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ARTICLE

**THE ROLE OF THE ATTORNEY AND THE ATTORNEY  
CLIENT RELATIONSHIP: THE KEYS TO IMPROVED PUBLIC  
PERCEPTION OF ATTORNEYS AND THE LEXUS<sup>1</sup>**

*Jeanne Marie Zokovitch Paben*<sup>\*+</sup>

It is a pivotal time for the legal profession. Economic challenges are making it harder and harder for the historical law firm to survive. According to the National Law Journal's annual survey, "the 250 biggest firms . . . shed more than 9,500 lawyers in 2009 and 2010, nearly 8% of the total [lawyers at those firms]."<sup>2</sup> This

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<sup>1</sup> I would like to note that as an avid environmentalist I of course refer to the hybrid version of the Lexus.

<sup>2</sup> *The NLJ 250 Regional Report*, NAT'L L. J., <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202489565842&slreturn=1>. For further reading about the plight of law firms dealing with the recession, see also Mathew Bishop, *A Less Gilded Future*, *ECONOMIST*, May 7, 2011, at 14, available at <http://www.economist.com/node/18651114>; Nathan Koppel, *Recession Batters Law Firms, Triggering Layoffs, Closings*, *WALL ST. J.*, Jan. 26, 2009, [http://online.wsj.com/article/SB123292954232713979.html?mod=rss\\_whats\\_news\\_us](http://online.wsj.com/article/SB123292954232713979.html?mod=rss_whats_news_us); Gus Lubin, *10 Huge Law Firm Collapses of the Decade*, *BUS. INSIDER L. REV.*, Dec. 8, 2009, available at <http://www.businessinsider.com/decades-biggest-law-firm-collapses-2009-12>; Carlo D' Angelo, *Overseas Legal Outsourcing and the*

represents the largest multiyear decline in the thirty-four years the National Law Journal has conducted this survey.<sup>3</sup>

These same challenges are making it harder for law graduates to get “typical” law jobs.<sup>4</sup> The job statistics for recent law school graduates have not been good.

According to the National Association for Legal Career Professionals (NALP), of 41,156 Class of 2010 graduates whose law schools reported their job status to NALP nine months after graduation, 36,043 (87.6%) obtained jobs of some type.<sup>5</sup> A lower percentage of law school graduates reported having a job for which bar passage was required than ever before (68.4% for the Class of 2010 compared to 74.7% for the Class of 2008).<sup>6</sup> Further, only seventy-one percent of the 2010 jobs reported were both full-time and permanent.<sup>7</sup> “Overall, nearly 27% of all jobs taken by

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*American Legal Profession: Friend or “Flattener”?*, 14 TEX. WESLEYAN L. REV. 167, 187-91 (2008) (discussing the outsourcing of American legal jobs).

<sup>3</sup> *The NLJ* 250, NAT’L L. J., <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202489565842&slreturn=1>.

<sup>4</sup> David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1, available at [http://www.nytimes.com/2011/01/09/business/09law.html?\\_r=1](http://www.nytimes.com/2011/01/09/business/09law.html?_r=1) (last modified on Jan. 16, 2011); see also Molly McDonough, *Company’s “Craigslist” Model Seeks to Keep Outsourced Work On-Shore*, A.B.A. J., Mar. 30, 2009, [http://www.abajournal.com/news/article/companys\\_craigslist\\_model\\_seeks\\_to\\_keep\\_outsourced\\_legal\\_work\\_on-shore/](http://www.abajournal.com/news/article/companys_craigslist_model_seeks_to_keep_outsourced_legal_work_on-shore/) (describing system for piece-work assignment of legal tasks).

<sup>5</sup> *Employment for the Class of 2010 – Selected Findings*, NALP.COM, <http://www.nalp.org/uploads/Classof2010SelectedFindings.pdf>.

<sup>6</sup> *Id.*; see also Menachem Wecker, *In Tough Job Market, Law Grads Use J.D.s for Nonlegal Work*, U.S. NEWS & WORLD REPORT, Sept. 30, 2011, <http://news.yahoo.com/tough-job-market-law-grads-j-d-nonlegal-150049287.html>.

<sup>7</sup> *Employment for the Class of 2010 – Selected Findings*, NALP.COM, <http://www.nalp.org/uploads/Classof2010SelectedFindings.pdf>.

members of [the Class of 2010] were classified as temporary.”<sup>8</sup>

Additionally, the downward turn in the economy is marginalizing the role of the attorney by allowing others to perform some work historically performed by attorneys.<sup>9</sup> Legal services are now being offered through untraditional media, such as newspaper columns, radio or television programs, or internet sites.<sup>10</sup> And, with increased reliance on electronic media in all parts of life, legal services have also been affected. Further, specific areas of practice such as environmental law, while a “fast track career” in the late 1980s and into the 1990s, began to wane during the end of the Twentieth Century when environmental regulation began to taper off and during times of economic turmoil; duties once asked of an environmental attorney are now handled by other environmental professionals.<sup>11</sup> With this in mind, it is clear that we must rethink the role of the attorney and what it takes to have a successful legal practice.

Further, the public perception of the bar, and the legal process in general, is not positive. Most recently, a December 2010 Gallup poll on the public’s rating of the honesty and ethical standards of various “professionals” placed lawyers sixteenth out of twenty-two, ahead of “car salesman,” “members of Congress,” “lobbyists” and “business executives.”<sup>12</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> See RICHARD SUSSKIND, *THE END OF LAWYERS: RETHINKING THE NATURE OF LEGAL SERVICES* (Oxford University Press, 2008).

<sup>10</sup> See Catherine J. Lancot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 218-45 (1999).

<sup>11</sup> Michael B. Gerrard, *Trends in the Supply and Demand for Environmental Lawyers*, 25 COLUM. J. ENVTL. L. 1 (2000).

<sup>12</sup> Jeffery M. Jones, *Nurses Top List in Honest and Ethics List for 11<sup>th</sup> Year*, GALLUP POLL NEWS SERVICE, Dec. 3, 2010, available at

Due in part to these changes, the chasm between the average citizen and attorneys continues. For all of these reasons, access to legal services continues to be a challenge for low income and other disadvantaged people. According to Legal Services Corporation “LSC,”<sup>13</sup> “[e]ven before the 2008 recession, studies in several states found that about eighty percent of the legal needs of low-income families go unmet.”<sup>14</sup> LSC’s internal monitoring revealed that for every client served by a LSC funded program, at least one client will be turned away due to a lack of resources even though the client meets the eligibility criteria for service.<sup>15</sup>

This article seeks to examine how the role of the attorney can shift some of these dynamics, make better lawyers, and improve relationships between lawyers and the general public. Further, in focusing on this issue, I assert that we can pave the way for more successful and rewarding legal practices. In Part I of this article I will explore the history of the role of the attorney in the United States legal system generally. In Part II, I will look through the lens of the three dominant historical attorney-client models – authoritarian, client-centered and collaborative – to observe the attorney-client relationship and the trends associated with each model. In Part III, the article looks at

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<http://www.gallup.com/poll/145043/Nurses-Top-Honesty-Ethics-List-11-Year.aspx>.

<sup>13</sup> LSC is a congressionally established entity and “is the single largest provider of civil legal aid for low-income Americans in the nation.”

*About*, LEGAL SERVICES CORPORATION, *available at* <http://www.lsc.gov/about/lsc.php>; *see also About, LSC Act and Other Laws*, LEGAL SERVICES CORPORATION, *available at* <http://www.lsc.gov/laws/act.php>.

<sup>14</sup> LEGAL SERVICES CORPORATION, 2010 Annual Report p.1, Jul. 21, 2011, <http://www.lsc.gov/media/press-releases/lsc-annual-report-highlights-importance-access-justice>.

<sup>15</sup> *See Documenting the Justice Gap in America*, LEGAL SERVICES CORPORATION, *available at* [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009..pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009..pdf), p. 4.

community lawyering models and the attorney-client relationship. In Part IV, I advocate for a broader role for attorneys today and identify impediments to this role. In Part V, I utilize professional rules of conduct to support this broader role and draw into question whether doing otherwise complies with these rules. Lastly, in Part VI, the article returns to advocating for a broader role for attorneys and sets the stage for discussion as to how achieve this in legal education and practice.

## Part I. History of the U.S. Legal System

### A. Colonial Times

To fully appreciate the role of attorneys in the United States legal system, it is important to look at the differences throughout time.<sup>16</sup> Attorneys at the inception of the United States legal system were quite often the politicians and thinkers of the time.<sup>17</sup> The Drafters of the Declaration of Independence and the Framers of the United States Constitution were mostly lawyers.<sup>18</sup> “Courts were increasingly manned by lawyers, who listened to the

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<sup>16</sup> LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 13-25 (Simon & Schuster 1973). Professor Friedman's book remains the outstanding comprehensive treatment of the history of American law and the legal profession from its English origins to its state in the late Twentieth Century. For further discussion on the history of the American legal profession, *see generally* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAWMAKERS (Little, Brown and Company 1950); MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 (Harvard University Press 1976); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (Oxford University Press 1992).

