as actively involved in decisions about legal strategy, evaluation of alternatives, and final case disposition. Douglas Rosenthal suggests that active client participation will reduce conflicts of interest between client and lawyer, increase client satisfaction, and ultimately produce a better case outcome for the client. Besides its ultimate benefit to the client, this kind of lawyer-client relationship would also strengthen the role of law in society. Empowering clients to speak in their own words and to express their own interests should make law itself more responsive to litigants’ experiences.

If we think of a continuum—between complete client control over decisionmaking at one end and lawyer control at the other—a client-centered practice or participatory model might be somewhere in the middle, yet closer to the client end. Stephen Ellmann, for example, defends client-centered lawyering but admits that some situations require lawyers to exercise considerable power over clients to achieve the overall goal of client autonomy. Despite disagreements among scholars favoring greater client participation on exactly what role lawyers should play in decisionmaking and why, they share a general distrust of lawyers’ control over clients.

To other scholars, however, the independent judgment of lawyers is precisely what they must provide their clients if they are to act as professionals. If the client is always right, then lawyers are not exercising the professional authority and expertise that defines their role. Lawyers should apply their own engaged moral judgment to their client’s problems and should acknowledge the alternative values that may conflict with their clients’ wishes. Another problem with a client-oriented perspective on lawyering is

16 Ellmann, supra note 3, at 720. See also Binder & Price, supra note 3.
17 Rosenthal, supra note 3.
18 Id.
19 See Cunningham, supra note 3, at 2493.
22 See, e.g., Luban, supra note 3; Gerald J. Postema, Moral Responsibility in Professional Ethics, 55
that client interests are not predetermined and fixed, but are shaped and constructed through the social interaction between client and lawyer. Even the ostensibly simple process of rephrasing client objectives into the language of law adds new meaning to the client’s position.\(^\text{23}\) The indeterminacy of client goals and the malleability of legal language suggest that lawyers cannot avoid exercising independent influence over clients.\(^\text{24}\) Additional support for lawyers’ independence comes from Robert Gordon’s argument that such a role is better for society, not just for clients’ interests.\(^\text{25}\) Since lawyers’ discretionary decisions necessarily entail making political judgments, they should remain independent from their clients in order to fulfill the ideal of law as a public profession.\(^\text{26}\)

Nevertheless, the basis for lawyers’ “independent judgment” remains problematic. Does it mean that lawyers should pursue exactly what the written law requires? Or what they believe the judge or jury would do? Or what they personally believe is the ideal moral course to take? Or what they believe to be in their client’s best interest? The very notion of “representation” entails the quite different meanings of the Burkean trustee (do what you think is best) and the delegate (do what you are asked to do).

In short, neither the rules of the bar nor the academic literature provide a clear answer to the question of what role lawyers should play in representing their clients. Perhaps lawyers, implicitly understanding this uncertainty, decide on their own whether to be agents for clients or independent advisors—with great individual variation in the choices made and no particular pattern as a result. But that seems not to be the case. An emerging literature focusing on lawyers’ ideologies and practices suggests that they develop standards of professionalism in concert with one another. That is to say, lawyers articulate and share particular norms of professional conduct through daily interactions with their peers—through “communities of practice,”\(^\text{27}\)


\(^{\text{24}}\) See Gordon, *supra* note 1; Simon, *supra* note 1.


\(^{\text{26}}\) See id.

"arenas of professionalism,"28 "local legal cultures,"29 or through the "culture . . . of practice organizations."30 Instead of thinking of professionals as autonomous individuals each developing her own approach to clients, professional decisionmaking should be understood in its social and organizational context. Viewed in context, one can see that lawyers create professional roles for client representation according to, for example, the nature of the client, the area of law practice, and the organizational setting of practice. Commonalities emerge, in short, from lawyers who handle similar clienteles, who do similar kinds of legal work, and/or who practice in organizations together. This explains Robert Gordon and William Simon's wry comment that, "[i]t is striking that the people who find the claims of professionalism most convincing are the professionals themselves."31 Lawyers believe in the claims because they have in effect constructed them out of the demands of their practice, the nature of their workplace, and the various ambiguous expectations of the bar and the legal academy.

