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LEADERS, FOLLOWERS, AND FREE RIDERS: THE COMMUNITY LAWYER'S DILEMMA WHEN REPRESENTING NON-DEMOCRATIC CLIENT ORGANIZATIONS

Michael Diamond and Aaron O'Toole***

I. INTRODUCTION

Democratic participation in decision making is a recurring ideal in many aspects of our society.¹ We are encouraged to vote for candidates for public office;² to voice our opinions to our representatives on matters of societal importance;³ to become involved in civic and social organizations;⁴ and to address common concerns

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1. JOHN GASTIL, *DEMOCRACY IN SMALL GROUPS* 5 (1993) [hereinafter GASTIL, *SMALL GROUPS*]. See generally JAMES A. MORONE, *THE DEMOCRATIC WISH* (rev. ed., Yale Univ. 1998) (1990) (arguing that the American democratic ideology sets a recurring pattern that calls the people to action). Cf. JOSEPH F. ZIMMERMAN, *PARTICIPATORY DEMOCRACY* (1986) (noting that while citizen participation is enshrined deeply in the culture of the United States, there is wide disagreement as to the forms and extent that active citizen participation should play in governance system). For a discussion of democratic participation in political theory see, for example, CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970) .

2. BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 134 (1984); ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 109-11 (1989); GASTIL, *SMALL GROUPS*, *supra* note 1, at 30 (1993) (stating that voting is the only form of democratic talk that is essential because all other forms of deliberation become virtually meaningless without the power to vote).

3. GASTIL, *SMALL GROUPS*, *supra* note 1, at 28-29 (2000); DANIEL C. KRAMER, *PARTICIPATORY DEMOCRACY* 43-46 (1972). See generally IAN BUDGE, *THE NEW CHALLENGE OF DIRECT DEMOCRACY* (1996) (arguing for the feasibility of direct mass involvement in policy-making and of having frequent popular votes with supporting discussion); MORONE, *supra* note 1, at 33-73 (documenting citizen participation in American government throughout the nation's history).

4. SAUL D. ALINSKY, *REVELLE FOR RADICALS* 99 (1946); BARBER, *supra* note 2, at 232; JOHN GASTIL, *BY POPULAR DEMAND* 12 (2000) [hereinafter GASTIL, *POPUL*].

through interactive debate and conduct.⁵ There is often, however, a considerable dissonance between the participatory ideal and the reality. This is particularly true in reference to community groups in low-income neighborhoods.⁶ There is a body of commentary that values the importance of democratic participation over the success of community groups in their legal struggles, but the literature suffers from a narrow and incomplete perspective.⁷ One important problem is that it emphasizes legal representation only in the context of the democratic *ideal* and not with reference to the needs of community groups as they actually exist and function. Moreover, the literature fails to recognize that there are many types of groups and that the ideal of democratic participation is not a one-size-fits-all imperative that suits the goals and *modus operandi* of each type.⁸

LAR DEMAND]. See generally BUILDING A COMMUNITY OF CITIZENS (Don Eberly ed., 1994) (advocating a return to civil society, with an active citizenry, to revitalize American democratic institutions); MORONE, *supra* note 1 (tracing the development of representative democracy in America and the ramifications of that development).

5. BARBER, *supra* note 2, at 151, 182-83; BUDGE, *supra* note 3, at 24; GASTIL, POPULAR DEMAND *supra* note 4, at 112-36; see JAMES FISHKIN, DEMOCRACY AND DELIBERATION 36-37 (1991) (commenting on the ideals of free & equal discussion); GASTIL, SMALL GROUPS, *supra* note 1, at 5 (describing democracy as an open discussion and the search for common ground); Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy is Different*, in DEMOCRACY 161 (Ellen Frankel Paul et. al. eds., 2000) (arguing for a deliberative theory of democracy in which decisions and policies are justified in a process of discussion among free citizens or their accountable representatives in order to make justifiable binding, collective decisions in the midst of continuing moral conflict). For a philosophic treatment of the need for reasoned discourse as a basis for democratic action see, for example, JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996).

6. See generally STUART G. COLE & MILDRED WEISE COLE, MINORITIES AND THE AMERICAN PROMISE: THE CONFLICT OF PRINCIPLE AND PRACTICE (1954) (studying the interrelationship between human relations, social change, and democracy); S.J. MAKIELSKI, JR., BELEAGUERED MINORITIES (1973) (highlighting the conflicts challenging the democratic way of life of the American people due to social change and misunderstanding).

7. See GASTIL, SMALL GROUPS *supra* note 1, at 20 (warning that democratic decisions cannot be reached by undemocratic processes by giving some group members more authority than others or sacrificing the democratic rights of the minority to the majority); GERALD LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 304 (1992) (referring derisively to those people who believe that the complexity of social life demands experts and that "'citizen politicians' should get out of the way").

8. Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 659 (1987) (postulating that traditional poverty lawyering echoes the domination of the powerful over the indigent); Stephan Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA.

This article will explore various aspects of the dissonance between the democratic ideal and the reality of groups in disenfranchised and disempowered communities. We will discuss the intersection of democracy and community action by examining the sociology of groups and the social psychology of leaders and followers. We will also examine the role of, and choices presented to, an attorney working in a community and for local community groups.

When a lawyer contemplates accepting or continuing the representation of a group from a disempowered community, she must consider much more than the legal merits of the particular matter presented. Before taking on a client a lawyer might consider, for example, whether the group is expressing legitimate community needs.⁹ Often a lawyer will look for evidence of broad member participation in the group's decision-making process.¹⁰ The latter issue is particularly important when the lawyer identifies herself as a lawyer who represents community interests in combatting poverty and oppression.¹¹

L. REV. 1103, 1103 (1992) [hereinafter Ellman, *Client-Centeredness*] (examining "the conflicts between the themes of group participation and individual autonomy in the context of public interest lawyers' representation of groups"); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 469 (1984) (contrasting established legal practice as an ex-post actor to Critical Legal Studies vision of the lawyer playing a proactive role); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049, 1049 (1970) (explaining how practicing poverty law differs from the traditional lawyering model).

9. The term "legitimate community needs" involves a complex interaction between the indefinite terms "legitimate" and "community." Here, we define "community" broadly as a defined geographic area encompassing a preponderance of people with similar ethnic, racial, cultural and economic backgrounds. The term "legitimate" is also broadly defined to mean there is a recognizable and significant body of support within the community for a position or set of positions. Thus, there may be several alternative, even competing, legitimate positions within any community. See Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 111-12 (2000) (noting how dissimilar the activist community lawyer's challenges, goals and territory are from those of the traditional lawyer).

10. See Ellmann, *Client-Centeredness*, *supra* note 8, at 1128-34.

11. See LOPEZ, *supra* note 7, at 32, 76-77 (describing lawyer's efforts to establish a legalization program for immigrants and how rebellious lawyering work with groups to effect social change); Diamond, *supra* note 9, at 73-77 (defining the community lawyer as activist); Stephan Ellmann, *Lawyers and Clients*, 34 U.C.L.A. L. REV. 717, 733-53 (1987) (describing client-centered lawyering); Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 CLINICAL L. REV. 639, 639-40 (1995) (defining "facilitative" lawyering); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 754-66 (1988) [hereinafter White, *Lawyering and Power*] (describing three models of lawyering).

The goal of participatory democracy must itself be subjected to careful examination.¹² In much of the commentary on community lawyering, achieving the goal of democratic participation is considered to be a worthy object in its own right.¹³ There is little or no critical examination of whether such participation is a prerequisite to meaningful social change or even whether participatory democracy is always an aid to such change. The consideration of these questions raises several subsidiary issues that also have received scant attention in the literature. For example, what role should an attorney play when she becomes aware of self-aggrandizing manipulation or autocratic rule by a leader in a community group? Should she attempt to foster democratic participation when it might jeopardize substantive outcomes that are generally desired by the membership? Do the rules of professional responsibility provide adequate guidance to an attorney who observes such manipulation or autocracy? In essence, the question is whether the maintenance of democratic participation must be part of the mission of a community lawyer.

12. In fact, the definition of *democracy* is itself subject to wide debate. A standard definition is "government by the people exercised either directly or through elected representatives." AMERICAN HERITAGE DICTIONARY (4th ed. 2000). Jane Mansbridge has defined a democratic community as:

[O]ne that makes decisions in ways that respect the fundamental equality of each citizen, both as a participant in deliberation and as the bearer of potentially equal power in decisions. The appropriate forms of democracy differ depending on the degree of common interest in the polity. The stronger the community, the less useful are aggressive democratic forms like majority rule, developed to handle fundamentally conflicting interests, and the more useful are deliberative democratic forms developed to promote mutual accommodations and agreement.