<sup>17</sup> *See* FRIEDMAN, *supra* note 16, at 93-137, 265-66.

<sup>18</sup> “Almost half of the signers of the Declaration of Independence, and more than half of the members of the Federal Constitutional Convention were lawyers and thirty-two out of the fifty-four Framers of the Constitution were lawyers.” FRIEDMAN, *supra* note 16, at 265.

arguments of other lawyers” but rarely to those of the commoner.<sup>19</sup> Wherever one looked in political life – in town, city, county, state and national government – the lawyers were there.<sup>20</sup>

The early lawyers in the United States were learned men; men that were learned not only about the law, but in all fields of knowledge.<sup>21</sup>

While a great many of the leaders of the Republic were attorneys, many commoners were distrustful of lawyers for the same reasons they despised the British rule.<sup>22</sup> Lawyers had often been denounced in earlier history by powerless people for trucking the will of the powerful minority (i.e., land owners, merchants and the general wealthy) and their allegiance in the young Republic was occasionally questioned by the common public.<sup>23</sup> For that reason, conspiracy theories formerly reserved for those that still supported British rule during the revolution, were refurbished and adapted to the activities of attorneys after the formation of the republic.<sup>24</sup> “Critics [of attorneys] read sinister implications into the very idea of the lawyer-politician, charging that an inevitable conflict of interest must exist when the same men both made the laws and profited from their ambiguities in private legal practice.”<sup>25</sup> These exaggerated fears – which flowed from visions of an

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<sup>19</sup> FRIEDMAN, *supra* note 16, at 95.

<sup>20</sup> Hurst, *supra* note 16, at 249-52.

<sup>21</sup> *Id.*

<sup>22</sup> For further discussion on anti-lawyer sentiment in the early United States, see generally BLOOMFIELD, *supra* note 16, at 32-58.

<sup>23</sup> See BLOOMFIELD, *supra* note 16, at 32-58; see also Jason J. Kilborn, *Who's in Charge Here?: Putting Clients in Their Place*, 37 GA. L. REV. 1, 7 (2002).

<sup>24</sup> Of concern to the public at the time was that “lawyers seemed a counterrevolutionary force, blocking the emergence of a truly free republic by their adherence to prewar forms.” Of additional concern was “their rapid rise to positions of power within state and national government.” BLOOMFIELD, *supra* note 16, at 40-41.

<sup>25</sup> BLOOMFIELD, *supra* note 16 at 43.

unholy alliance between lawyers, judges and legislators – had some foundation in objective conditions.”<sup>26</sup> “Attorneys were profiting from the distress of the times through their heavy involvement in contract cases, debt collections, and land transactions, which made up the lion’s share of their practices.”<sup>27</sup> “Small wonder then that [the common public] felt trapped at times in a vast web of legal chicanery and denounced those that constructed it.”<sup>28</sup> Lawyers were the advocates for the new Republic, yet they were still distrusted based on their perceived dominance of the public when they needed representation and consultation. How could the general public embrace such dominance when just a few years back they were fighting a war for ideas of self-determination and respect for individual values against the English absolute monarchy?

## B. The Nineteenth Century

Lawyers of the mid-1800s were largely mentored and self-taught, worked in small firms or solo practice settings, and handled a wide range of business.<sup>29</sup> “[T]hey would ride circuits representing clients with disputes about stolen livestock in the morning and perform transactional work for the railroads, among the largest corporate clients of the time, in the afternoon.”<sup>30</sup> At the time, the system of

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 43-44.

<sup>29</sup> See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 15 (1976) (“Practicing alone in a small town, [the country lawyer] prepared for his profession by reading Blackstone and Kent and by apprenticing himself to an established practitioner for whom he opened and cleaned the office, copied documents, and delivered papers.”).

<sup>30</sup> See *id.* (“An independent generalist, he served all comers, with no large fees to turn his head toward a favored few.”); William Hornsby, *Challenging the Academy to a Dual (Perspective): The Need to*



legal representation accepted, and even encouraged, legal representatives' control of the decisions of the parties they represented.<sup>31</sup> Written and unwritten norms of lawyer-client interaction at best ignored the client's interest in controlling her legal matters; at worst, they encouraged lawyers to substitute their moral or legal judgments for those of clients.<sup>32</sup> Most clients had little choice but to submit to the total guidance of their advocates.<sup>33</sup> Those who sought legal representation were in most instances relegated to handing over complete control to the legal expert and praying that the result obtained would suit them. At that time, lawyers did not have the ethical rules to follow or disciplinary procedures to face what lawyers of today have become so accustomed to.<sup>34</sup> The Nineteenth Century's influential voices on the subject of legal professional ethics advocated for authority and discretion in the lawyer's handling of a case.<sup>35</sup> For example, David

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*Embrace Lawyering for Personal Legal Services*, 70 MD. L. REV. 420, 421 (2011)

<sup>31</sup> Hornsby, *supra* note 36, at 421. *See also* FRIEDMAN, *supra* note 16, at 96-99; Kilborn, *supra* note 29, at 14-15.

<sup>32</sup> Kilborn, *supra* note 29, at 14-15 (discussion of how much of the legal system from English rule carried over to the United States as did the approach to legal practice totally detached from the client and focused instead on professional hierarchy and scientific discovery of a priori rules of law).

<sup>33</sup> *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 30, available at [http://avalon.law.yale.edu/subject\\_menus/blackstone.asp](http://avalon.law.yale.edu/subject_menus/blackstone.asp). Blackstone's view was consistent with the developing professional ideology of the client's reliance on his counselor's independent judgment. EDWARD P. WEEKS, A TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW 50 (1878) (it was clear that lawyers were not liable for failing to follow the client's instructions, as "[t]he conduct and control of the cause are left to him.")

<sup>34</sup> Hornsby, *supra* note 36, at 421; Kilborn, *supra* note 29, at 17.

<sup>35</sup> Kilborn, *supra* note 29, at 17-22. *See* DAVID HOFFMAN, A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION

Hoffman, a lecturer at the University of Maryland who drafted a proposed list of fifty “Resolutions” for “professional deportment,” encouraged lawyers to act as a gatekeeper, controlling access to the legal system by standing as the sole judge of appropriate claims and defenses.<sup>36</sup> Similarly, George Sharswood, then a Dean and Professor at the University of Pennsylvania, a state court judge, and later a Chief Justice of the Pennsylvania Supreme Court, described attorneys as “the keeper of the conscience of the client” and the role of attorneys as one of guardians over clients.”<sup>37</sup> Edward Weeks, author of a work that “purported to be the first American treatise exhaustively treating ‘the law governing the attorney as an officer of the court and as the representative of his client,’”<sup>38</sup> claimed, “[T]he attorney has a very extensive authority, which springs mainly from his general retainer. He has the free and full control of a case, in its ordinary incidents, and as to those incidents is under no obligation to consult with his client.”<sup>39</sup> Weeks went so far as to advocate for the attorney to proceed in opposition to the client’s wishes because “the client has no right to control the attorney in the due and orderly conduct of a suit.”<sup>40</sup>

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GENERALLY 720, 752-75 (1836), *reprinted in* 31 A.B.A. REP. 717-35 (1907).

<sup>36</sup>Kilborn, *supra* note 29, at 17-18. *See* A.B.A. REP. at 720 (Resolution XIII).

<sup>37</sup> Kilborn, *supra* note 29, at 18-19; *see* GEORGE SHARSWOOD, COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW DELIVERED BEFORE THE LAW CLASS OF THE UNIVERSITY OF PENNSYLVANIA (1854), *reprinted in An Essay on Professional Ethics*, 32 A.B.A. REP. 1 at 110-11 (1907). *See, e.g.,* WILLIAM ALLEN BUTLER, LAWYER AND CLIENT: THEIR RELATION, RIGHTS, AND DUTIES 15-16, 18 (1871); SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS 1750-1900 85 (1991).

<sup>38</sup> Kilborn, *supra* note 29, at 19. *See* WEEKS, *supra* note 39, at 50.

<sup>39</sup> Kilborn, *supra* note 29, at 19 (citing WEEKS at 385).

<sup>40</sup> *Id.* at 20 (citing WEEKS at 387).

### C. The Twentieth Century

The Twentieth Century was a period of rapid social, economic, and political change. World population doubled between 1900 and 1970.<sup>41</sup> Greater connectivity, through automobile and airplane travel as well as the spread of technologies like the telephone (invented in the late 1800s)<sup>42</sup> and television (invented in the 1920s),<sup>43</sup> combined with widespread political upheaval (two World Wars) and economic changes (the Great Depression of the 1930s and the increased presence of women in the workplace during the World Wars) culminated in widespread social changes. Just as important, if not more influential, was the decreased divide between social classes, which brought more people into the mainstream.<sup>44</sup> Now, many of the new lawyers who

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<sup>41</sup> THE WORLD AT SIX BILLION, <https://www.un.org/esa/population/publications/sixbillion/sixbillion.htm>.