II. EMPIRICAL RESEARCH ON LAWYERS AND CLIENTS

Sociological studies of lawyers have been heavily skewed toward those who deal with individual clients such as criminal defendants, divorce litigants, or personal injury plaintiffs. Scholars have also examined lawyer-client interactions in various law reform campaigns such as civil rights and disability rights. In contrast to these practice areas, systematic studies of corporate lawyers are rare. In this Part, I summarize the empirical research on different types of lawyers, paying particular attention to the reasons suggested for their different approaches to clients. Much of the work purports to assess the lawyer-client relationship or to describe lawyer-client negotiations, but in fact nearly all of the research relies on observations or interviews only with the lawyer, not the client.32

29 Thomas W. Church, Jr., Examining Local Legal Culture, 1985 AM. B. FOUND. RES. J. 449, 450.
32 For exceptions to this, see JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE (1972) (analyzing interviews with criminal defendants); SARAT & FELSTINER, supra note 2 (analyzing taped office conversations between divorce lawyers and their clients).
A. Criminal Defense Lawyers

In a well-known 1967 article, Abraham Blumberg portrayed private criminal lawyers as engaged in a "confidence game" in which they sold their clients out by avoiding trials and convincing clients to accept plea bargains in order to meet the organizational demands of the court in processing heavy caseloads. Further research, however, presented a more complex view of defense lawyers, showing, for example, that although most lawyers adopted a cooperative relationship with prosecutors it was not because of caseload pressures. Rather, lawyers sought the predictability that resulted from negotiated settlements and outcomes that they believed to be in their clients' best interests. Defense attorneys shared a worldview based upon their experience that the vast majority of their clients were factually guilty with little chance of an acquittal. In such situations most lawyers concluded that they should attempt to negotiate for a reduced charge and/or a lesser punishment. The challenge then became one of "client control," a process of persuading clients that they should trust the advice of their lawyers and accept the recommendation about the benefits of a plea bargain. On this point, private defense attorneys had the built-in advantage that they had been selected by their client and the client had paid for their service. By contrast, public defenders—regardless of how committed and competent—faced their clients' distrust (or even hostility) because there was no payment from the client and, even worse, the public defenders' salary came from the same coffers as the prosecutors.

Numerous studies compared the behavior of private attorneys and public defenders (or legal aid attorneys) in an effort to ascertain who fought harder for their clients and most found little or no difference between them. Explicit in

33 Abraham S. Blumberg, The Practice of Law As a Confidence Game: Organizational Cooptation of a Profession, 1 LAW & SOC'Y REV., June 1967, at 15.
36 See, e.g., MATHER, supra note 34, at 139-48 (summarizing literature). Clientele differences between public and private counsel explain a good deal of any aggregate variation found since public defenders disproportionately represent defendants charged with more serious crimes and having more severe prior criminal records. Defendants charged with serious crimes or having poor records faced more difficulties in obtaining lenient dispositions in plea bargaining. Roy B. Flemming, Client Games: Defense Attorney Perspectives on Their Relations with Criminal Clients, 1986 AM. B. FOUND. RES. J. 253, 266.
some of this research is analysis of the role defense attorneys take toward their clients in decisionmaking. Defense attorneys most often articulated a professional role of independent advisor rather than agent for their client, advising clients to accept a plea bargain rather than seek trial. As one public defender said, "There's too much risk involved to take [some of] these cases to trial. . . . We'd like to do jury trials. But that's not what's best for our clients." Other research questioned whether the lawyers were pursuing what was best for their clients or what was best for themselves. In particular, their fees could affect the role private attorneys played because most criminal work was done on a "flat fee" basis, providing an incentive for lawyers to process cases quickly through guilty pleas. Additionally, defendants often perceived public defenders or legal aid lawyers to be acting not in their clients' interests but in the interests of smooth working relations with the state.58