Jane Mansbridge, *Feminism and Democratic Community*, in DEMOCRATIC COMMUNITY 340-41 (John W. Chapman & Ian Shapiro eds., 1993). Mansbridge has also connected democracy to coercion. "In democracies, we must use power to get things done. By power, I mean coercion—causing others to do what they would not otherwise do by threat of sanction or the use of force." Jane Mansbridge, *Using Power/Fighting Power*, 1 CONSTELLATIONS 53, 53 (1994). Dorf and Sabel take a more pragmatic approach. They suggest "a new model of institutionalized democratic deliberation that responds to the conditions of modern life." Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 283 (1998). They find that "[d]emocracy was the method for reflecting on the connection of means to ends in social activity. Specifically, for Dewey, it was a method for identifying and correcting through public debate and action the unintended consequences of coordination among private actors." *Id.* at 286.

13. See Ellmann, *Client-Centeredness*, *supra* note 8, at 1147 (noting that "even if each individual knows his or her mind it remains necessary for the group to come to a collective decision. To make a collective decision requires a collective decisionmaking method, but there is no method that infallibly reflects yet does not influence the preferences of the voters").

Our conclusion is that the value of participatory democracy is not a given. Rather, it is a function of the nature and goals of a particular group at a particular time and is not a *sine qua non* of group representation. Lawyers may recognize the legitimacy of groups and their leaders even in the absence of democratic participation. They need not demand, encourage or expect such participation as a prerequisite for beginning or continuing the representation. Regardless of the presence of a participatory process, there are also issues of whether the lawyer must be concerned about discovered manipulation or self-aggrandizement by a group's leaders and whether she must confront such behavior on behalf of the group. Unfortunately, the Model Rules of Professional Responsibility¹⁴ provide little-to-no guidance on how a lawyer should act in such situations.

Because the nature of an association and the relationship between its members and leaders will have a significant effect on a lawyer's role in representing it, we examine some of the concepts surrounding the formation and functioning of groups. The remainder of Part I will describe the ideal of democratic participation and juxtapose it against two narratives of community group interactions. Part II explores group and organization theory. It will examine what differentiates an aggregation of individuals from a group and will discuss concepts of followership and free riding. Part III will examine the problems these issues present to a lawyer dedicated to community representation. We will survey the existing legal literature on the relationship of lawyers to groups and point out the gaps in the analyses. We will also examine the ethical considerations relevant to group representation and identify the significant shortcomings of the Model Rules as they pertain to a community group practice. In Part IV, we lay the foundation for a new ethic of group representation for the community lawyer, one that distinguishes between issues of client autonomy as an end and substantive changes in physical conditions and power relationships in communities. This ethic also takes into account the characteristics of groups and their leaders, and addresses the relationship of democratic participation to legal representation in the community context.

14. See ANN. MODEL RULES OF PROF'L CONDUCT (1998). While Model Rule 1.13 does address a lawyer's responsibilities in the representation of a group client, in Part III, we will discuss its limited applicability to the representation of many community groups.

A. The Idealized Vision

The embodiment of an effective community group involves people who come together, either spontaneously or at the urging of an organizer,¹⁵ in a participatory collaboration,¹⁶ to address injustices its members face in common.¹⁷ The resulting interaction should foment both new ideas and a sense of personal stake in the process and in the outcome. Group members discuss their common concerns, educate themselves about the issues and decide on appropriate action.¹⁸ The ideal envisions leadership emerging from among the participants with the leaders being recognized as such by an informed and active membership.¹⁹ The leaders would speak for the group and help it to shape its purposes and activities.²⁰ The membership might also seek the involvement of outsiders to assist them in their development and help to create and implement strategies to combat the problems that brought them together.

Unfortunately, community groups in poor communities rarely develop in this manner.²¹ While many groups coalesce around perceived problems and evolve into effective and democratic organizations, there are also many cases in which groups and their activities are exploited by their apparent leaders, by adversaries, occasionally by allies and sometimes by group members themselves.²² In discussing democracy and outcomes, we will examine

15. See ALINSKY, *supra* note 4, at 77-78 (noting that in order to have an organization or program that reflects "the people's" wish, one must first have an organization through which the program can be developed because the people's program is the "product of one person, five persons, a church, a labor union, a business group, a social agency, or a political club; in short, a program which can be traced to one or two persons or institutions, but never to the people").

16. LOPEZ, *supra* note 7, at 38; see ALINSKY, *supra* note 4, at 109-10 (relating the synergist effect of inclusion rather than exclusion).

17. LOPEZ, *supra* note 7, at 38.

18. *Id.*

19. See *id.* at 30-31 (describing how a community lawyer lives, and therefore is intimately attuned with the problems in the community); see also ALINSKY, *supra* note 4, at 102 (telling the consequences of a community organizer ignoring local mores).

20. LOPEZ, *supra* note 7, at 32.

21. See Ellmann, *Client-Centeredness*, *supra* note 8, at 1154 (noting that groups that represent poor and disadvantaged groups have few alternatives—particularly if the group further subdivides into factions; consequently, they are "under considerable pressure to find a solution within the parameters of continued membership in the group").

22. See Lucie E. White, *Lawyering for Poor Communities in the Twenty-First Century*, 25 FORDHAM URB. L. J. 813, 825 (1998). White explains:

There is always going to be tension, in community-based work that aspires to be both participatory and emancipatory, between the directive role that an organizer, lawyer, leader, or teacher, must play to get the work going and keep it on track, and the teacher's aspiration to draw out, rather than dic-

the nature of groups and of democratic participation,²³ the meaning and efficacy of group leadership and the issues of followership, free riding and exploitation.²⁴ We will explore the tensions between democratic participation and successful outcomes²⁵ and the ethical and political dilemma of a lawyer who represents a group with a non-democratic or exploitive leadership.²⁶ In some cases, the autocracy or exploitation may, nevertheless, lead to the achievement of the group's purposes.²⁷ In other cases, it merely serves the self-aggrandizing purposes of the leader at the expense of the membership and of the community.²⁸

B. Setting the Stage

Much of the current literature on community lawyering both legal and non-legal, focuses on the relationship between law and oppression, on the role of leaders and on the process of group goal setting and decision making.²⁹ Some of the literature focuses on the role of lawyers who represent community groups involved in such struggles, emphasizing the nature of the lawyer-client rela-

tate, the group's own voices. William Simon has referred to this paradox as "the dark secret" of community-based poverty lawyering. You need powerful leadership to get a community-based group together and to help it undertake meaningful action. Yet with that leadership comes the obvious risks of domination and exploitation.

Id. (citing to William Simon, *The Dark Secret of Community Based Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1102-04 (1994)).

23. See discussion *infra* Part II.A-B.

24. See discussion *infra* Part II.C.

25. See discussion *infra* Part II.D.

26. See discussion *infra* Part III.

27. See discussion *infra* Part III.A.

28. See discussion *infra* Part III.A.

29. See e.g. Ellmann, *Client-Centeredness*, *supra* note 8, at 1146-48 (explaining the difficulties of collective decision making). For a survey of the scholarship on the role of lawyers in facilitating group decision making see GASTIL, *SMALL GROUPS*, *supra* note 1; LOPEZ, *supra* note 7; Christina Z. Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229 (2000); Diamond, *supra* note 9; Zenobia Lai, et. al., *The Lessons of the Parcel C Struggle: Reflections on Community Lawyering*, 6 ASIAN PAC. AM. L.J. 1 (2000); John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825 (1992); Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO STATE L. J. 1 (1993); White, *Lawyering and Power*, *supra* note 11; Melanie D. Acevedo, Note, *Client-Choices, Community Values: Why Faith-Based Legal Services Providers Are Good for Poverty Law*, 70 FORDHAM L. REV. 1491 (2002).

tionship.³⁰ The questions with which we began this essay, however, have received little attention.

Consider the following two situations,³¹ one concerning an ad hoc group and the other concerning an *institutional* group. In each case, one individual dominates the group but the nature of the dominance, and its results, differ in each situation. These differences highlights some of the important questions we hope to address.

A seventy-five-unit apartment building has long been occupied by low-income residents, most of whom are immigrants, some of whom are undocumented, and many of whom do not speak English. The building is in a neighborhood that has been rapidly gentrifying and the owner wants to sell it to someone who will likely convert it to luxury apartments or to a condominium. In furtherance of this goal, the owner has not re-rented apartments that have become vacant when a tenant moved out and has not made improvements to the building. Maintenance has been cut to the bare minimum necessary to preserve habitability. The tenants had been organized by a now-deceased resident who led them in initiating a rent strike and in filing various administrative proceedings against the owner, most of which were conducted *pro se*. The owner has instituted landlord/tenant actions against the tenants and has sought permission from the local rent-control agency to evict the tenants due to the owner's desire either to substantially renovate the building himself or to sell it to someone who will renovate it. The struggle has continued with several ebbs and flows for a considerable period and multiple pieces of litigation were proceeding simultaneously.