<sup>42</sup> See Stephen H. Cutcliffe & Terry S. Reynolds, *Technology in American Context*, in TECHNOLOGY AND AMERICAN HISTORY: A HISTORICAL ANTHOLOGY FROM TECHNOLOGY AND CULTURE 18 (Stephen H. Cutcliffe & Terry S. Reynolds, eds., 1997) (noting that a quarter million phones were in service within fifteen years of Alexander Graham Bell's 1876 patent for the telephone, but that the number grew exponentially when his patents expired so that by 1929, forty-two percent of American homes had phone service).

<sup>43</sup> ALEXANDER B. MAGOUN, TELEVISION: THE LIFE OF A TECHNOLOGY 15-37 (2007) (telling the stories of the invention of four different television systems). Like the telephone, it took another two decades of infrastructure and programming development before television was widely adopted by the American public. *Id.* at 39-76. It was not until 1941 that the Federal Communications Commission adopted a commercial standard for television. *Id.* at 40. However, America's entrance into World War II caused significant disruption in the availability of commercial television service. *Id.* at 76. Production of televisions resumed in 1946 after the War, and within a generation, ninety-five percent of Americans had a television receiver. *Id.* at 77-78.

<sup>44</sup> Kilborn, *supra* note 29, at 23. World War II brought a huge economic boon to the country and allowed more people to become middle/upper class. Women and African Americans also started to slowly lay the

were starting to experience the changes in the first half of the Twentieth Century were better able and more willing to empathize with their clients and respect their individuality. The seeds of social change that were planted in the first half of the Twentieth Century forced the practice of law and the standards governing client and lawyer interaction to recognize and embrace the individual as well as their choices.

If any specific year can be said to embody all these changes, that year is 1968. 1968 was such a remarkable year that multiple bibliographies have been written about it.<sup>45</sup> It was a year of revolution – “a spontaneous combustion of rebellious spirits around the world.”<sup>46</sup> “What was unique about 1968 was that people were rebelling over disparate issues and had in common only that desire to rebel, ideas about how to do it, a sense of alienation from the established order, and a profound distaste for authoritarianism in any form. . . . It was not planned and it was not organized.”<sup>47</sup> 1968 was the result of four historic factors – the civil rights movement, a generation that felt different and alienated, the near-universally hated Vietnam War, and television’s coming of age.<sup>48</sup> The year started with the Tet Offensive in Vietnam.<sup>49</sup> The year ended with the safe return to Earth of

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groundwork for the civil rights movement and stand for the belief that they were individuals and not to be ignored. People were starting to move from rural areas of the country into cities. For further discussion on the impact of the first half of the Twentieth Century. see Jason J. Kilborn, *Who's in Charge Here?: Putting Clients in Their Place*, 37 GA. L. REV. 1, 23 (2002).

<sup>45</sup> MARK KURLANSKY, *1968: THE YEAR THAT ROCKED THE WORLD* (2005); CHARLES KAISER, *1968 IN AMERICA: MUSIC, POLITICS, CHAOS, COUNTERCULTURE, AND THE SHAPING OF A GENERATION* (1997); MICHAEL KAUFMAN, *1968* (2009).

<sup>46</sup> KURLANSKY, *supra* note 51, at xvii.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at xviii.

<sup>49</sup> *Id.* at 1.

the Apollo 8 mission – the first American-manned mission to orbit the moon.<sup>50</sup> In between, Martin Luther King, Junior and Bobby Kennedy were assassinated, protestors rioted at the Democratic National Convention in Chicago, the Black Power movement gained momentum – visually illustrated when two black American athletes gave the Black Panther salute on the medal podium at the Olympics, and Richard Nixon was elected as the President of the United States.<sup>51</sup> The events of 1968 made it abundantly clear that we were living in a new world, a world in which the old models must be carefully examined – or perhaps just discarded outright as suspect – and new models, more reflective of the new realities, developed.

By the end of the 1960s, it was clear the world as we knew it was a changed place, and that the role of the lawyer had to be considered in light of these changes. It was in that context that in 1969 the ABA issued the first Model Code of Professional Responsibility that opens with the following lines:

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible; for only through

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<sup>50</sup> THE APOLLO PROGRAM (1963 - 1972), <http://nssdc.gsfc.nasa.gov/planetary/lunar/apollo.html> (earlier missions orbited the Earth or were unmanned) (last visited April 15, 2012).

<sup>51</sup> KURLANSKY, *supra* note 51.

such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.<sup>52</sup>

This recognition of the power, rights, and dignity of an individual's self-determination is a clear departure from the past role of the lawyer as the all-powerful gatekeeper and guardian, proceeding as the lawyer sees fit without regard to the client's wishes. This new belief can most certainly be attributable to the civil rights revolutions of the 1950s and 1960s, as the Bar recognized that lawyers no longer should maintain control of the individual.<sup>53</sup> This new belief of legal theory could be achieved only through an attorney-client relationship that respected individual dignity and each individual's capacity for autonomy.

## Part II. Attorney Client Models

Beginning in the 1970s after the new Model Code,<sup>54</sup> legal writers began analyzing various attorney-client relationship models. There has been a wide variety of nomenclature used to define these different attorney styles

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<sup>52</sup> REPORT OF THE SPECIAL COMMITTEE ON EVALUATION OF ETHICAL STANDARDS, 94 A.B.A. REP. 729, 731 (1969).

<sup>53</sup> See generally Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 513 (1990) (the civil rights movement of the 1950s and 1960s is a salient representative example of the rise of individual rights in the American social consciousness and "[r]ecognizing a person's autonomy is essential to according respect to that person; respect for autonomy is a cornerstone of liberal legal theory and of the American political system").

<sup>54</sup> Kilborn, *supra* note 29, at 36-37.

or types.<sup>55</sup> Further, there has been an array of models applied to different aspects of legal practice.<sup>56</sup> However, over the last several decades there seems to be three general types of attorneys that have been defined, discussed and compared, regardless of what labeling is used.<sup>57</sup> For the

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<sup>55</sup> Several books and articles have explored the place of lawyer/client relationship. See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 2 (1994); MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 60-62 (2d ed. 2002); DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 282-84 (1991); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 334-38 (1990); Robert F. Cochran, Jr., John M.A. DiPippa, Martha M. Peters, "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" (2d ed. Matthew Bender & Co., Inc., of LexisNexis Group 2006); Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons From Dostoyevsky*, 35 HOUS. L. REV. 327 (1998); Jack L. Sammons, *Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counseling in the Law Office*, 18 U. ARK. LITTLE ROCK L.J. 1 (1995); Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers as Strangers and Friends: A Reply to Professor Sammons*, 18 U. ARK. LITTLE ROCK L.J. 69 (1995); Kimberly E. O'Leary, *When Context Matters: How to Choose an Appropriate Client Counseling Model*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 103 (2001).

<sup>56</sup> See generally Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1104 (1992) (focusing on the public interest); Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 4 (1998) (focusing on criminal law); David Dana, *Environmental Lawyers and the Public Service Model of Lawyering*, 74 OR. L. REV. 57, 70 (1995) (focusing on environmental justice/environmental law); Kimberly E. O'Leary, *When Context Matters: How to Choose an Appropriate Client Counseling Model*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 103 (2001) (discussing different models for different areas of practice).

<sup>57</sup> Robert F. Cochran, Jr. et. al., *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 593-602 (2003).

purposes of this section, I will focus on the broad but easily distinguishable attorney-client models most commonly referenced: the Authoritarian/Directive Model, the Collaborative Model and the Client-Centered Model.<sup>58</sup> For the most part these models have been applied to client interviewing and counseling skills,<sup>59</sup> but the same traits that guide an attorney's interviewing and counseling practice can also be applied to most aspects of client representation, including litigation. In this article I do not seek to duplicate the analyses of these models that have been done by many accomplished scholars. In fact, this article is not looking at these models so much for the purpose of framing the strategies used by different attorneys in individual client representation, but instead to use them for context in discussing the role of the attorney and the overall approach attorneys take in their entire practice.

#### A. Authoritarian Model

The Authoritarian or Directive Model is often also called the traditional model, as it is commonly-accepted as the model most ascribed to during the greater part of the American legal system.<sup>60</sup> Analyses of this approach can be found as early as the 1830s.<sup>61</sup> While clearly there were

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<sup>58</sup> See generally Robert F. Cochran, Jr., John M.A. DiPippa, Martha M. Peters, "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling, Second Edition" (Matthew Bender & Co., Inc., of LexisNexis Group 2006).

<sup>59</sup> See generally DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 282-84 (1991); Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling."

<sup>60</sup> See Binder, *supra* note 59; Cochran, Jr., *supra* note 59, at 595.