Regardless of the reasons for their independent role, defense attorneys still faced the task of persuading their clients to accept the attorney's recommendations. On this point, research found considerable variation between lawyers. Private criminal attorneys tended to dominate their clients, strongly urging them to accept their advice. This professional role was reinforced by the fact that clients initially selected the attorney and were paying for the advice, and also by the attorney's ability to withdraw from representation or tell his client to find another lawyer. As an attorney in a Midwestern city explained, "In private cases, I will lean on him [the defendant]. That is the difference that comes out in a private case. If he doesn't like the advice, it's sure easy enough to hire somebody else."39

Public defenders (PDs) faced more skeptical clients than did private counsel, and public defenders could not easily withdraw from a case. Their response to these constraints seemed to vary by court and, to an extent, by individual. A 1979 study of public defenders in Los Angeles found that the vast majority, like their colleagues in private practice, strongly urged their clients to follow their advice. As one typical PD said, "Yeah, I'll twist arms . . . . My job is to do what I can for my client. If you've got a bad case and it's a loser, then it's not worth the risks of trial. You've gotta come down hard on a client sometimes."40

37 MATHER, supra note 34, at 123.
38 CASPER, supra note 32.
39 Flemming, supra note 36, at 266.
40 MATHER, supra note 34, at 123-24.
However, a small group of public defenders in Los Angeles said that they refused to “twist arms.” They were more willing to let their clients set the strategy, not from a belief in client-centered practice or client empowerment, but from exasperation with their clients and the sharp social distance between lawyer and client. A maverick PD in Los Angeles explained:

I can’t talk to these clients—it’s frustrating and you never really do get through to them. So if they want their jury trial, then OK, I’ll give it to them. I prefer to deal with the people of the court—I’d rather talk and argue my case with reasonable people in court, instead of arguing with my clients.41

The Midwestern public defenders studied by Roy Flemming generally agreed with this view. “I’m not gonna twist an arm,” one Midwestern PD said.42 And another explained:

It used to be I would argue with a client on why he should take the plea. Now, somewhat to his disadvantage, I have said, “Screw him.” . . . I’m not gonna fight with him and tell him he’s gonna plead. Because over and over again you see cases in which the defendant is appealing.43

Other public defenders in Flemming’s study took on a collaborative role, indirectly advising clients, involving them in discussions, and letting them make the key decisions.

A recent survey of PDs in five large urban offices also found variation in lawyers’ beliefs and practices regarding client involvement in decisionmaking. Most public defense lawyers thought that they should control both strategy and tactics “even in the face of the defendant’s contrary opinion or explicit objection.”44 Yet lawyers’ support for independence depended on the strategic issue involved and it varied considerably by office location. Interestingly—and giving credence to the power of institutional culture over time—the public defenders surveyed in Los Angeles gave the strongest endorsement to an independent professional role and were “less committed to a client-centered approach to decisionmaking than their counterparts in the other four public defender offices.”45 Other factors that public defenders cited as important influences on their willingness to share decisionmaking with clients

41 Id. at 124-25.
42 Flemming, supra note 36, at 264.
43 Id. at 265.
44 Uphoff & Wood, supra note 8, at 59.
45 Id. at 58.
included a belief that the client would make a poor decision and a general perception of criminal clients’ low intelligence.46

Thus, although most criminal defense lawyers saw themselves as directing their clients rather than the reverse, attorneys varied in their commitment to this position. Private attorneys held to it more consistently, while public defenders varied individually and across offices.

B. Divorce Lawyers

Like the criminal defense bar, most divorce lawyers see themselves as in charge of the case.47 They take the view that, as one attorney put it, they are “expensive taxi drivers” in which “the passenger decides on the destination and I decide on the route.”48 But, also similar to defense attorneys, a small minority of the divorce bar takes a more client-oriented view to representation.