The possibility of a settlement emerged and a judge, seeking a solution to the seemingly endless litigation, suggested to the group that they retain counsel to help negotiate a settlement.

30. For a survey of the scholarship discussing the ethical, interpersonal, and political aspects of the attorney-client relationship, see, for example DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974) (discussing the interpersonal aspects of the attorney-client relationship); William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992) (addressing the political aspects of the attorney-client relationship); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Bruce A. Green, *Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients*, 67 FORDHAM L. REV. 1713 (1999); Michelle S. Jacobs, *Legal Professionalism: Do Ethical Rules Require Zealous Representation for Poor People?*, 8 ST. THOMAS L. REV. 97 (1995).

31. The narratives we present here have been derived from actual cases with which we either have been involved or been aware. The names of the participants and some of the facts have been modified to preserve their anonymity.

The judge, with the group's consent, contacted a local attorney experienced in housing finance and development to see if she would be willing to speak to the residents. The judge warned the attorney that the current leader of the group (the daughter of the deceased founder) was a very difficult client and that three previous attorneys had withdrawn from representing the group because of her. Nevertheless, the attorney, after meeting with the group (in the presence of interpreters of four different languages), agreed to take on the limited task of negotiating a settlement that would satisfy the resident's wishes. The current group leader, whom we shall call "Arabella," tells the attorney that the thirty-one remaining residents are willing to vacate but want a significant amount of cash, a period of free rent while they seek other housing accommodations, and assistance from the owner in finding such accommodations.

Arabella is herself an immigrant but with significantly more education and financial means than the other residents. She is intelligent, analytical and professes total commitment to the well-being of the residents. Arabella assumed the leadership position several years ago, after her father's death.

It is unclear whether the residents actively decided to place Arabella in the leadership position but there did not seem to be any serious opposition to her leadership. In fact, there did not seem to be any other member of the group who even desired the role. Arabella seemed to perform all of group's tasks and made all of its decisions without any known dissent from group members. They seemed all too willing to let Arabella continue to act as she had.

A settlement was eventually reached after a lengthy negotiation in which Arabella played a part. It provided, among other things, for a significant sum to be distributed among the residents according to a two step process: the first step involved a formula that was incorporated in the settlement agreement; the second step permitted the residents association to make an allocation of the balance of the funds. When the residents' allocation (which was prepared by Arabella) was presented to the group's attorney, the attorney was shocked to see that Arabella had allocated to herself a bonus of \$114,000 (or 15% of the total funds available) in addition to her otherwise allocated share of the proceeds. Her bonus reduced each resident's share by an average of \$3,500.

This story raises important, often submerged, issues such as whether the group obtained better results with Arabella's now apparent autocratic and manipulative leadership than it would have with a more democratic, participatory procedure. This assumes the

membership was capable and willing to initiate and maintain such procedures. A more basic question is whether this was a group at all or merely an aggregate of individuals.³² In either case, one could ask how the lawyer should have related to the interactions between Arabella and the residents.

A second case presents related problems but in a different context.

In the Winter of 1989, tenants in a building received notices that the owner intended to sell it. Under local law, the tenants had the first right to purchase the building. A group of tenants exercised that right and with the assistance of a local nonprofit organization, the residents entered into a contract to purchase the building, put together the necessary financing, and ultimately acquired the building through a cooperative housing association formed by the tenants. Most tenants became members of the cooperative and each member had the right to live in one of the units in the building.

Upon forming the cooperative association, one of the members' first actions was to elect a board of directors. Several members competed for the limited number of directorships, including Ms. Johnson. For more than ten years prior to the tenants' purchase of the building, Ms. Johnson had been the resident manager, an employee of the former owner. During her tenure in that position, many of the tenants came to dislike her. She was unfriendly and often failed to respond to the requests and complaints of residents. On more than one occasion, she threatened to call the INS to report tenants she thought were undocumented immigrants. Not surprisingly, Ms. Johnson was not elected to the board.

Over the next few years, the cooperative ran relatively smoothly. The Board met regularly and effectively managed the property. Annual membership meetings were well attended and residents volunteered for the various committees organized to maintain the cooperative. Ms. Johnson, somewhat embittered by her defeat in the Board election, did nothing more than sit quietly at membership meetings.

As with any building, old residents left and new residents moved in. After several years, few of the households that had lived in the building prior to its conversion remained and none of the original board members remained. At that year's annual mem-

32. The question is basic because both the governance structure of a group can be very different from that of a mere aggregation (leaving the lawyer with dissimilar political concerns) and because the ethical responsibilities of a lawyer to a group differ from those of a lawyer to a set of related, but individual, clients.

bership meeting, Ms. Johnson re-ran for director and she won. At its first organizational meeting, the new board elected Ms. Johnson president of the cooperative.

Not long after securing her post, Ms. Johnson went to several of the cooperative members with a proposed resolution to amend the bylaws. The amendment would increase the term of a director from two years to seven years. She did not provide notice of the proposed change to all of the members and no meetings were held to discuss the change. Nonetheless, a majority of the members signed the resolution approving the amendment. Ms. Johnson then forwarded the amendment to the cooperative's attorney, who included it in the file without questioning it.

During her presidency, several more board members moved out, board meetings became less frequent and less well attended, and Ms. Johnson increasingly took control of the affairs of the building. Eventually the cooperative's bank requested the board's minutes. Having nothing to show them, Ms. Johnson sought volunteers to fill the vacated slots on the board. Several members agreed, and for a while meetings were held regularly. While Ms. Johnson would permit the other board members to speak at the meetings, she would then disregard their views and took whatever action she desired. For example, several of the new board members raised the issue of replacing the management company because of its poor performance: units remained vacant for long periods of time while individuals applying for units were being told that there were no units available; the board did not receive reports and budgets in a timely manner; and repairs and maintenance were performed slowly, poorly, or not at all.

Under such autocratic conditions, board members quickly became discouraged and stopped attending meetings. Board meetings, which were open to all members of the cooperative, rarely had more than two people in attendance. Over the past three years, various members have sporadically requested that the cooperative hold elections for directors. Each time Ms. Johnson has ignored the request, usually with the backing of a few supportive members. Trying a different approach, one board member contacted an outside organizer and arranged for a meeting to discuss how the members of the cooperative could regain control of their building. Only three people showed up.

While it seems clear that the cooperative's attorney failed in his most basic duties to the client,³³ the question remains as to what

33. At the very least, the attorney should have advised the cooperative's board of both the procedural and substantive illegality of Ms. Johnson's proposed by-law amendment. The more difficult question, one that we will address later in this article,

the attorney should have done in this situation. How should the attorney react to a group that seems disinterested, without hope, or that is intimidated into inaction by a rogue leader? Should the result depend on the substantive progress of the project on which the group embarked or is there another criterion on which an attorney should determine the scope of her role? In either case, how does an attorney make such an appraisal? These are questions to which we will return in Part IV of this article.

For now, we simply wish to point out some of the significant differences between the associations in the two narratives. An important distinction is that the Arabella narrative involves a group that evolved into an one-shot group. Its goals evolved from long-term improvements in living conditions in the building (where residents would remain) to securing a one-time payment for departing. The cooperative, on the other hand, involved the goals of maintaining resident-owned, affordable housing in decent condition as well as involving the members of the cooperative in a collaborative process of interaction and personal growth. The group expected to remain together for the long term.

The differences in the goals of the associations suggest a difference in the form of interaction and governance they might adopt and also might affect the way in which an attorney relates to the organization. We will address the differences in structure and interaction in Part III and the implications of those differences in Part IV.

II. THE NATURE OF GROUPS

What distinguishes a “group” from merely an aggregate of individuals, from a crowd, or from a mob? Need there be interaction or interdependence among the individuals? Need there be a leader, a set of goals, a doctrine, or creed? Social scientists have proposed various definitions for the notion of a group and have identified several, occasionally conflicting, attributes necessary for an aggregation to qualify as a group.³⁴ The distinctions can have

is whether the attorney took too narrow a view of his role in representing the cooperative.

34. Social scientists have subdivided groups into several different types, each of which with its own characteristics. For a survey of various definitions of groups, see, for example, NICHOLAS ABERCROMBIE, ET. AL., *THE PENGUIN DICTIONARY OF SOCIOLOGY* (4th ed. 2001); CHARLES HORTON COOLEY, *SOCIAL ORGANIZATION: A STUDY OF THE LARGER MIND* (1909); HENRY PRATT FAIRCHILD, *DICTIONARY OF SOCIOLOGY* (1944); THOMAS FORD HOULT, *DICTIONARY OF MODERN SOCIOLOGY* (1969); G. DUNCAN MITCHELL, *A HUNDRED YEARS OF SOCIOLOGY* (1968); EDWARD

serious implications for an attorney in the nature of her representation and in the ethical considerations that apply to that representation. In a community context, these distinctions can also take on political implications for the lawyer.