<sup>61</sup> Cochran, Jr., *supra* note 59, at 595 (quoting David Hoffman, who in the 1830s drafted the first guidelines for American lawyers, said, "[the client] shall never make me a partner in his knavery." Judge George Sharswood said, "[i]t is in some measure the duty of counsel to be the keeper of the conscience of the client; not to suffer him, through the



nuances to employment of such a model specific to individual attorneys and/or their individual relationships with each client, the Authoritarian Model was the norm for a long time. In the Authoritarian Model the attorney is the central figure in the attorney-client relationship.<sup>62</sup> Quite simply and bluntly stated, the Authoritarian Model puts the lawyer fully in charge of the relationship between attorney and client. Under this model it is the clients' understanding that they should trust their lawyer(s) to act in their best interest.<sup>63</sup> As such the clients are expected to be docile and passive.<sup>64</sup> Further, clients are expected to be hands-off and lawyers are expected to be aggressive, decisive, and commanding.<sup>65</sup> In the often referenced and cited study of lawyers and clients, Douglas Rosenthal calls this the "traditional approach," in which he concludes "the traditional idea is that both parties are best served by the professionals assuming broad control over solutions to the problem brought by the client."<sup>66</sup> This old-fashioned

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influence of his feelings or interest, to do or say anything wrong . . . ." (HON. GEORGE SHARWOOD, AN ESSAY ON PROFESSIONAL ETHICS 110 (T & J.W. JOHNSON AND CO., 1876); Judge Clement Haynsworth put it, in a law school commencement address: "[T]he lawyer must never forget that he is the master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and legally right.

<sup>62</sup> Binder, *supra* note 59, at 17; Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 2.

<sup>63</sup> Binder, *supra* note 59, at 17; Cochran, Jr. et al. "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 2.

<sup>64</sup> Binder, *supra* note 59, at 17; Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 2-4.

<sup>65</sup> Binder, *supra* note 59, at 17; Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 2-4.

<sup>66</sup> DOUGLAS E. ROSENTHAL, "WHO'S IN CHARGE?" 7 (1974).

approach, even with the criticism it engenders, is alive and well in many areas of law.<sup>67</sup>

The motives for the Authoritarian Model are not difficult to recognize – clients are often vulnerable, troubled persons, they frequently lack a general understanding of the law, and they do not understand the procedure of the courts. Why would the client not put all his trust into his lawyer? This reality is further exacerbated by societal circles in which lawyers see themselves as members of the elite and better than the clients they are hired to serve.<sup>68</sup>

When these factors are present, it becomes easy for a lawyer to act paternalistically towards a client and deal with her not as an adult, but as a child, or perhaps a broken object to be fixed.<sup>69</sup> The lawyer through her actions treats the client “as though the client were an individual who needed to be looked after and controlled, and to have decisions made for him or her by the lawyer, with as little interference from the client as possible.”<sup>70</sup>

Critics of the Authoritarian Model indicate that this model assumes that “[l]awyers give adequate and effective service; [l]awyers are able to be disinterested and make objective decisions; [t]he solutions to legal problems are primarily technical; [o]rdinarily, there is a correct solution to a legal problem; and [l]awyers are experts in the technical information that is needed to arrive at the correct conclusion.”<sup>71</sup> Noted critical scholars of the Authoritarian

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<sup>67</sup> For additional discussion on the authoritarian model *see* David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454 (1981); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978).

<sup>68</sup> Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 18 (1975); Cochran, Jr., *supra* note 64, at 595..

<sup>69</sup> Wasserstrom, *supra* note 75, at 21..

<sup>70</sup> *Id.* at 22.

<sup>71</sup> Cochran, Jr. et al., “The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling” at 2-3 (citing

Model Robert Cochran, John DiPippa and Martha Peters identify four problems with the authoritarian approach.<sup>72</sup> First, it disregards the client's dignity.<sup>73</sup> The client should be in charge of the important decisions about her life, not a lawyer. Second, it is likely to be less satisfying for a client "because clients, in general, are likely to be the best judges of their own interests."<sup>74</sup> Only the client knows her values, goals and willingness to take risks.<sup>75</sup> Third, client control is likely to achieve better monetary results than the authoritarian model.<sup>76</sup> In their book, Cochran, DiPippa, and Peters note that Rosenthal's study found that "plaintiffs who are actively involved in their cases obtain higher settlements and higher verdicts than plaintiffs who allow their lawyers to control the representation."<sup>77</sup> Fourth and most importantly, the Authoritarian Model is contrary to the purpose of the Model Rules of Professional Conduct, which give the client the ultimate authority to decide the objectives of the representation.<sup>78</sup>

There are even bigger problems with the authoritarian approach. Under the Authoritarian Model,

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Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* 169 (1974)).

<sup>72</sup>*Id.* at 3-4; see GERALD DWOMUN, *THE THEORY AND PRACTICE OF AUTONOMY* 110 (1988); IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 59, 67-68, 73. <--which edition of Kant?

<sup>73</sup> Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 3.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*; see Gary Bellow & Beatrice A. Moulton, *The Lawyering Process* 1055 (1978) and Geoffrey C. Hazard, *Ethics in the Practice of Law* 136-37 (1978).

<sup>76</sup> Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 4.

<sup>77</sup> *Id.* (citing Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* 36-46 (1974)).

<sup>78</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 (2011); Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 2-3.

client problems are viewed as legal problems for which the lawyer provides legal solutions.<sup>79</sup> The lawyer pigeonholes clients' claims and concerns into legal elements without regard to clients' personal thoughts.<sup>80</sup> As a result, it is unlikely that an attorney and client will engage in a sufficient and thorough discussion of the professional and moral issues involved with the representation.<sup>81</sup> Feelings, emotions, morals, religious considerations, and concern for third-parties are all irrelevant.<sup>82</sup> There is little reason to raise moral issues if the lawyer views the client as a child, rather than an adult.<sup>83</sup> The client may feel as if their own thoughts, ideas or concerns cannot be voiced, and the lawyer may bracket their own moral and professional values.<sup>84</sup> As a result the authoritarian model for the attorney-client relationship is inconsistent with client dignity.

#### B. Client-Centered Model

After centuries of domination of the Authoritarian Model in legal representation throughout the world, including close to two centuries in the United States, in the mid-Twentieth Century the backlash against the legal profession resulted in the emergence of the Client-Centered Model.<sup>85</sup> The Client-Centered Model seeks to rectify the power imbalance inherent in and perpetuated by the Authoritarian Model by attempting to make the attorney subservient to the client.<sup>86</sup> At its extreme, the Client-

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<sup>79</sup> Binder, *supra* note 60, at 5, 17.

<sup>80</sup> *Id.* at 5, 17.

<sup>81</sup> *Id.* at 8, 17.

<sup>82</sup> *Id.* at 17.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 4.

<sup>86</sup> *Id.*

Centered Model severely limits, or in fact completely removes, any input from the attorney's perspective.<sup>87</sup> Proponents of the Client-Centered Model assert that such a drastic shift is necessary to overcome the natural inclinations of the attorney to control the relationship and the goals of the representation and is the only way to achieve even a semblance of balance in the power between the attorney and the client.<sup>88</sup> In the Client-Centered Model the attorney is almost a mere facilitator in the problem-solving of the client. The job of the attorney is to make the client comfortable and aid the deepening of the client's involvement in identifying the problem, conceiving of and weighing solutions, and ultimately selecting strategies and tactics to achieve his or her own identified goal.<sup>89</sup>

As its name suggests, in the Client-Centered Model the client is indeed in the center of the relationship. An attorney who truly subscribes to the Client-Centered Model will utilize lawyering skills to help the client probe the issue and its desired outcome through lenses other than just the legal realm.<sup>90</sup> Other lenses can include looking at

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<sup>87</sup> See Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 820-22 (1987) (describing how Binder and Price, the initial proponents of a client-centered approach, suggest the attorney go to great lengths to avoid stating an opinion, including carefully controlling demeanor when discussing options with a client and refraining from stating an opinion, even when directly asked to do so by the client).

<sup>88</sup> *Id.* at 817 (describing how early proponents of a client-centered model came from a legal services background and realized that lawyers representing indigent clients "frequently imposed their own values on their clients and dominated the clients during the counseling process."); Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 11-26 (discussing ways lawyers subconsciously dominate clients and control cases).

<sup>89</sup> Binder, *supra* note 60, at 5, 17.

<sup>90</sup> For example, see the extensive decision making process described in Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 135-66.

solutions that do not include traditional legal services and identifying all pros and cons of various solutions as they affect the client.<sup>91</sup> Critics of the Client-Centered Model significantly address two issues. One critique is the fear that the attorney will contort herself to such a degree, in an effort to escape even minute influence over the client's processing, that she may fail to provide to the client with the one thing that the client seeks an attorney: learned and experienced counsel.<sup>92</sup> The other dominant critique is that the Client-Centered Model, when employed at the extreme, may ignore not only the attorney's perspective, but also the perspective and consequences of any other person beyond the client.<sup>93</sup> For instance, the Client-Centered Model, when truthfully followed, prevents the attorney from playing the devil's advocate. The devil's advocate is less about the attorney's perspective and goals and more about posing perspectives and goals alternate to the initial inclinations of the client. Many attorneys believe that such role is necessary to in fact help the client reach true conclusions on his own goals, strategy, and tactics.<sup>94</sup> At first blush, the failure to include perspectives and consequences other than the client's may seem to fully embrace the bedrock principle of zealous representation of your client. However, as many notable critics have asserted, rare is the client who truly has no impact, as can be seen in the consequences of their decisions on others.<sup>95</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 6.