Divorce lawyers pointed to their clients’ emotional state to explain why meaningful client participation in the divorce process was often difficult to sustain. Howard Erlanger et al. found some divorce clients unable to assert themselves due to “their shock or reluctance over the divorce.”49 Other research cited lawyers whose clients were so full of anger and blame that they were unable to think “realistically” about their case options, or whose clients were so agitated or depressed that they could not focus on case discussions.50 A client’s vulnerability could lead even the most client-centered divorce lawyer to become more directive and controlling. Further, researchers have

46 See id. at 55. Contrary to the authors’ expectations, PDs surveyed in this study did not believe that high caseloads, time pressures, client mistrust, or their court-appointed status were important factors affecting their clients’ participation in decision making. See id. at 54.
49 Erlanger et al., supra note 47, at 601.
50 See SARAT & FELSTINER, supra note 2, at 54; MATHER ET AL., supra note 27, at 91–92; see also Kenneth Kressel et al., A Provisional Typology of Lawyer Attitudes Towards Divorce Practice: Gladiators, Advocates, Counselors, and Journeymen, 7 LAW & HUM. BEHAV. 31 (1983) (finding some variation in divorce attorneys according to their perceptions of clients as problems because of their emotional instability, unrealistic expectations, or inability to make good decisions).
noted the miscommunication between clients who focus on the social and emotional aspects of the divorce and their lawyers who seek to focus on the legal aspects. In the era of fault-based divorce, lawyers transformed failing marriages into one-sided conflicts with fault and transgression on one side.\footnote{See O'GORMAN, supra note 47.}

Now, in a predominantly no-fault era, lawyers attempt to construct legal divorces without laying blame, but their clients may still talk in terms of who was responsible for the break-up. Teaching clients to have “realistic” expectations, to understand the requirements of the law, and to accept a “reasonable” settlement is a process that has encouraged divorce lawyers to act as independent advisors. One attorney explained, “[i]t’s not that you’re telling them what to do but telling them that the positions that they are taking are unreasonable and unsupportable.”\footnote{MATHER ET AL., supra note 27, at 108.}

Experience with the long-term consequences of divorce, particularly the impact of an acrimonious divorce on children, has provided another reason for many divorce lawyers to reject the hired gun role. The lawyer becomes an objective advisor in order to protect the third party interest of children or to further the long-term interest of the client in the role of parent. Although divorce attorneys were likely to explain their approach to client representation in terms of promoting a settlement that was “best for the client” or was “what the law requires,” some lawyers also acknowledged their own interest in not appearing “unreasonable” to their peers or to the court. The need to have a cooperative, reasonable reputation acted as an additional factor influencing lawyers to exercise some control over divorce clients.\footnote{See MATHER ET AL., supra note 27; Erlanger et al., supra note 47, at 593; Ronald J. Gilson & Robert H. Mnookin, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation, 94 COLUM. L. REV. 509, 527 (1994).}

Although divorce lawyers preferred to be in the driver’s seat for most cases, there were significant exceptions to this norm. First, a small number of divorce attorneys self-identified (or were identified by their peers) as hired guns proudly advertising their fidelity to their clients’ wishes.\footnote{See MATHER ET AL., supra note 27; Erlanger et al., supra note 47, at 593; Gilson & Mnookin, supra note 53, at 509, 527.} Second, insistent clients with substantial resources could sometimes convince even the most independent-minded attorney to represent them the way that they would like. Third, analysis of taped office conversations between clients and lawyers
found that the distribution of power between them was constantly changing and that clients often resisted the advice of counsel.55

C. Personal Injury Plaintiff’s Lawyers

Douglas Rosenthal’s 1974 book on personal injury claims laid the groundwork for much of the empirical research cited above.56 Entitled Lawyer and Client: Who’s in Charge? the study sought to test the assumptions of the traditional model of the lawyer’s role, and compare it to a model of client participation in decisionmaking. Personal injury lawyers generally followed the traditional role of dominant decision maker, but some clients were more active than others in asserting their interests and becoming involved in the process. Rosenthal compared the extent of client participation with case outcome (measured independently) and found that active client participation was associated with better case outcomes, a result contrary to the expectations of the traditional model that clients would be better off by passively delegating responsibility to their lawyers.57 Further, the contingent fee system, contrary to popular belief, created inherent conflicts between the lawyer (who could maximize income with quicker turnover of cases) and client (who could gain more by waiting for trial). Increasing client participation in decisionmaking, Rosenthal argued, could provide a check on lawyers’ pursuit of their own self-interest as well as allowing clients greater influence over case outcomes that they (and not their lawyers) would have to live with.58