In this section, we will consider some of the more influential definitions of the term "group" and examine some of the attributes associated with them. We will also look at issues of leadership, followership and democratic participation in groups and apply our observations to community groups in the preceding examples in Part I of this essay. Then we will examine the lawyer's role and responsibilities when representing groups and aggregates of individuals. Finally, we will speculate about issues of legitimacy and group representation of community goals.³⁵

Our interpretation of the lawyer's role involves the lawyer helping to create and maintain community groups to combat oppression. A large body of literature reflects on the need for organization and political action in this struggle.³⁶ We think of the lawyer as an activist and a participant in these activities and in the groups that she represents. We view the lawyer's role as seeking solutions to problems wherever the solutions may be found. Thus the role of the lawyer, and the area in which the lawyer should function, is quite expansive. Of course, not all clients or all groups are interested in or receptive to this type of lawyering. The question then arises of how a lawyer should collaborate with such groups. We elaborate on this question in Part IV.

BYRON REUTER, *HANDBOOK OF SOCIOLOGY* (1941); *SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES* (E. Tory Higgins & Arie W. Kruglanski eds., 1996); GEORGE A. THEODORSON & ACHILLES G. THEODORSON, *A MODERN DICTIONARY OF SOCIOLOGY* (1969).

35. In the interest of full disclosure, we thought it appropriate to set out our initial biases. We believe that the law, and litigation in particular, is a necessary, yet clearly insufficient, element of community change and empowerment. Lawyers who focus primarily on the creation or enforcement of rights often lose the opportunity to establish lasting institutions that can aggregate and wield power in the ongoing struggle for political and economic equality. Having taken this position, we suggest a redefinition of the role of public interest or community lawyers for whom litigation has historically been a mainstay of their endeavor.

36. See, e.g., Diamond, *supra* note 9; Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 *Geo. L.J.* 1603 (1989); Wexler, *supra* note 8; Lucie E. White, *Collaborative Lawyering in the Field?: On Mapping the Paths From Rhetoric To Practice*, 1 *CLINICAL L. REV.* 157 (1994).

A. A Group by Any Other Name

Many scholars have studied, and often disagreed, about the nature, or even the existence, of groups.³⁷ Of those who recognize their existence,³⁸ the consensus is that there is no consensus.³⁹ There is agreement that the term has been applied to a number of very different combinations. For example, some scholars differentiate between formal and informal groups.⁴⁰ Formal groups are often defined as those with established hierarchies, written procedures and that are, generally, of large size.⁴¹ Informal groups are typically smaller with unwritten procedures.⁴² They are established by the members themselves, are more flexible, and change often.⁴³ Other scholars distinguish between primary and secondary groups.⁴⁴ Charles Horton Cooley has defined primary groups as "those characterized by intimate face-to-face association and cooperation. They are primary in several senses, but chiefly in that they are fundamental in forming the social nature and ideals of the individual."⁴⁵

37. Some scholars characterize a group broadly, as a generally inclusive term; a group is nothing more than two or more individuals associated with each other that must be thought of together. See ABERCOMBIE, ET AL., *supra* note 34, at 108; REUTER, *supra* note 34, at 121 (offering different definitions of "group" all of which refer to more than one individual). Other scholars characterize a group more narrowly, requiring an established pattern of psychological interaction, reciprocal communication, some degree of interdependence and a type of collective behavior. DORWIN CARTWRIGHT & ALVIN ZANDER, *GROUP DYNAMICS: RESEARCH AND THEORY* 46-48 (3d ed. 1968); FAIRCHILD, *supra* note 34, at 133-37; HOULT *supra* note 34, at 147-48; THEODORSON & THEODORSON, *supra* note 34, at 176. Still other scholars do not accept the existence of groups; they argue that no group has an identity other than the composite of the individuals who have come together. FLOYD HENRY ALLPORT, *SOCIAL PSYCHOLOGY* 4 (1924) (asserting that "[t]here is no psychology of groups which is not essentially and entirely a psychology of individuals").

38. There is widespread agreement among scholars that the aggregation of individuals can create a group as long as there is interdependence among its members; this interdependence is a "key criterion distinguishing groups from other social aggregates." John Levine & Leigh Thompson, *Conflict in Groups*, in *SOCIAL PSYCHOLOGY* 745 (E. Tory Higgins & Arie W. Kruglanski eds., 1996).

39. *Id.* (stating that "[m]any definitions of groups have been offered over the years, and no single definition has achieved universal acceptance") (citations omitted).

40. See THEODORSON & THEODORSON, *supra* note 34, at 177; STEPHEN WILSON, *INFORMAL GROUPS: AN INTRODUCTION* 17 (1978).

41. See THEODORSON & THEODORSON, *supra* note 34, at 177.

42. See *id.*

43. *Id.* at 178-79.

44. See COOLEY, *supra* note 34, at 23-31.

45. See WILSON, *supra* note 40, at 18 (citing COOLEY, *supra* note 34, at 23). Wilson has criticized this definition because many informal, face-to-face groups lack the

Still others recognize groups through the participants' self-identification as members.⁴⁶ Ruppert Brown, for example, after examining several defining criteria, has suggested "a group exists when two or more people define themselves as members of it and when its existence is recognized by at least one other."⁴⁷

Peter Hartley has attempted to categorize the elements that various scholars have used in defining groups.⁴⁸ After reviewing the literature, he identified four factors around which groups commonly have been defined. The factors are:

- the *common fate* of the members
- the *social structure* of the group
- the nature of the *interaction* between members
- the fact that members *categorize* themselves as members⁴⁹

Even among smaller, informal, primary groups, there is considerable variation in the kinds of groups that have been recognized. Henri Tajfel and Colin Fraser have identified four types of small groups: family groups, friendship groups, work groups and laboratory groups.⁵⁰ These groups can be further categorized as voluntary, where the members chose to be associated, or compulsory, where circumstances have thrust members together, more or less without their volition (e.g. family groups, employee work groups, etc.).⁵¹

In applying Tajfel and Fraser's classifications, the community lawyer will be interested primarily in the voluntary work group. Work groups aim to achieve certain goals or to rectify certain problems.⁵² They are the kinds of groups that often seek assistance from a lawyer and they are also the type for which a lawyer could be most helpful.

The associations we have described fit many of the characteristics of groups. For example, Arabella's group is a voluntary, primary, work group. It is informal even though it has certain formal

sense of "we-ness" that Cooley called for and, in fact, display a very low sense of "we-ness."

46. RUPPERT BROWN, *GROUP PROCESSES: DYNAMICS WITHIN AND BETWEEN GROUPS* 2 (1988).

47. *Id.* at 2-3.

48. See PETER HARTLEY, *GROUP COMMUNICATION* 20 (1997).

49. *Id.*

50. HENRI TAJFEL & COLIN FRASER, *INTRODUCING SOCIAL PSYCHOLOGY* 178-83 (1978), *discussed in* HARTLEY, *supra* note 48, at 25-26.

51. Ann E. Chudd, *Nonvoluntary Social Groups*, in *GROUPS & GROUP RIGHTS* 58 (Leslie Francis et. al. eds., 2001).

52. See TAJFEL & FRASER, *supra* note 50, at 180 (commenting that work groups' major goals are instrumental or task oriented).

characteristics such as bylaws. Although there are some elements of self-identification among the members, they are relatively weak. Nonetheless, the building owner and the court see the residents as a group. The housing cooperative is also a voluntary, primary, work group. It is, however, much more formal than Arabella's. Members self-identify as part of a group and much of the outside world see them that way as well. In our example, the autocratic leadership weakened the self-identification to the point that many residents saw themselves simply as tenants rather than as members of a cooperative.

A lawyer's ability to help these types of groups depends, to a great extent, on the nature and dynamic of the group. The dynamic, in turn, depends on the nature of the group's leadership and followership.⁵³ Are the goals articulated by the leadership supported by the membership? Is there a procedure by which member's views are transmitted to the leaders of the group? Do the leaders accurately transmit the group's desires to the attorney? We will examine these and similar issues in the next sections.

B. Degrees of Groupness

Tajfel and Fraser and others have talked in terms of the degree of groupness present in an aggregation of individuals.⁵⁴ The inference is that not all groups will exhibit all of the attributes of groupness at any particular time and the attribute levels will vary over time. Ruppert Brown has asserted that the common factor "to many, if not all" groups is interdependence.⁵⁵ He distinguishes be-

53. Followership describes a fluctuating equilibrium in the relationship between a group's leader and its members. It suggests an ongoing tension: the followers communicate their needs and the leader responds. In the balance are both the achievement of group goals and the maintenance of control by the leaders. For a discussion of followership, see, for example, Kingsley R. Browne, *Women at War: An Evolutionary Perspective*, 49 BUFF. L. REV. 51, 133-42 (2001); Andrew Fenton Cooper et al., *Bound to Follow? Leadership and Followership in the Gulf Conflict*, 106 POL. SCI. Q. 391 (1991).