<sup>93</sup> *Id.* at 5.

<sup>94</sup> *Id.*

<sup>95</sup> Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 5.

### C. Collaborative Model

With the other client-attorney relationship models, one party dominates decisions, raising moral and professional concerns. Under the authoritarian approach, the lawyer controls such decisions; under the client-centered approach, the client controls such decisions. Under the Collaborative Model, “the client would control decisions, but the lawyer would structure the process and provide advice in a manner that is likely to yield wise decisions.”<sup>96</sup> “The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling,” an exceptional exploration of the Collaborative Model, quotes David Rosenthal, urging lawyers and clients to work towards “mutual participation in a cooperative relationship in which the cooperating parties have relatively equal status, are equally dependent, and are engaged in activity ‘that will be in some ways satisfying to both [parties].’”<sup>97</sup>

Critics like Cochran and his co-authors argue that the collaborative approach avoids the problems of the Authoritarian and Client-Centered Models.<sup>98</sup> As compared to the Authoritarian Model, the Collaborative Model upholds client dignity and yields better results.<sup>99</sup> The Collaborative Model is superior to the Client-Centered Model as well, because it encourages the client to consider not only her own self-interest, but also the interests of

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<sup>96</sup> *Id.* at 6.. For further discussion on the Collaborative Model see Cochran Jr., *supra* 64, at 598; Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541, 548 (2006).

<sup>97</sup> Cochran, Jr. et al., “The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling” at 7.

<sup>98</sup> *Id.* at 5-6; Cochran, Jr., *supra* note 64 at 597-98.

<sup>99</sup> Cochran, Jr. et al., “The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling” at 7; Cochran, Jr., *supra* note 64, at 597 -98.

others who might be affected by her decisions.<sup>100</sup> Since the Collaborative Model allows both parties to bring their practical wisdom to bear upon problems, it is likely to lead to better, more-informed decisions.<sup>101</sup>

Perhaps most importantly, the Collaborative Model allows lawyers and clients to engage in a moral dialogue. The lawyer is not the client's boss, but neither is she the client's hired gun. Each party is empowered to raise moral concerns. Cochran and his co-authors suggest analogizing the relationship between a lawyer and client to the relationship between friends.<sup>102</sup> This does not mean, of course, that lawyers must become friends with each and every client, but that lawyers might discuss moral issues with a client in the way that they would discuss moral issues with a friend – not imposing their values on the client, but exploring their clients' moral values, and not being afraid to influence their clients.<sup>103</sup>

A collaborative relationship is also like a friendship in that each party maintains moral accountability for her own actions within a context of mutual accountability to and for the other.<sup>104</sup> Neither party is the rubber stamp of

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<sup>100</sup> Cochran, Jr. et al., "The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling" at 7.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 8; Cochran, Jr., *supra* note 64, at 598.

<sup>103</sup> See Cochran, Jr., *supra* note 64, at 598; see Piomelli, *supra* note 103, at 599.

<sup>104</sup> Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 455-59 (1990) (arguing that lawyers should deal with clients as they would a good friend). Professor Charles Fried uses the analogy of the lawyer-as-friend for a quite different purpose. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1066-67 (1976) (arguing that the lawyer-as-friend analogy explains why lawyers may do things for clients that ordinary morality would condemn). For a sharp criticism of Fried, see Edward A. Dauer & Arthur A. Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573 (1976).



the other.<sup>105</sup> When we go to a friend, we expect advice on what to do. We do not want to be preached at, and we do not want to be manipulated. We would not consider ourselves well advised, however, if our friends failed to consider the moral, as well as any other dimensions of our problem.<sup>106</sup> Lawyers should be free to give “the kind of candid, tough advice” that a friend would give.<sup>107</sup>

Some scholars have worried that the collaborative models might be a cloak for subtle manipulation and domination by the lawyer.<sup>108</sup> In many lawyer-client relationships, the lawyer is in the dominant position. The lawyer has the knowledge of the law and the trappings of power.<sup>109</sup> The lawyer in either situation may have to work to attain a level of mutuality with the client. To raise and discuss moral problems thoughtfully with another requires wisdom, a quality that comes in part with age and experience.<sup>110</sup> Further, we live in an individualistic age where we do not collaborate very well. That may be why each of the other models of client counseling identifies one of the parties to the relationship as the party in charge. Moral counsel also requires time, a scarce commodity in the hourly billing-driven practice of the corporate lawyer or the heavy case-load practice of the legal aid lawyer.

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<sup>105</sup> Cochran, Jr., *supra* note 64, at 598.

<sup>106</sup> Morgan, *supra* note 105.

<sup>107</sup> *Id.* at 457.

<sup>108</sup> Professor Jack Sammons objects to the friendship model, doubting that lawyers and clients share sufficient common moral values. Schaffer and Cochran admit, “There is a danger that the lawyer will err either on the side of imposing her values or on the side of ignoring moral values. Developing the ability, the skill, to initiate and carry on such conversations without imposition is a challenge.” Thomas L. Shaffer & Robert F. Cochran, Jr. *supra* note 55 at 83.

<sup>109</sup> There are other ways that domination could occur – age, status, sex, etc.

<sup>110</sup> Cochran, *supra* note 64, at 598.

#### D. Analysis of the Three Models Throughout Time

One purpose to including these three models of attorney-client relationships is to evaluate their rise and fall in the context of history and public satisfaction levels of attorneys. As previously discussed, since the dawn of the legal system in the ancient Greek empire, the predominant model of legal representation has been the Authoritarian Model.<sup>111</sup> Similarly, even in the early United States, when the chief goal of the colonists was freedom from an oppressive elite, consisting in large part of those in the judicial system, the colonists still established a new legal system that was based on this elitism. Both with respect to the status in society of those who were part of the judicial system, and to the roles that they adopted in the way that they employed their profession – that the lawyer knows best, a commoner is not smart enough, the well-educated and affluent are inherently more moral and capable of making such judgments – this elitism is the dominant theme throughout the United States legal system.

Throughout the history of both the legal system in the world as well as that in the United States, we have seen significant times of dissatisfaction, distrust, and even hostility towards the elite. It is during these time periods that shifts in the role of the attorney in representing clients are made. In some instances, that shift manifests itself as reluctance to engage in such a relationship (i.e., people do not hire lawyers). In other times, the shift is actually the dynamic between the attorney and the client and in its extreme, results in the employment of one of the other two models. It should be of no shock to anyone that the Client-Centered Model found its first great acceptance during the mid-to-three quarters Twentieth Century, when the distrust of the legal system and the political system in general, by a public scarred by things like the Vietnam War, Watergate,

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<sup>111</sup> Cochran, *supra* note 59.

and even the economic recession of the 1970s, were at an all time high.

Not only is the time period indicative of the rise of the Client-Centered Model, but the location of its birth is also.. The Client-Centered Model was largely birthed from those in legal representation of the poor. It is fair to say that the harsh realities of the imbalance of power in the Authoritarian Model are likely felt no greater than by those in such circumstances. It is also worth noting that the client-centered mentality was likely to find a receptive audience in the legal services attorneys of this time, who were often elite white men troubled by disparate representation who wanted to use their privilege to serve those less fortunate. That desire was a natural outcome of the turmoil of the 1960s and 70s. As is often the case, when you have a problem of such significance that has been entrenched for so long, a dramatic about-face is necessary to achieve any change. The Client-Centered Model represented a dramatic change from the long history of authoritarianism and the systemic problems it brought.

After time and change occurs from the dramatic shift, the pendulum often swings back. How far it swings back is often dependent on the negative impacts of the original model and the negative and positive impacts of the first dramatic shift. And so the Collaborative Model was born. Most would characterize the Collaborative Model as envisioned by its original scholars as a move back toward the Authoritarian Model while remaining closer to the envisioned Client-Centered Model.

This article focuses its evaluation of the models at their extremes to fully capture the impacts. However, I acknowledge and would caution all readers to recognize that in fact, the proponents of each model tend to see the models in shades of grey, or, if you will, as a spectrum by which even individual attorneys identifying themselves strongly with one or another model in fact embrace and

utilize very different methods, principles, and strategies. However, interestingly enough, the critics of each of the models historically have almost without fail approached their criticisms on the other models as exemplified by the extreme. I myself have utilized this approach in the critiques espoused in the previous section but would be remiss to not acknowledge the tendency for analytical, learning or other purposes to draw generalizations about those employing each of the models.

For the most part, the analysis of the three models in this article is meant only as a backdrop to discuss that although we have spent significant time analyzing different attorney-client relationship models, that such analysis has largely focused on the interviewing and counseling aspect of that relationship. And yet, using this same language and framework we could further analyze other aspects of legal practice. It is with this in mind, that they are included here.