A study of contingency fee lawyers nearly twenty-five years later also found that they exercised “considerable control over their clients in the settlement process.”59 The lawyers set expectations for their clients, emphasized uncertainty in the process, prepared clients with what to expect in settlement, and used various strategies to sell the settlement to the client. However, the lawyers were not entirely in the driver’s seat because of other constraints. Most importantly, success for a contingency fee lawyer did not rest on a single short-term payoff but depended upon longer-term issues of reputation. An attorney who sold out too quickly to get the immediate reward would risk her bargaining credibility with insurance adjustors and opponents in

55 See SARAT & FELSTINER, supra note 2.
56 ROSENTHAL, supra note 3.
57 See id. at ch. 2.
58 See id.
future cases. Lawyers were also concerned about the reputation they left with their clients at the conclusion of a case. Plaintiff lawyers depend heavily upon client referrals and word of mouth for their business, so satisfied clients can help lawyers by bringing new clients to them.60

D. Poverty and Civil Rights Lawyers

Legal services lawyers, like those in criminal law, have a high volume practice and typically face a large social distance between themselves and their clients. Studies of lawyer-client relations in areas of poverty law (e.g., housing, welfare, consumer problems) have observed lawyers generally taking charge of clients' cases. Indeed, scholarly critics of lawyer dominance such as Gerald Lopez, Anthony Alfieri, and Lucie White draw explicitly on examples from poverty law to develop their arguments for changing the way lawyers practice. Traditional legal practice, these critics argue, simply strengthens power differentials between lawyer and client and encourages passivity and dependence in the poor. Carl Hosticka's systematic observations of lawyer-client negotiations in a legal services office certainly support this critique.64 Using sociolinguistic methods, he found that poverty lawyers dominated conversations with clients through control over topic and timing. By controlling the clients' problem definitions, lawyers could routinize cases into set categories for easier disposition. The cost of this approach was "to ignore differences in detail and preferences between clients" and to communicate to clients how little the system cares about them as individuals.66

65 Id. at 607.
66 Id. at 609-10.
Ann Southworth’s recent study of legal services and law school clinic lawyers similarly reported very little client participation. Lawyers she interviewed explained that their clients were “unsophisticated,” “had no idea what to do,” or simply expected the lawyers to take charge. Other lawyers in Southworth’s research worked for advocacy organizations and they too described the substantial direction they exercised in cases, partially due to their interest in long term law development. Like their peers in legal services, lawyers for advocacy organizations have also been attacked for defining and waging, through the courts, what are essentially political agendas on behalf of disadvantaged minorities without allowing meaningful client input. Lawyers for the NAACP during the campaign for school desegregation have been used as examples of lawyers exerting control over case strategy and tactics. Since then, social reform litigation has become widespread and rights consciousness among consumers has increased. Susan Olson’s 1984 research on disability rights litigation revealed a collaborative process in all five of the law reform cases she studied, with active client participation in the formulation of case strategy. Disabled clients asserted themselves in the litigation process as part of their emphasis on autonomy and self-help. The disability rights groups Olson examined were already organized at the outset of litigation, which also facilitated the group leaders’ active involvement with their lawyers.

Attorneys who worked in small civil rights firms or business lawyers from large firms who represented nonprofit organizations as part of their public service expressed far more deferential views toward their clients than those in the legal service programs discussed above. For instance, the business lawyers interviewed by Southworth said that they rarely made strategy decisions without consulting with their clients (who were nonprofit organizations), and that they preferred to explain the legal options and let clients choose among them. Some attorneys qualified this view, however, by noting that their role depended in large part on “the sophistication of their

68 Id. at 1112 (quoting remarks of legal services lawyers interviewed by author).
71 Id. at 161.
72 Id. at 161-62.
73 Southworth, supra note 67, at 1120-22.
74 Id. at 1121.
The contrast found between the lawyers’ norms in legal service organizations and those in the private firms could be due to differences in the social distance between lawyer and client or to the legal culture of workplace itself.