54. Tajfel & Fraser argue that there are 6 major characteristics identified with groups: 1) *interaction* among members; 2) *perception* by members of their membership; 3) having certain *goals* or *purposes*; 4) having group specific *norms*; 5) *differentiated roles* among members; and 6) *affective relations* among members. These factors will be present, to one degree or another, in all groups. By plotting these factors on a graph, one could discern the profile of a particular group and compare degrees of groupness across different groups. See TAJFEL & FRASER, *supra* note 50, at 177-78. More generally, for the difference between an aggregation or collectivity and a group, see FAIRCHILD, *supra* note 34, at 7, 133; HOULT, *supra* note 34, at 69, 147-48; REUTER, *supra* note 34, at 82, 121; THEODORSON & THEODORSON, *supra* note 34, at 60, 176.

55. BROWN, *supra* note 46, at 27.

tween *interdependence of fate*, and *interdependence of task*.⁵⁶ Interdependence of fate is often arbitrary. In what is now an eerily compelling example, Brown describes a situation of passengers on a commercial airplane.⁵⁷ There is little interaction among them and their presence on the flight is random. If the plane were to be hijacked, however, the passengers would be transformed into hostages; their fate would be bound closely together. They would be transformed into a group.⁵⁸

Brown finds interdependence of fate to be the "weakest form of interdependence."⁵⁹ Interdependence of task is much more important to group process. It involves common goals among members and implies the division of tasks within the group. Each member's successful completion of her task impacts the ability of other members to complete their tasks and the group to achieve its goals.⁶⁰ The division of tasks can lead to cooperation or competition among group members. It also has pertinence for how members feel about their membership and about themselves.

Another way of looking at these issues is to distinguish between *group content* and *group process*.⁶¹ Group content is comprised of group tasks and activities while group process refers to how the group operates and how the members relate to it and to each other.⁶² R.F. Bales, a post-war psychologist, discusses this issue by identifying *instrumental*, or task related, activity and *expressive*, or

56. *Id.* at 28. Brown here draws on the work of Lewin and others in which they assert that groups come into existence not because members are similar to one another but because they recognize that their fate depends upon the fate of the group as a whole.

57. *Id.* One need only recall the passengers on American Airlines Flight 11 and United Airlines Flight 175 that crashed into the World Trade Center towers, or American Flight 77 that crashed into the Pentagon on September 11, 2001, for examples of interdependence of fate. Based on news reports, one could also look at United Flight 93 that crashed 80 miles southeast of Pittsburgh, Pennsylvania, where passengers acted on September 11, to divert the plane from its intended target, or American Airlines Flight 63 en route from Paris to Miami on which passengers acted in concert to subdue Richard Reid before he was allegedly able to detonate explosives on the plane, to understand how the interdependence of fate can lead to an interdependence of task. See Tim Golden, *A Day of Terror: The Operation*, N.Y. TIMES, Sept. 12, 2001, at A13 (listing airline flights that were hijacked on September 11, 2001); Donald G. McNeil, Jr., *A Nation Challenged: The Inquiry*, N.Y. TIMES, Dec. 24, 2001, at B5 (identifying Reid's flight).

58. BROWN, *supra* note 46, at 28.

59. *Id.* at 30.

60. *Id.*

61. HARTLEY, *supra* note 48, at 24.

62. *Id.*

emotional or personal, behavior in small groups.⁶³ His starting point in discussing group behavior is that small groups are created to achieve some task and that their activity is directed toward that end.⁶⁴ In pursuing instrumental goals, however, disagreements among members may threaten the functioning of the group.⁶⁵ These may be strategic differences, differences in underlying values, or competition over roles and power. Bales suggests that the tensions caused by these differences may be mitigated by expressive behavior,⁶⁶ that is, some personal action, such as a display of anger or laughter or rejection of a member or members in the group. He theorizes that this leads the group towards regaining equilibrium in order to continue pursuing its ultimate goal.⁶⁷ Thus, expressive goals are often supplementary to, and supportive of, instrumental ones.⁶⁸ Of course, the group leadership plays a significant role in giving the group its personality and in determining the nature of its instrumental and expressive activities.⁶⁹ We turn now to an examination of the nature of leadership and of its corollary, followership.

C. You Weren't Born to Follow

Until philosophers are kings, or the kings and princes of this world have the spirit and power of philosophy . . . and those

63. See R. F. BALES, *INTERACTION PROCESS ANALYSIS: A METHOD FOR THE STUDY OF SMALL GROUPS* 51 (1950) (differentiating between expressive and instrumental acts).

64. *Id.* at 53; see also BROWN, *supra* note 46, at 28 (noting that a collection of people become a group when they realize that their fates are intertwined).

65. BALES, *supra* note 63, at 54-55.

66. *Id.* at 55.

67. *Id.*

68. See *id.* (explaining that expressive actions are the means to restoring the group and permitting it to pursue an instrumental goal). The concepts of instrumental and expressive goals are salient in other situations. For example, several commentators, particularly in social work and some lawyers, see expressive goals as equal to or, in some cases, paramount to, instrumental ones. If this viewpoint is valid, it has major implications for the role of lawyers who represent community groups. See, e.g., EILEEN KENNEDY-MOORE & JEANNE C. WATSON, *EXPRESSING EMOTION: MYTHS, REALITIES AND THERAPEUTIC STRATEGIES* 92-98 (1999) (exploring the link between emotional expression and goals); David A. Binder et. al., *A Client-Centered Approach*, 35 N.Y.L. SCHOOL L. REV 29, 34-35 (1990) (discussing that client satisfaction is the goal of representation and the client's goals may differ depending on the client's situation); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 591-94 (1990) (commenting on Binder & Price's approach); Ellmann, *Client-Centeredness*, *supra* note 8, at 1123.

69. John R.P. French, *Group Productivity*, in *GROUPS, LEADERSHIP AND MEN: RESEARCH IN HUMAN RELATIONS* 48 (Harold Guetzkow ed., 1951).

commoner natures who pursue either to the exclusion of the other are compelled to stand aside, cities will never have rest from their evils,—no, nor the human race . . . and then only will this our State have a possibility of life and behold the light of day.⁷⁰

Strong leaders make weak people.⁷¹

The nature of a group, its goals and processes, often reflects the nature of its leadership.⁷² Because a lawyer generally relates to a group through its leaders, the nature of that leadership necessarily affects the extent and scope of the lawyer's representation. It also affects the lawyer's relationship with a group. We will explore this relationship and will examine the difficult questions of group legitimacy, particularly in reference to the degree of groupness displayed by a particular group. We will also examine the nature of the group's goals and its activities in pursuing those goals.

Leadership has long been the subject of inquiry and study.⁷³ Although there is greater support for the desirability of leadership than suggested by Zapata, there is not agreement on a single definition of the term.⁷⁴ Today, a common understanding is that lead-

70. PLATO, THE REPUBLIC Book V, in PORTABLE PLATO 492 (Scott Buchanan ed., Benjamin Jowett trans., Penguin Books 1948).

71. Emiliano Zapata, quoted in Benjamin R. Barber, *Neither Leaders nor Followers: Citizenship Under Strong Democracy*, in ESSAYS IN HONOR OF JAMES MACGREGOR BURNS (Michael R. Beschloss & Thomas E. Cronin eds., 1989).

72. See, e.g., CARTWRIGHT & ZANDER, *supra* note 37, at 304; DONELSON R. FORSYTH, AN INTRODUCTION TO GROUP DYNAMICS 40-42 (1983); GROUPS DECISION MAKING 493 (Herman Brandstaetter et. al. eds., 1982); JOSEPH E. MCGRATH, GROUPS: INTERACTION AND PERFORMANCE 254-56 (1984); Browne, *supra* note 53, at 137 (discussing different leadership styles in relation to gender and the group type).