Further, although some have sought to evaluate or categorize other legal practice, including litigation, into these same or similar models, little has been done to evaluate the effect of the attorney-client relationship and an individual attorney's selected approach to this relationship on attorneys' overall practice and their ability to obtain and retain clients. The same is true for law schools' efforts to properly prepare new attorneys to adequately represent their clients.

This article asserts that there are lessons to be learned by viewing the deployment of all three attorney client counseling models throughout history and by utilizing the themes of both the proponents and the critics of all three models in evaluating the choices to be made regarding the role that an attorney, and the impacts and consequences of such a choice to the attorney, his or her practice, the client, the entire Bar, and society as a whole. To be clear, this article does not seek to solve all of these problems, but instead seeks to begin a new dialogue

regarding the attorney-client relationship. By focusing more on the role of the attorney, we may seek better ways to practice law, represent our clients, and train our students.

Regardless of with which model an individual attorney may identify, the utility of such identification is limited when applying it to one's practice as a whole. For purposes of teaching through the academy or even in professional trainings on interviewing and counseling techniques, the models continue to maintain significant benefit, but rarely do we see the effects of employing one model over another to one's practice as a whole. Often, different clients and different issues require different dynamics.

### Part III. Community Lawyering

To add information where the above models most commonly attributed to interviewing and counseling have not been widely considered - assessing the attorney-client relationship to one's practice as a whole - it may also be beneficial to look at efforts to categorize different approaches to serving a particular client-base. To bring that added dynamic, this article will look at some of the writings regarding models of community lawyering.

The term "community lawyering" has been used for years to define the practice of law in underrepresented communities.<sup>112</sup> In the last decade or so, the term has taken on significant definition and meaning in the context of law school clinics who often define themselves as community lawyering clinics.<sup>113</sup> This by no means is meant to say that only law school clinics are performing community lawyering. Community lawyering can also be found in

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<sup>112</sup> Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333, 339 (2009).

<sup>113</sup> *Id.* at 333-34.

legal services and other nonprofit legal entities. Like any other terminology, proponents of community lawyering each have their own nuances in the description of their practice, but consistently define the betterment of “the community” among their goals.<sup>114</sup> Historically, different models of community lawyering have included: the civil legal aid model, the impact litigation model, the social-rescue model, and the movement or political lawyering model.<sup>115</sup> Regardless of the model, all community lawyering seeks social justice.<sup>116</sup> The civil legal aid model is based on high volume work, essentially subscribing to the fact that 1. if there were enough lawyers, all individuals could be served and 2. that individual service can achieve social justice if all needs are met.<sup>117</sup>

In the impact-litigation model, lawyers focus on systemic changes, class actions and other representation that can affect the greatest number of people to the greatest possible degree.<sup>118</sup> In the social-rescue model, lawyers team with other professionals to cure the failure of social services including but not limited to legal services.<sup>119</sup> Through the movement or political lawyering model, attorneys focus on building the power of communities to challenge and remove societal inequities.<sup>120</sup> While all of the above community lawyering models are still employed today, most have embraced some aspect of the political or movement lawyering model, resulting in stronger

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<sup>114</sup> *Id.* at 342.

<sup>115</sup> Joseph Phelan, *Purvi & Chuck: Community Lawyering*, ORGANIZING UPGRADE (June 1, 2010).

<sup>116</sup> Brodie, *supra* note 119, at 343.

<sup>117</sup> See Phelan, *supra* note

122; <http://www.organizingupgrade.com/2010/06/social-justice-lawyering/http://www.organizingupgrade.com/2010/06/social-justice-lawyering/> Brodie, *supra* note 119, at 347-48.

<sup>118</sup> Phelan, *supra* note 122.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

connections with the community clients, greater collaborations with non-lawyers, and a focus on community empowerment. In a 2009 survey of law school clinics who self-describe themselves as community-lawyering clinics all agreed on three tenets: prioritizing social justice in their mission, defining their client as a community – “a member of some socially cognizable and systemically disadvantaged group,” and providing a broad range of services both substantively and tactically.<sup>121</sup> Some community lawyering advocates have defined these common themes as the answers to three questions: Who do you work with? What do you do for them? And how do you work together?<sup>122</sup>

Prior to the emergence of the community lawyering movement, public interest attorneys probed these same questions. In the context of environmental justice lawyering, the practice of representing clients dealing with disproportionate impacts of pollution and disease, no scholar was as prolific and as prophetic as Luke Cole.<sup>123</sup> Cole’s practice and writing involved the merging of civil rights, poverty, and environmental law.<sup>124</sup> In his article, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, Cole

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<sup>121</sup> Brodie, *supra* note 119, at 342-45.

<sup>122</sup> Phelan, *supra* note 122.

<sup>123</sup> Luke Cole was killed in a car accident in 2009, while on vacation in Uganda. Michael Taylor, *Luke Cole – Environmental Justice Lawyer – Dies*, SFGATE, June 9, 2009, available at [http://articles.sfgate.com/2009-06-09/bay-area/17209219\\_1\\_environmental-law-environmental-justice-mr-cole](http://articles.sfgate.com/2009-06-09/bay-area/17209219_1_environmental-law-environmental-justice-mr-cole). The author cannot overstate the impact that Mr. Cole has had on her legal career.

<sup>124</sup> Mr. Cole co-founded both the Center for Race, Poverty and the Environment (a nonprofit law firm) and the journal *Race, Poverty, and the Environment*. *Our Founders*, CENTER ON RACE, POVERTY & THE ENVIRONMENT, [http://www.crpe-ej.org/crpe/index.php?option=com\\_content&view=article&id=153&Itemid=121](http://www.crpe-ej.org/crpe/index.php?option=com_content&view=article&id=153&Itemid=121) (last visited Apr. 14, 2012).

discusses a community environmental justice battle in three different approaches: the professional, the participatory, and the power model.<sup>125</sup> Through the lens of each of these models, he explores different options for clients, significantly different roles for the attorney, and vastly different relationships between the attorney and the client.<sup>126</sup> The professional model is most akin to the Authoritarian Model discussed previously. The lawyer is the center of the relationship. He is the one in control, who dominates the relationship and who makes the decisions. In the professional model, it is presumed that the clients come to the attorney for his skills, experience, and knowledge of the legal system, that the desired service is that of litigation, and that the attorney is well-situated to utilize the legal system to achieve the client's goals.<sup>127</sup> However, much like the Authoritarian Model, critics of the professional model, including Cole himself, believe that the domination by the attorney puts at risk the true desires of the client and acts to further divide lay people and the professional bar.<sup>128</sup>

In the participatory model, the clients play a more active role and, although they are less subservient to the attorney, they remain subservient to the legal process.<sup>129</sup> The participatory model, as its name indicates, is where the attorney educates the client on opportunities to participate in decision-making.<sup>130</sup> In some areas of law, like environmental justice, where decisions are made through judicial, legislative, quasi-judicial, and administrative processes, points of entry for potentially affected people

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<sup>125</sup> Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687 (1995).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 693.

<sup>128</sup> *Id.* at 703-04.

<sup>129</sup> *Id.* at 705-07.

<sup>130</sup> *Id.* at 705.



(i.e., clients) to participate can be significant. In employing the participatory model, the attorney's primary function is to identify these opportunities and to assure participation by the clients, either directly or via the attorney herself.<sup>131</sup>

Much like other models we have looked at today, there is a spectrum of employing the participatory model, which in some instances results in comment, advocacy, testimony, and/or representation of the client's interests via the attorney and at the other end involves the attorney educating, training, and empowering the clients to comment, advocate, testify, and/or represent themselves.<sup>132</sup> In the participatory model, it may also be possible for the attorney to do both, resulting in direct participation by the clients but also participation by the attorney in a representative capacity.<sup>133</sup> Many areas of substantive law, like environmental administrative law, including but not limited to environmental law, are heavily reliant on these participatory processes. In fact, legal standing can be predicated upon such participation.<sup>134</sup> For instance, often in a land use context, lower level decision-making is done by local elected government bodies. Decisions of that body are often challengeable to Article III Courts, but failure to participate before the elected body can result in impediments, or in some instances in fact preclusion, from the ability to get Article III standing.<sup>135</sup> The critics of the participatory model are often steeped in areas of law that are heavily administrative in nature, hence the Catch-22: it is these administrative processes and administrative rights that provide the opportunity for such participation but which often, when they finally make it to the judicial

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<sup>131</sup> Cole, *supra* note 132, at 705..

<sup>132</sup> *Id.* at 705-06.

<sup>133</sup> *Id.* at 709.