E. Corporate Lawyers

Unlike most of the lawyers discussed thus far who represented individual clients, attorneys retained by large businesses or corporations occupy a quite different segment of the profession. As John Heinz and Edward Laumann have shown, lawyers working on personal plight cases or personal business issues share little in common with those working on cases for the corporate sector. The differences in background, demographics, working conditions, pay, and prestige in the two sectors extend to the relations between clients and lawyers. Lawyers representing business and organizational clients identify with them and defer to them in decisionmaking. Paradoxically, then, as Richard Abel notes, “lawyers at the bottom of the professional hierarchy are the most autonomous.” Or, to put this as Joel Handler does, “Strong, rich and confident clients direct their lawyers . . . lawyers dominate the relationship when clients are poor, deviant, or unsophisticated.”

Robert Nelson’s interviews with over two hundred lawyers in large Chicago law firms revealed how closely attorneys identified with their clients and how dependent upon them they were. When asked how much of their time was spent on just one client, lawyers at one firm said it was nearly fifty percent, with an average of more than one-third across the interview sample. Rarely did the lawyers see a conflict between their personal values and what they were asked to do by their clients. Additionally, the notion of professional

75 Id. at 1122.
77 HEINZ & LAUMANN, supra note 73.
78 Richard L. Abel, Revisioning Lawyers, in LAWYERS IN SOCIETY: AN OVERVIEW 15 (Richard L. Abel & Philip S.C. Lewis eds., 1995). Interestingly, such decline in lawyers’ autonomy characterized the nineteenth-century bar as well. See, e.g., 1 THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS (Alfred S. Konefsky & Andrew J. King eds., 1982) (noting the change from Daniel Webster’s independent role in rural practice to the more limited discretion and agency role he played when representing the mercantile-industrial elites.).
autonomy made no sense in the course of their daily practice. Robert Kagan’s and Robert Eli Rosen’s study of lawyers in large firms found the same picture of lawyers as agents for their clients.\footnote{Robert A. Kagan & Robert Eli Rosen, \textit{On the Social Significance of Large Law Firm Practice}, 37 STAN. L. REV. 399 (1985).} One section of their article is entitled, “Why The Lawyer-As-Influential-and-Independent-Counselor Role is Likely to Be Extraordinary Rather than Ordinary.”\footnote{\textit{Id.} at 422.} The large businesses and corporations acting in their client role simply did not want influence or direction from a lawyer; rather they sought a “conduit” or perhaps an “insurer.” Thus, attorneys in large law firms reported that they rarely acted as influential and independent counselors for their clients.

If a corporation’s attorney were to offer independent advice to her client and try to “lean” on the client to accept it—similar to the approach of the public defender or divorce lawyer—the result would be obvious and swift: the business would seek another attorney. Competition for corporate business thus discourages client-influencing behavior.\footnote{KELLY, supra note 30, at 212. \textit{See also supra notes 77-82.}} Eve Spangler’s research on large-firm lawyers in New England provides further evidence for this point. For example, she cites one corporate attorney (who had previously worked in legal services and civil liberties) about the differences between these areas of practice:

\begin{quote}
I think Legal Services people see an issue, want to represent that issue. On the other hand, when you’re involved in this type of practice, you are a tool of your client. You’re part of his team—you’re there to advise the client, structure the deal, whatever, but you’re still doing it within what his goals are.
\end{quote}

One consequence of lawyer deference to business clients lies in the periodic scandals of corporate wrongdoing. Such episodes should not be surprising given the difficult situation in which business lawyers are placed. Thinking about the differences between representation of corporate and individual clients raises other issues for considering “what do clients want?” The client-sensitive or agent role in representation could become the role of the lackey in situations of unequal power between client and lawyer. As a result, the broader public interest, including the requirements of the law, may suffer.