73. See THOMAS GORDON, GROUP CENTERED LEADERSHIP 17 (1965).

74. See, e.g., HARTLEY, *supra* note 48, at 88 (stating that "we still do *not* have a definitive account of what it means to be an effective leader across a wide range of situations") For a discussion of leadership literature see *id.* at 88-96. Early research on leadership was concerned with identifying the characteristics of leaders (trait approach). Commonly invoked traits for leadership were high morale; high productivity; popularity; equalitarianism; and authoritarianism. CARTWRIGHT & ZANDER, *supra* note 37, at 303. Disappointment with the trait approach has led to a more situational approach, which stresses the characteristics of the group and the situation in which leadership exists. Under this approach, leadership is viewed as the performance of those acts that help the group achieve its preferred outcomes (group functions). More specifically, leadership consists of: 1) aid in setting group goals; 2) moving the group toward its goal; 3) improving the quality of interactions among the members; 4) building the cohesiveness of the group; and 5) making resources available to the group. See *id.* at 304-06. Other scholars like Carroll L. Shartle have identified 5 general definitions of "leader" that have appeared in literature: 1) one who exercises positive influence acts upon others; 2) one who exercises more important positive influence acts than any other member of the group; 3) one who exercises the most influence in setting or achieving goals of the group; 4) one elected by the group to serve as leader;

ership is closely tied to the factual situations in which it arises.⁷⁵ This represents a change from earlier views which were tied to in-born or learned personal characteristics or traits of leaders.⁷⁶ In fact, current theory often assesses leadership as a fluid process that is tied not only to the actions and abilities of the leader but also to the needs and actions of the followers.⁷⁷

1. *Recognizing Leadership*

First, it is important to note that scholars almost universally viewed leadership within the group context.⁷⁸ According to Gita De Souza and Howard Klein, leadership's main purpose is to organize groups and direct them towards their goals.⁷⁹ James MacGregor Burns argues that leaders also help to shape the "motives and values and goals of followers through the vital *teaching* role of leadership."⁸⁰ These definitions leave us, however, with questions of how one becomes a leader and, once one has done so, which methods and techniques should be utilized to be a successful leader. One may also inquire about the nature of authority and the attendant problems associated with the misuse of that authority.

and 5) one in an office or position of apparently high influence potential. Carroll L. Shartle, *Studies in Naval Leadership*, in *GROUPS, LEADERSHIP AND MEN: RESEARCH IN HUMAN RELATIONS* 121-22 (Harold Guetzkow ed., 1951).

75. See CARTWRIGHT & ZANDER, *supra* note 37, at 302-04 (discussing the shift from trait theory to a more situational understanding of leadership).

76. *Id.*; see also GORDON, *supra* note 73, at 47-48 (explaining the shift in belief that the origin of a good leader depends not on heredity, nor even on traits acquired through "experience, education, and special training," but that different types of groups require different kinds of leadership).

77. See, e.g., CARTWRIGHT & ZANDER, *supra* note 37, at 302-04; JAMES MACGREGOR BURNS, *LEADERSHIP* 425 (1978). Burns states that "[l]eadership is the reciprocal process of mobilizing, by persons with certain motives and values, various economic, political, and other resources, *in a context of competition and conflict*, in order to realize goals independently or mutually held by both leaders and followers." *Id.* (emphasis added); see also Robert G. Lord et al., *Understanding the Dynamics of Leadership*, 78 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 167, 167 (1999) (noting that "[l]eadership is widely recognized to be a social process that depends on both leaders and followers"). For a discussion of leadership literature, see HARTLEY, *supra* note 48, at 88-96.

78. See Kenneth F. Janda, *Towards the Explication of the Concept of Leadership in Terms of the Concept of Power*, in *POLITICAL LEADERSHIP: READINGS FOR AN EMERGING FIELD* 49 (Glenn D. Paige ed., 1972) (stating that "virtually no one writes on leadership apart from group behavior").

79. Gita De Souza & Howard J. Klein, *Emergent Leadership in the Group Goal-Setting Process*, 26 *SMALL GROUP RES.* 475, 475 (1995).

80. BURNS, *supra* note 77, at 425.

Leadership may be recognized in both formal and informal ways.⁸¹ The most obvious manner of achieving formal leadership is through an individual being selected, by election or otherwise, to fill a leadership post.⁸² Such a leader gains legitimacy by virtue of occupying the designated position. Informal leadership, often called emergent leadership, is more difficult to identify. The emergent leader has been defined as a group member who exerts significant influence over other members although no formal authority has been vested in that member.⁸³ In either case, according to Thomas Gordon, a leader "still must be perceived as facilitating to the group if he is to remain the group's leader in a psychological sense."⁸⁴ Gordon points out that once a person is perceived as a leader by the group in a particular situation, "the members may in future situations tend to respond more readily to *his* behavior than to others'. "⁸⁵ If true, this suggests an inertial tendency to perpetuate incumbent leadership.

2. *The Impact of Followership*

We have alluded to the interrelationship between leaders and followers in a group.⁸⁶ Until relatively recently, examinations of group activity had been, to a great extent, an examination and analysis of leadership behavior.⁸⁷ Several scholars question that analysis because "it assumes that leadership can be deduced by looking at the leader's behavior alone; it assumes that one need not

81. See WILSON, *supra* note 40, at 142-45; see also CARTWRIGHT & ZANDER, *supra* note 37, at 364-67.

82. De Souza & Klein, *supra* note 79, at 476.

83. *Id.* (citing Craig Eric Schneier & Janet R. Goktepe, *Issues in Emergent Leadership: The Contingency Model of Leadership, Leader Sex, Leader Behavior*, in 1 SMALL GROUPS AND SOCIAL INTERACTION 414 (Herbert H. Blumberg et al. eds., 1983)).

84. GORDON, *supra* note 73, at 53. Gordon quotes Knickerbocker to the same effect:

The leader may "emerge" as a means to the achievement of objectives desired by a group. He may be selected, elected, or spontaneously accepted by the group because he [or she] possesses or controls means . . . which the group desires to utilize to attain their objectives—to obtain increased need satisfaction. . . . However, there will be no relationship with the group—no followers—except in terms of the leader's control of means for the satisfaction of the needs of the followers. Either the leader's objectives must also be those of the group . . . or else accepting the leader's direction must be seen by the group members as the best available means to prevent reduced need satisfaction.

Id.

85. *Id.*

86. See *supra* note 53 and accompanying text.

87. Cooper et al., *supra* note 53, at 393.

bother examining too closely what the followers are actually doing, what is motivating them, what is driving their behavior."⁸⁸

Instead, these scholars examine the interaction between the leader and the members and explore the "dynamics of followership . . . what drives followers to follow."⁸⁹ Leadership must be distinguished from mere dominance or naked power perpetrated upon weaker members by the preeminent leader.⁹⁰ As Burns has put it,

To perceive the working of leadership in social causation as motivational and volitional rather than simply as 'economic' or 'ideological' or 'institutional' is to perceive not a lineal sequence of stimulus-response 'sets' or 'stages,' nor even a network of sequential and cross-cutting forces, but a rich and pulsating *stream* of leadership-followership forces flowing through the whole social process.⁹¹

Followership, according to its proponents, involves choices by members to accept and to follow a leader.⁹² The follower senses that "the leader and the leader's 'vision'. . . [are] worthy of active and concrete support,"⁹³ and that the follower "willingly trusts the leader . . . accords the leader the right to make decisions on behalf of the group to achieve [its] goals."⁹⁴ Once a leader has attained this level of trust, the members will accept the leader's decisions even when they conflict with the personal interests of one or more of the members or when they cause some members to alter their preferences.⁹⁵ This acceptance by members is what gives the leader legitimacy as a spokesperson for the group and, perhaps even more significantly, as a shaper of the group's goals, aspirations, and strategies.

There are important distinctions between these leadership/followership roles and those in which a leader rules by force, intimidation or manipulation, situations that we will call the "dominance model." While the overt behavior of members may appear to be the same in both models, there are subtle, but important, differences between the dominance and followership models. In the dominance model, the dominated party will look for an opportu-

88. *Id.*

89. *Id.* at 395.

90. *Id.* at 396.

91. BURNS, *supra* note 77, at 437.

92. See Cooper et al., *supra* note 53, at 398.

93. *Id.*

94. *Id.*

95. *Id.*

nity to defect while the dominating party will incur the costs associated with domination and monitoring compliance.⁹⁶ In the followership model, on the other hand, there are the efficiencies wrought by stability and predictability.⁹⁷

The stability that is gained through general acceptance of a leader is, itself, somewhat misleading. The dynamic and fluid nature of the relationship between leader and followers is hidden.

Because our emphasis is on collective purpose and change we stress the factors that unite leaders and followers as well as those that differentiate them. This distinction may be elusive to an observer who sees leaders leading followers but does not understand that leaders may modify their leadership in recognition of followers' preferences, or in order to anticipate followers' responses, or in order to harmonize the actions of both leader and follower with their common motives, values, and goals.⁹⁸

Thus, the leader must alternate her exercise of opportunistic, or common-good, leadership according to the reaction and/or inaction of her followers. The followers continually communicate needs to the leader and the leader's viability depends on the followers' sense that those needs, which may be constantly changing, are being satisfied.