<sup>134</sup> *Id.*

<sup>135</sup> For example, Florida's Administrative Procedure Act provides, "A party who is adversely affected by final agency action is entitled to judicial review." FLA. ST. ANN. § 120.68(1) (West 2011).

system, involve exceptionally high standards or burdens of proof, including things such as agency deferential standards.<sup>136</sup> Such standards often make victory in an Article III Court extremely difficult and offend the average person's sense of fairness and justice. Clients invest time, energy, and money in going through the motions of these participatory options and at the end of the day feel let down or like it was all for nothing.<sup>137</sup>

In essence, the greatest critique of the participatory model is that it disempowers communities and individuals because of the low likelihood of victory. It is the challenges identified above with the professional and the participatory models which led Cole and others to advocate for the power model.<sup>138</sup> In the power model, the attorneys and clients accept that the system is flawed or fixed, that the ability to succeed in court or through other legal or government decision-making tribunals is unlikely, and that when disenfranchised people spend energy pursuing either option that the failures do not serve to strengthen the resolve of the communities but instead to further disempower them.<sup>139</sup> In the power model, the key is power and the role of the attorney is to help the clients get that power.<sup>140</sup> Often this involves not advocating for or against a particular issue, but instead advocating for a change in the system and/or those making the decisions.<sup>141</sup>

Supporters of the power model believe that employing this model leads to empowerment of disenfranchised communities, and such empowerment leads to societal changes in a way that betters the quality of life

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<sup>136</sup> Cole, *supra* note 132, at 702-03.

<sup>137</sup> *Id.* at 707.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 697-98.

<sup>140</sup> *Id.* at 701-02. See David H. Harris, Jr., *Farm Land, Hog Operations and Environmental Justice*, RACE, POVERTY & ENV'T 31, 32-33 (Fall 1994-Winter 1995).

<sup>141</sup> Cole, *supra* note 132 at 698-99.

beyond a single issue.<sup>142</sup> Critics of the power model focus on the fact that failing to participate and avail themselves of legal representation, in whatever decision-making venues exist, guarantees that the communities will lose important battles. One example critics might give of the consequences of this model might be a community failing to testify on a zoning change, which could result in another polluting factory in your neighborhood, and will assure that that factory is built. Further, failing to challenge the air permit associated with the factory with an experienced, knowledgeable attorney in court will also assure that the factory is built and that it will be poorly regulated.<sup>143</sup>

Other critics of the power model assert that the goal is too lofty and that much like criticisms of the other two models, the systems and decision-makers in the power model are also fixed and may not result in improved societal changes.<sup>144</sup> For instance, you convince the local community leader to run for the seat on the local government body who makes the sitting decisions, only to find that the one vote does not preclude the sitting of yet another factory in your neighborhood, or due to campaign corruption, the once local community leader becomes a politician beholden to those who put and who will keep him in office.<sup>145</sup> Even in these early writings, Cole himself seems to imply that a combination of models is often necessary in environmental justice representation, although his disdain for the professional model is thinly veiled.<sup>146</sup>

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<sup>142</sup> *Id.* at 708; *See Harris, supra* note 147, at 32-33; Matthew Chachere, "What's Intent Got to Do With It?", *RACE, POVERTY & ENV'T* 42, 42-43 (Fall 1994-Winter 1995).

<sup>143</sup> *See Cole, supra* note 132, at 702-03.

<sup>144</sup> *Id.* at 701.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 708-09 (calling the professional model "a waste of time from the perspective of the community" and the participatory and power models "complementary"); *see* Richard Toshiyuki Drury & Flora Chu,

Part IV. The Legal System Today: Do We Value  
the Attorney-Client Relationship?

Two common themes of community lawyering analyses are the need for the attorney to provide problem-solving services and the need for equity and balance between the attorney and client, within the attorney-client relationship.<sup>147</sup> The question is: Are our current configurations of legal practice conducive to achieving those goals?

It is not very conducive to achieving either of these goals. In fact, our legal practice has become more and more specialized over the last several decades, resulting in artificial boxes being imposed on clients' problems. Essentially, when a client walks in the door the question posed to the attorney is: Can you take my case? More often than not, both the client and the attorney want the answer to be yes. Unfortunately, the question translates to the attorney as: Can I perform a legal service which might address your issue? The type of legal services the attorney offers is the artificial box into which the client's problem must then fit. Perhaps compounding the problem is that we all want to fit into the skinny jeans and we come up with extensive contortion and rationalization just to make it happen, when in fact we should just go buy a new pair. By relegating the client's problem immediately into whatever box defines one's practice at the outset, one often precludes potential solutions. Further, the limitations on solutions also lend to the imbalance of power between the attorney and the client.

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*From White Knight Lawyers to Community Organizers*, 5 RACE, POVERTY & ENV'T 52, (Fall 1994-Winter 1995).

<sup>147</sup> See Gifford, *supra* note 94, at 812-13; Dinerstein, *supra* note 59, at 600; see also R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN (Houghton Mifflin ed.1981); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 758 (1984).

To further the skinny jean analogy, if you find you do not fit into one pair and go back to the rack, you end up discovering that there is a disproportionate number of size 2s on the rack.<sup>148</sup> Essentially, impediments in the legal system result in attorneys focusing significantly on the same type of services. For instance, attorney's fees provisions and contingency fee arrangements, while intending to create more access to legal services, may be unintentionally pushing solutions towards litigation where such fee arrangements are permissible.

When the real answer is that we do not need another pair of jeans but maybe some cords, or that we just need to look through our closet for something else to wear, the problem is that we as attorneys often do not get paid if we point clients to those other choices. So, can we be trusted to fully evaluate those options? As discussed above, attorney's fees provisions and contingency fee arrangements may be leading attorneys to recommend and select litigation solutions. Is this consistent with what we want to promote? Much of the critique of attorneys and the legal system revolves around this perception of a "litigious society"; yet, we find ways to compensate attorneys only if they actually bring and win litigation. Additionally, in contingency fee arrangements, we actually allow the percentage of fees to increase at the point of litigation. To be clear, I do not assert that attorney's fees provisions or contingency fee arrangements should be done away with, as they have been shown to offer some greater access to those underrepresented, but we should be considering how we can incentivize attorneys to explore other options.

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<sup>148</sup> Yes, I know that I may have just lost the entire male portion of the legal profession with my chosen analogy, but let's be honest, attorneys are the most vain people on Earth. So, despite the initial protest, I am confident that most of you men are fully aware of what I am talking about.

The discussion above focused on service or tactical limitations in practice, but the trend towards greater specialization in substantive practice areas may also have unintended consequences. The goal of developing a substantive specialization is to demonstrate expertise, which will provoke confidence in clients who desire services on a particular issue. However, implicit in this is a predicate that the client knows what the substantive issue is when she comes to see the attorney. Does such specialization also result in predetermined limitations regarding solutions? For instance, if I am a public interest environmental law attorney working at a nonprofit, am I more likely to force the client's issue into an environmental law enforcement claim over a tort claim? I would assert that in most instances the answer is yes. Further, if there are claims under multiple environmental statutes and my client is a nonprofit or an indigent individual or a low income community, do claims with attorney's fees provisions climb to the top of the list, and if so, at what expense? Related to this, what if the alternative is to say no to the client, who may receive no legal assistance? If the nonprofit is dependent on private donations from individuals and foundations, as well as attorney's fees recovery, is an alternative choice to litigation more acceptable? The concepts I am proposing are not exactly radical. In fact, many would argue that these concepts are what we as attorneys, to some degree individually but even more so as a whole, are supposed to be following. One only needs to look to the rules of professional conduct to find that attorneys are not supposed to go down an assembly line and pick (1) litigation or transactional law, or (2) substantive specialization to define the types of cases we could take. In fact, the choices in one are only the tip of the iceberg when you look at the roles that the rules anticipate the attorney playing.

## Part V. Professional Regulation

In the Model Rules of Professional Conduct, Rule 2.0 addresses issues related to the attorney as Counselor and Rule Three issues related to the attorney as Advocate.<sup>149</sup> The roles of the attorney, however, are more expansively defined under both of these rules as well as others. Under Rule 2.0, the sub-rules envision attorneys functioning as an advisor to a client<sup>150</sup> or as a third party neutral.<sup>151</sup> Under Rule 3.0, the conduct of the attorney as an advocate, predominantly in the litigation context, is addressed. However, Rule 3.0 also talks directly about the attorney functioning as an advocate in a non-adjudicative proceeding, specifically citing to client representation before a legislative body or an administrative agency.<sup>152</sup> Also under Rule 3.0, and more specifically in Rule 3.5, the conduct of the attorney before a “tribunal” is regulated.<sup>153</sup> The language beneath is more expansive than just referring to a judge or jury, also including “other officials.”<sup>154</sup> In the definition section Rule 1.0, “tribunal” is defined as “a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.”<sup>155</sup> Again, this definition makes clear that the Model Rules envision attorneys functioning in capacities other than just that of a courtroom litigator. Similarly, Rule 3.3, entitled “Candor Toward the Tribunal,” emphasizes duties on all attorneys representing clients before any of these tribunals.<sup>156</sup> And Rule 4.1

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<sup>149</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1, 3.1 (2004).

<sup>150</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1 (2004).

<sup>151</sup> MODEL RULES OF PROF’L CONDUCT R. 2.4 (2004).

<sup>152</sup> MODEL RULES OF PROF’L CONDUCT R. 3.9 (2004).

<sup>153</sup> MODEL RULES OF PROF’L CONDUCT R. 3.5 (2004).

<sup>154</sup> MODEL RULES OF PROF’L CONDUCT R. 3.5(a) (2004).