\footnote{EVE SPANGLER, LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK 64 (1986).}
III. FACTORS EXPLAINING LAWYERS’ ROLES

As this brief survey has shown, lawyers’ approaches to client representation vary considerably by areas of practice and type of client.85 Within specific legal fields lawyers generally share an understanding of the appropriateness and value of their particular way of working with their clients. Yet the exceptions in each area of practice and the variation across them also reveal important insights about lawyers’ professional roles. This Part draws on the data presented above and also on the work of other scholars who have studied lawyers’ approaches to their clients. Most importantly, lawyers’ decisions to control their clients or to cede control seem to be based less on formal legal principles and more on economic and social factors.86

Just like other workers, lawyers appear to respond to economic incentives in the course of their work. Thus, client resources and fee structure influence lawyers’ approach to representation. A single or flat case fee encourages private criminal defense attorneys to minimize time on a case and to dominate their clients. Personal injury lawyers, who are paid on a contingency fee, also benefit from a quick turnover of cases and tend to exercise considerable client control. By contrast, business lawyers, who bill by the hour, typically allow their clients to set the agenda and pace of work. Comparison of lawyers representing poverty and civil rights claims found that, with some exception, “lawyers who were dependent upon their clients for their salaries generally expressed more deferential views than did lawyers whose payment came from other sources.”87 Exceptions to these patterns in criminal practice or divorce work frequently came from clients with substantial resources. Clients with deep pockets could more easily resist their lawyers’ control and, if they chose to, direct case strategies themselves.

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85 Other important areas of practice and types of client to consider include inside counsel, lawyers who work for governments such as prosecutors and attorney generals, and lawyers in solo or small firm general practices. Maureen Cain’s 1979 research on solicitors in Britain is the classic study of general practice lawyers acting as agents of their clients. Maureen Cain, The General Practice Lawyer and the Client: Towards a Radical Conception, 7 INT’L J. SOC. L. 331 (1979) (finding that most lawyers translated their clients’ objectives rather than controlling their clients by refusing to translate or substituting their own views).

86 See OLSON, supra note 70; Southworth, supra note 67 (summarizing facts from empirical research); see also Gordon, supra note 1; Zacharias, supra note 1.

87 Southworth, supra note 67, at 1124. See also HEINZ & LAUMANN, supra note 76 (reporting a relationship between degree of professional control and clients’ control over lawyers’ payment); Abel, supra note 78 (arguing that lawyers behave in ways to get clients to pay the bills).
The relationship between lawyer and client also explains why some lawyers exercise greater control over clients than others do. Lawyers in high volume practices, such as criminal defense or divorce work, do not depend on any particular client for a significant source of their income. This provides the lawyer with leverage to part ways with clients who resist her advice. On the other hand, corporate lawyers whose annual income depends heavily on one or two clients may have difficulty exerting substantial influence over them. As the saying goes, “you can’t be a good lawyer with just one client.” That is to say, professional independence and objectivity are threatened by a lawyer’s economic reliance on her client. Furthermore, as Marc Galanter has shown, clients who are “repeat players,” regularly using the courts, show less deference to their lawyers than “one shotters” who use the courts infrequently. But repeat player clients who regularly work with the same lawyers over time willingly cede control to them and rely on them for advice. As one senior partner in a large law firm explained, “business clients with whom I have had a relationship over a long period of time do look to me for independent business advice as well as for legal counsel.” Thus, lack of a working relationship between lawyer and client, or an imbalance of power between them, affects how lawyers approach the task of client representation.

How lawyers represent their clients also depends upon the organizational context of lawyers’ work. Law firms and other legal organizations develop shared cultures or house norms that profoundly affect how a lawyer practices, including her approach to clients. As discussed earlier, the office cultures of different public defender organizations varied along numerous dimensions, including the allocation of decision-making responsibility between public defenders and their clients. Informal communities of legal practice develop around certain legal specialties (e.g., divorce, personal injury) and in small towns and cities where lawyers repeatedly work with one another. These communities provide another type of organizational context that shapes lawyers’ actions. Thus, particular norms of client representation develop and influence lawyers in those communities to behave accordingly in order to maintain their reputations. For example, as discussed earlier, most divorce