This dynamic relationship between members (or potential members) and the group has also been described in terms of commitment.⁹⁹ Richard Moreland, et. al., have explored what makes people join groups. The result of their investigation is a model based on three psychological processes: evaluation, commitment and role transitions.¹⁰⁰ Moreland argues that both the individual and the group are constantly evaluating the relationship and the benefits they obtain from it.¹⁰¹ On the basis of that evaluation, feelings of commitment may arise but they change over time according to previously established reference points, or what the authors call "decision criteria."¹⁰² When one of the decision criteria

96. *Id.* at 399.

97. *Id.*

98. BURNS, *supra* note 77, at 426.

99. See Richard Moreland et al., *Group Socialization: The Role of Commitment*, in *GROUP MOTIVATION* 105 (Michael A. Hogg & Dominic Abrams eds., 1993).

100. *Id.* at 106.

101. *Id.*

102. *Id.*

is reached, a "role transition" may take place and a change in the relationship between the individual and the group occurs.¹⁰³

Moreland's model begins with a period of investigation. A potential member investigates an existing group¹⁰⁴ to determine whether it meets her needs while the group recruits and evaluates prospective new members who can assist it in meeting its goals.¹⁰⁵ If the commitment to each other rises to a certain level (i.e. the decision criteria are met) a role transition (entry) takes place and the prospective member joins the group.¹⁰⁶ A socialization period follows in which the new member tries to change the group to accommodate her personal needs while the group tries to change the member so that she can, and will, contribute more to the group.¹⁰⁷ If these goals are achieved, the next role transition (acceptance) takes place and the individual becomes fully engaged in the group.¹⁰⁸ There is then a maintenance period where the member and the group negotiate the nature of their ongoing relationship to maximize the possibility of reaching individual and group goals.¹⁰⁹ If the negotiation succeeds, the commitment level remains high.¹¹⁰ If the negotiation fails to satisfy both sides, there is a distancing (divergence) between the individual and the group and the individual becomes a marginal member.¹¹¹ The negotiation may continue and, if successful, the member may return to full participation.¹¹² If it fails, the final transition occurs and the member exits the group.¹¹³

3. *The Social Loafer Takes a Free Ride*

Each of these views of group relations depends upon the existence of an involved and active membership.¹¹⁴ There are other theories that indicate the likelihood of encountering this type of

103. *Id.* There are, according to Moreland et al., four role transitions that can occur: entry, acceptance, divergence and exit. *Id.*

104. While Moreland implicitly confines himself to existing groups, his analysis seems to be adaptable to the process of individuals coming together with the idea of establishing a group.

105. Moreland et al., *supra* note 99, at 106.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 106-08.

110. *Id.* at 108.

111. *Id.*

112. *Id.*

113. *Id.*

114. See, e.g., James H. Davis, *Social Interaction as a Combinatorial Process in Group Decisions*, in *GROUPS DECISION MAKING* 27-30 (Herman Brandstaetter et.

membership is not great.¹¹⁵ One of these theories, the “free-riding” or “social loafing” theory, suggests that rationally thinking members (or potential members) of groups might choose not to exert great effort towards achieving a group’s goal. A free rider is a member of a group who obtains benefits from membership but who does not bear a proportional share of the costs of procuring those benefits.¹¹⁶ An individual’s decision whether to free ride comes from comparing the net expected benefits from contributing to the group’s efforts and the net expected benefits of free riding.¹¹⁷ When the cost of additional (or any) effort exceeds the marginal increase in benefit derived from that effort, the rational actor will not exert the effort.¹¹⁸

Consider the following situation. A town is facing a water crisis because its water supply is gradually drying up. If residents are asked to conserve water at home by taking shorter showers or by using less water in a bath, the entire town will gain a benefit by compliance. A resident might conclude, however, that the overall benefit to her will be slight compared to the significant cost in terms of her convenience and enjoyment. When one adds the fact that it is unlikely that any defection by a particular resident would be discovered, economic rationality indicates that the resident should defect and use as much water as she desires and let others conserve. This allows the defector to have the best of both worlds, current enjoyment and long term water availability. The fallacy, of course, is that all rationally thinking residents will reach the same conclusion and, therefore, everyone will defect and the water supply will be quickly exhausted.¹¹⁹

Al, eds., 1982) (noting that active participation is a necessary element for most groups).

115. *Id.*

116. See Robert Albanese & David D. Van Fleet, *Rational Behavior in Groups: The Free-Riding Tendency*, 10 *ACAD. MGMT. REV.* 244, 244 (1985). Social loafing is a similar concept. Social loafing involves “a reduction in individual effort when working on a collective task (in which one’s outputs are pooled with those of other group members) compared to when working alone or co-actively.” Kipling Williams et al., *Working on Collective Tasks: Social Loafing and Social Compensation*, in *GROUP MOTIVATION* 140-41 (Michael A. Hogg & Dominic Abrams eds., 1993).

117. Albanese & Van Fleet, *supra* note 116, at 245.

118. See *id.*

119. For a well-known example of free riding, see Garret Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244-45 (1968). Hardin describes the free-rider problem in the context of livestock herders using a communal field. As a rational actor, each herder will seek to maximize his herd because he reaps a direct benefit while the community shares the negative result of overgrazing. In other words, the herder gets

4. *The Rationale of Active Group Participation*

This leaves us with the question of why people *do* participate in groups. Professor Pamela Oliver has identified four factors that help determine varying levels of involvement in community groups.¹²⁰ They are: 1) one's interest in the collective good; 2) the costs of participation; 3) the extent of social ties among group members; and 4) a member's expectation about the active participation of others.¹²¹ Oliver analyzed data to determine why people became active in local groups.¹²² The question is particularly salient when applied to issues of leadership. Why does someone become a leader of a local community group that seeks a public benefit for its membership?¹²³ Oliver's examination of the data led to one particularly surprising result. While popular wisdom holds that people are more willing to participate in collective action if they believe others will, Oliver found that people become active because they believe that if they do not, no one else will.¹²⁴ In other words, the most active members are often very pessimistic about the likelihood of active participation from their neighbors.¹²⁵

There are, of course, less benign reasons why one would seek a leadership role. For example, one might wish to acquire or consolidate power for political or ego-based reasons; one might be seeking the emoluments, licit or illicit, of control; or one might see leadership as a stepping stone in an ascending career path. Several commentators have noted that leaders (as well as followers) might have ulterior motives or conflicting loyalties when they assert their influence on a group.¹²⁶ These hidden agendas often put the leader's

more benefit for less cost. The overexploitation of the common resource is the "tragedy of the commons." *Id.*

120. Pamela Oliver, "*If You Don't Do it, Nobody Else Will*": *Active and Token Contributors to Local Collective Action*, 49 AM. SOC. REV. 601, 602 (1984).

121. *Id.*

122. *See id.* at 604. The subjects of the experiments were 1,456 Detroit residents who were either non-members, token members, or active members of their neighborhood associations. *Id.* at 601.

123. A public benefit has been defined as one that has a non-excludability feature; that is, the provision of the good to some members of a group means that it must be provided for all. *Id.* at 602; *see also* Albanese & Van Fleet, *supra* note 116, at 246 (explaining the relationship between costs of organizing a group and free-riding impulse).

124. Oliver, *supra* note 120, at 602.

125. *See id.* She states that "[p]eople who believe others will provide the collective good are motivated to ride free; people who do not believe others will provide the collective good are motivated to provide the good themselves or do without." *Id.*

126. Leland Bradford, for example, has stated that there is usually a hidden agenda in addition to the public agenda of a particular group. Bradford points out that a

goals in direct conflict with those of the group. In other cases, the hidden agenda does not conflict with the group's goals or does so only to a partial extent, thus allowing group goals to be achieved, albeit at a reduced level.

D. Community Stories Redux

Earlier, we described two community groups, each with problematic leadership. Let us re-consider those narratives in the context of the preceding discussion of group theory, leadership and followership. Each narrative involved voluntary, primary, work groups, one to protect residents of a rental building whose owner wished to have it vacated and the other involving the operation of an affordable housing cooperative. In each case, the leader initiated non-participatory, non-democratic processes that were contrary to that group's charter and purpose. In the cooperative's case, Ms. Johnson altered the original intent of the membership. In Arabella's case, the original purpose of the membership was to act collaboratively against the owner to improve the living conditions in the building; that original purpose later changed as did the leader of the group. In each situation, the lawyer representing the respective group had to have been aware of the leader's usurpation. Nevertheless, despite the similarities in their origins and histories, the two groups have significant differences. Do these differences justify a lawyer taking different approaches in the representation of these groups in which the respective leaders have usurped power and eliminated the participatory processes?