<sup>155</sup> MODEL RULES OF PROF’L CONDUCT R. 1.0(m) (2004).

<sup>156</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3 (2004).

requires “truthfulness in statements to others” from attorneys regardless of what role they are serving.<sup>157</sup>

Likewise, in many state rules regulating attorneys, the same widely-defined roles are seen. In the Rules Regulating the Florida Bar, at least six roles are defined for attorneys: advocate,<sup>158</sup> third-party neutral,<sup>159</sup> adviser,<sup>160</sup> representative before a non-adjudicative tribunal,<sup>161</sup> person providing legally-related services,<sup>162</sup> and person providing non-legal services.<sup>163</sup> Additionally, other provisions in the Rules Regulating the Florida Bar demonstrate expectations of broader roles through the expansive language. In Rule 4-3.3, entitled “Candor Towards the Tribunal,” the rules do not say “candor towards the court,” clearly indicating that the attorney may be involved in a representative capacity in some other forum.<sup>164</sup> Even more telling is that the rules apply not to an attorney delivering legal services, but in fact to the attorney’s behavior regardless of whether the attorney is functioning in a legal capacity at that moment.<sup>165</sup> In looking at these rules, I am acutely aware of that cocktail party “fact,” which states that we only actually use about ten percent of our brain.<sup>166</sup> Is that what we are doing when we only offer clients one solution to their legal problems?

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<sup>157</sup> MODEL RULES OF PROF’L CONDUCT R. 4.1 (2004).

<sup>158</sup> FLA. RULES OF PROF’L CONDUCT R. 4-3 (2006).

<sup>159</sup> FLA. RULES OF PROF’L CONDUCT R. 4-2.4 (2006).

<sup>160</sup> FLA. RULES OF PROF’L CONDUCT R. 4-2.1 (2006).

<sup>161</sup> FLA. RULES OF PROF’L CONDUCT R. 4-3.9 (2006).

<sup>162</sup> FLA. RULES OF PROF’L CONDUCT R. 4-5.7(a) (2006).

<sup>163</sup> FLA. RULES OF PROF’L CONDUCT R. 4-5.7(b) (2006).

<sup>164</sup> FLA. RULES OF PROF’L CONDUCT R. 4-3.3 (2006).

<sup>165</sup> FLA. RULES OF PROF’L CONDUCT R. 4-5.7 (2006).

<sup>166</sup> This supposed fact is “so wrong it is laughable” according to neurologist Barry Gordon. Robynne Boyd, *Do People Only Use 10 Percent of Their Brains?*, SCI. AM., Feb. 7, 2008, available at <http://www.scientificamerican.com/article.cfm?id=people-only-use-10-percent-of-brain>.



Beyond these clear notions of expansive roles for the attorney, the ethical rules also speak to the way the attorney-client relationship should be conducted. As a professor, every semester when discussing the various models of attorney-client relationships, at least one of my students will ask how the Authoritarian Model complies with various ethical rules. Most notably, students question compliance with Rule 1.2(a), which requires the lawyer to “abide by a client’s decisions concerning the objectives of representation and . . . consult with the client as to the means by which they are to be pursued,” and Rule 1.4(a)(1), which requires the lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”<sup>167</sup> Similarly, students question how an attorney employing the Client-Centered Model, at its extreme, allows a lawyer to zealously represent his or her client as required by the Model Rules if at the protection of client control a lawyer’s ability to pursue the best legal solution is undermined. Other students believe that the Collaborative Model’s insistence on making the client evaluate the impacts of their decisions on others may run afoul of the duty to zealously represent one’s client. Aren’t these the same allegations made by clients when they seek redress for what they perceive as poor legal representation? What should that be saying to us? And what should we do about it?

#### Part VI. Conclusion: Where do we go from here?

Part of this article is to try to help us figure out how we got here, and then to pose two questions: Do we like where we are? And if not, What do we intend to do about it? In researching this article, I have at least attempted to answer these questions for herself and to elicit greater

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<sup>167</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2004); MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2) (2004).

dialogue from others.<sup>168</sup> For me, the answer to the first question is no, but the second question is not for any one individual to answer. I do, however, posit that a place to start is in legal education. I further assert that the focus of this legal education should be more about the importance of the attorney-client relationship and defining the role the attorney can play. When looking at attorney satisfaction surveys, those clients most happy with their attorneys are the ones who win.<sup>169</sup> However, for those who are happy with their attorneys even when they do not win, the reasoning is often routed in a positive, respectful and sympathetic relationship with their attorney.<sup>170</sup> To be clear, by no means am I saying that as long as you are a nice guy your clients will never care if you win. I am saying that if clients feel ownership in the decisions made in their cases, feel like they truly understand the consequences and risks of their choices, and feel like they understand the potential outcomes of their choices – that in the end, they can own the outcome. I further posit that if we teach law students more about the importance and the impact of the attorney-client relationship, we will help them make more educated, value-laden choices in their practice.

To teach law students these things, coursework should draw from the lessons of the attorney interviewing and counseling models and the tactics employed to foster client participation, as well as from the lessons of the community lawyering movement and practice models, such as those defined by Cole. Additionally, skills classes which provide the opportunity for students to employ such lessons are a critical component.

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<sup>168</sup> And, as quite a few colleagues have pointed out, to set the stage for needed empirical research.

<sup>169</sup> Cochran, Jr., *supra* note 65, at 4. See Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge* (1974).

<sup>170</sup> *Id.* See also DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 282-84 (1991).

However, in addition to giving them the opportunity to practice lawyering skills, we must give them the experience of observing and managing the attorney client relationship. In the last decade or so, medical schools have recognized that curriculum that addresses “the bedside manner” are critical to both success as a doctor and the reputation for the medical profession as a whole.<sup>171</sup> Patients treated respectfully are often less likely to sue for malpractice.<sup>172</sup> Isn’t this telling us something?

However, skills education is not the full picture of how to integrate these issues into legal education. In the doctrinal context we should consider ways to humanize the cases. Without identifying the human dynamics between clients and attorneys, the case study is limited in its ability to address these issues. One way to do this is to talk more about what took place before the appellate opinion. How often have we as professors teaching doctrine heard students brief a case by telling us the arguments of the plaintiffs and the defendants? Yet, what tools and information have we given them to determine what those arguments are? Do your students, like mine, not ask you questions about why the plaintiffs did not argue X or why the defense did not refute plaintiff’s Y argument? When you get these questions, does not it drive home the fact that we are limiting the students’ perspectives on what actually happened in the case? The appellate opinion in actuality tells us only what the court thinks the arguments are, but we seem to gloss over that fact too often. In a similar vein, how many times have you as a trial attorney read an

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<sup>171</sup> Pauline W. Chen, M.D., *The Hidden Curriculum of Medical School*, N.Y. TIMES, Jan. 29, 2009, available at <http://www.nytimes.com/2009/01/30/health/29chen.html>.

<sup>172</sup> Beth Huntington & Nettie Kuhn, *Communication Gaffes: A Root Cause of Malpractice Claims*, CBS INTERACTIVE BUSINESS NETWORK RESOURCE LIBRARY, available at [http://findarticles.com/p/articles/mi\\_6802/is\\_2\\_16/ai\\_n28172966/?tag=content;coll](http://findarticles.com/p/articles/mi_6802/is_2_16/ai_n28172966/?tag=content;coll).

opinion only to think either the court missed the boat on your argument or characterized it in a way so as to justify the end result? Is it not in our students' best interest to help them see the path from the complaint to the opinion or at least to acknowledge the limitation by not looking backward?

As indicated above, I do not pretend to have all of the answers, or even to assert that my answers within this article are the correct ones. What I do know is that we need to talk more about this. In retrospect, I found that when talking to others about this article, I kept saying that my "hypothesis" is that we as individual attorneys and as a collective profession need to shift the system to promote a more problem-solving role for attorneys with less predisposed solutions and which partners more with our clients. Essentially, I think the crux of the conversation is the role of the attorney and the combined role of attorneys – both in what we do as well as how we do it.

Stepping away from the substance of my "hypothesis," I think the nomenclature I use is also telling – several colleagues kept correcting me and calling it my "thesis" but it is in fact not a thesis but a hypothesis.<sup>173</sup> Though some will recognize them as synonyms – the definitions make it clear that the hypothesis is the younger naïve cousin – a thesis is an idea which one argues to support but a hypothesis is offered as unsupported or partially supported. Similarly, the one is more an art term and the latter a scientific term. In Composition or Lit 101, your paper should, in fact, support your thesis or you will not like your grade. In science, however, your hypothesis may be disproved without your grade suffering.

From my reality, this is a "hypothesis" because while I feel I can contribute to this conversation with support for preliminary contentions, I believe the real

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<sup>173</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged) (1971).

answers to these questions are far beyond the capacity of my mind, or in fact, any one mind. Some may say I am being lazy or cowardly in such an assertion, but neither is a word that anyone who knows me would attribute to me. Regardless, my hope is that this article will create new discussions, but also borrow from old discussions to consider our lessons learned in a new light, and to then chart new territory.

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