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89 Quoted in Kagan & Rosen, supra note 81, at 427.
90 KELLY, supra note 30, at 18.
91 Uphoff & Wood, supra note 8.
attorneys value reasonableness and pride themselves on educating their clients to have realistic expectations.\footnote{See sources cited \textsuperscript{ supra} note 53.}

Variation in the characteristics of individual clients sheds further light on why lawyers choose different professional roles. Lawyers who exercised considerable client control often referred to the characteristics of their clients to justify or explain the need for the attorney’s influence. Criminal defense lawyers commented on their clients’ lack of intelligence; divorce lawyers emphasized their clients’ emotional instability and self-absorption; and legal services attorneys pointed to their clients’ lack of sophistication. On the other hand, corporate lawyers pointed to their business clients’ extensive knowledge and sophistication to justify a collaborative style or attorney deference to client. Variation in the personality or demographics of lawyers has also been suggested to explain different approaches to client representation, but little systematic evidence exists to support this point.\footnote{See, e.g., \textsc{Olson}, \textsuperscript{ supra} note 70, at 136-39. It would be interesting to look for any commonalities in the personality or demographics of graduating law students as they select their different areas of legal practice. That is, can any of the differences in professional role by area of practice be explained by self-selection?}

Other factors might also explain differences in the degree of independent judgment and influence lawyers exercise over clients. These include: the nature of the problem and the available legal remedies; the type of legal work performed (e.g., litigation, transactional, organization, counseling, etc.); the degree of uncertainty and the clients’ willingness to accept risk; political goals for lawyers and client; and any external controls over lawyer-client interactions (e.g., governmental regulation, ethics supervision within a law firm or company, appellate processes, or insurance systems).

CONCLUSION

The power of these factors to shape lawyers’ professional ideology and practice suggests that reform will be difficult, even if we agreed on the direction to take to improve how lawyers act with their clients. I conclude with some tentative suggestions.

- Professional rules of conduct should acknowledge the differentiated and stratified nature of the profession, and bar committees should stop writing vague “one-size-fits-all” rules that fit no one. Current admonitions about what lawyers should do with their clients generally ignore the practice setting of the lawyer, the nature of the
legal problem, and the power differential between lawyer and client. David Wilkins’s suggestion of middle-range legal principles for various segments of the profession may have some merit.\textsuperscript{94} Currently, some bar rules do impose different obligations on lawyers according to their area of practice, for example, the prohibition on sexual relations between lawyer and client during representation of domestic relations issues, but not for other areas of practice.\textsuperscript{95} The American Academy of Matrimonial Lawyers has its own set of professional guidelines, which specifically recognize the particularities of divorce law practice,\textsuperscript{96} as do other specialties. Research on the impact of these guidelines would be useful.

- Since one kind of abuse of the lawyer’s role as client advocate occurs at the behest of clients who are more powerful than their lawyer, we might address the power of the law firm over individual lawyers. To the extent that it exists, professionalism in practice does not reside in each lone individual lawyer, but in the social community in which each lawyer practices. For lawyers in firms, that community is the law firm organization, with its formal policies on billing hours and its hierarchy, and its informal understandings reinforced daily at the water cooler. The development of “entity” discipline, the ability to sanction law firms, is occurring through broader workplace policy (such as sexual harassment for which the entire firm is liable). Here, too, research should be done on the effectiveness of such policies.

- Both ideas above rest on formal discipline within the profession—rules, enforcement bodies, and sanctions. Yet these are notoriously ineffective measures when compared with the power of social forces, organizational culture, and economic self-interest. Surely there must be an alternative way to monitor professional conduct besides formal rules. Since it is through practice that new lawyers learn the particulars of their work, one solution is to harness the power of practice. Pay attention to the patterns of rewards and sanctions built into legal practices and devise strategies to take advantage of the already existing informal controls. Make visible the norms that lawyers are following in the different areas of practice and encourage reflection about them. And fully fund legal services for indigent criminal defendants and low income clients in

\textsuperscript{94} See Wilkins, supra note 12.
civil cases to reduce the power imbalances between lawyer and client in these areas.