In the first narrative, the residents of the rental property sought, in exchange for moving out, a one-time financial benefit along with assurances that they would have a habitable abode until they vacated the building. As the residents were going to disperse after achieving their principal goal, there was little likelihood of ongoing interaction between them. The incumbent leader of this group had gained her position through a combination of factors including heredity, (her late father had organized and lead the group until his death), capacity (she was well educated, spoke fluent English and had the time and resources available to seriously pursue the group's goals), her desire to lead, and the acquiescence of the other residents. Her style of leadership was superficially democratic—

hidden agenda may be held by group members, the group's leader or by the group itself. Leland Bradford, *The Case of Hidden Agenda*, in *GROUP DEVELOPMENT* 60 (1961). Of course, the effects of a hidden agenda are more likely to be felt when acted upon by the leader of a group than by an individual member.

she held meetings of the membership—but it was in fact autocratic and manipulative. At the meetings, she normally told members what decisions she had reached or what actions she had taken or was about to take. Arabella used meetings to manipulate the other members into agreeing with and/or ratifying her aspirations.¹²⁷ An example of her usurping the group's collaborative process is that only a part of the membership knew that she was intending to take a bonus from the proceeds of a settlement and, of those who knew, even fewer understood the magnitude of the bonus she had allocated to herself or the costs it would impose on them.¹²⁸

The goals of the cooperative were different in the second narrative. Its members sought long term benefits in the form of decent and affordable housing that they could control on an ongoing basis. There was every expectation of continuous interaction among the members. In fact, that interaction was integrally wrapped into the substantive goals of the group. There were established procedures for the selection of leaders and for the operation of the cooperative. This organization exhibited, at least initially, a high degree of groupness.

Ms. Johnson, the president, had been validly elected to her leadership position by the membership. It was only after ascending to power that Ms. Johnson discarded the cooperative's procedures and ruled autocratically. In several cases, she changed cooperative procedures to the extent that they were directly opposite to the founding principles of the organization. In some cases, she made changes that were contrary to law. As a result, the members of the cooperative became increasingly apathetic; the group dynamic became one of dominance rather than followership. Given the barriers to effective participation, members chose to expend their energy elsewhere. In all of these situations, the cooperative's attorney was aware of Ms. Johnson's actions but he failed to address

127. While the residents exhibit several of the attributes of a group, the "degree of groupness" is relatively small. The group has an interdependence of fate but only a minimal interdependence of task. There was little commitment to the group or its procedures by the membership. See *supra* notes 54-60 and accompanying text.

128. When it was explained to the membership as a whole, several members who said they knew of the bonus were nonetheless shocked at its size and revoked any approval they had given. Similarly, of those who did not know of the bonus, they did not approve when it was pointed out to them. Several members, however, did know of the bonus and of its size and continued to approve. It appears that Arabella fully disclosed her intentions concerning the bonus only to those residents she thought would approve of it. She then used the approval of this small percentage of residents as validation of her right to the bonus.

the issues to either Ms. Johnson, the board of directors or the cooperative membership. He did not intervene in any way.

The cooperative's lawyer failed to live up to his professional obligations,¹²⁹ but even if he had, there would have continued to be problems associated with his representation of this group. Similarly, there were several problems associated with the representation of Arabella's resident association. While the lawyer for this group became aware of Arabella's intentions only late in the representation, consider what her response ought to have been. Consider further what that response ought to have been if she had learned of her agenda earlier in the process.

The Model Rules provide little or no practical guidance in attempting to answer these questions. In fact, many of the ethical problems that lawyers face in the representation of community groups are not effectively addressed by the Model Rules. The Rules are premised on a discrete legal problem, generally between individuals or clearly defined groups. They do not provide guidance in the more amorphous community setting of the sort depicted in our narratives.¹³⁰ Nor do they provide guidance concerning the myriad of political problems that arise in group representation. In the next section, we will examine the rules as they apply to group representation and look at some of the commentary about the lawyer's obligations in such representation.

III. LAWYERS, ETHICS, AND DEMOCRACY

The standard source of guidance for lawyers who represent community groups¹³¹ is Rule 1.13 of the Model Rules of Professional

129. See *infra* note 131 and accompanying text to help clarify what the lawyer's professional obligations regarding this issue.

130. Or, for that matter, to the representation of non-community groups such as labor unions, non-profit corporations and many closely held business corporations. Similar problems may be encountered concerning the representation of class plaintiffs in class action litigation. See, e.g., Nancy Morawetz, *Underinclusive Class Actions*, 71 N.Y.U. L. REV. 402 (1996) [hereinafter Morawetz, *Class Actions*] (discussing difficulties in defining the scope of a class in the class action context). See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing difficulties in reconciling the needs of specific clients with the overarching goal of integration ideals).

131. We recognize that lawyers who represent business associations will also confront several practical and ethical problems. To a great extent, however, we believe that, because of the nature of the entities involved, corporate representation and the representation of community groups present distinct problems and call for different responses. Therefore, we will discuss the representation of business associations only to the extent that it illuminates the analysis of ethics in the practice context with which we are immediately concerned.

Conduct.¹³² Nevertheless, Rule 1.13 and the other relevant Rules do not effectively address many of the issues that community lawyers are likely to face. They presume, for example, a clearly delineated decision-making structure that is often absent in the

132. ANN. MODEL RULES OF PROF'L CONDUCT R. 1.13 (1998). Rule 1.13 addresses the situation of the organizational client. It states:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

amorphous community setting. Moreover, they generally envision the lawyer primarily as a technician, disengaged from substantive and moral concerns of the group.¹³³ This creates a blueprint for lawyering that translates poorly for one engaged in a community practice.

Commentators have recently begun to examine the ethical dilemmas that confront lawyers representing community groups and have begun to identify some of the shortcomings of the Model Rules in addressing those dilemmas.¹³⁴ None, however, have considered in any detail the issues with which we are presently concerned—the nature of a community lawyer's obligation to a group client in the face of autocratic leadership and the tension between process and outcomes.

At the broadest level, an attorney's response to a problem she encounters in the course of representing community groups, with autocratic leadership or otherwise, must be informed by the goal or goals of the representation. This simple, yet essential, proposition begs some difficult questions. While the Model Rules provide for the client to define the goals of the representation,¹³⁵ in some cases, that is too facile a requirement. With community groups, it is often unclear who the client really is and who the spokesperson is. Should a lawyer pursue the goals articulated by the group's leader? If so, how can she verify that the leader is a legitimate spokesperson for the group? How can the lawyer be certain the leader's pronouncements are accurate? Is there a recognized process within the group for decision making? Should the lawyer actively participate in the process, either by expressing her own views or by facilitating consensus? Moreover, even assuming goals are established by the prescribed process, is the attorney entitled to question whether those goals are truly in the best interest of the group or the larger community? We will examine each of these questions in greater detail in the following sections.

133. See *infra* note 198 and accompanying text.

134. E.g., Ellmann, *Client-Centeredness*, *supra* note 8, at 1104; Stephen L. Pepper, *Autonomy, Community, and Lawyers' Ethics*, 19 *CAP. U. L. REV.* 939, 962-63 (1990); Ann Southworth, *Collective Representation For The Disadvantaged: Variations In Problems of Accountability*, 67 *FORDHAM L. REV.* 2449, 2465 (1999).

135. See *ANN. MODEL RULES OF PROF'L CONDUCT R. 1.2 & CMT 1* (1998). Rule 1.2(a) states that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation." Comment 1 explains that the "client has ultimate authority to determine the purpose to be served by the legal representation."

A. The Client Speaks

An ethical dilemma that will inevitably confront a lawyer representing community groups is the question of client identity. At one level, this might mean identifying which groups within the community are clients. Although this is an important and potentially difficult task,¹³⁶ we are presently concerned with questions of client identity that arise after the designation of group as a client. Groups speak and act through individuals, and a lawyer may not always be able to ascertain which individuals truly speak for and act on behalf of the group. It is common for a lawyer to identify a group's leader, particularly one who is a strong and visible leader, as the client. This occasionally leads to the lawyer representing the interests of the leader rather than the interests of the group, her nominal client.

The Model Rules address this problem, albeit rather simplistically. Rule 1.13 states that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."¹³⁷ This rule is meant to apply to all forms of organizations, formal and informal.¹³⁸ It has limited value, however, as a practical guide to action when an organization lacks "duly authorized constituents," or, in the words of Ann Southworth, "lacks reliable internal governance procedures."¹³⁹ Such a scenario is all too common in a community practice. Often groups are not formally organized and operate without bylaws or other rules of internal governance. Even when a group has undertaken such formalities, it may view them as externally imposed abstractions and therefore worthy of little attention in the conduct of its day-to-day operations.

In general, the response of legal scholars to the disjunct between the Model Rules and the reality of community representation has been to encourage lawyers to make clients fit the corporate paradigm. To the extent the group lacks internal governance proce-

136. See Shauna Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 187-206 (2000) (examining ethical issues related to a lawyer who, in advocating for an issue deemed important to the community, could be seen as representing numerous groups); cf. Nancy Morawetz, *Class Actions*, *supra* note 130, at 428-29 (analyzing the difficulties in defining the scope of a class).

137. ANN. MODEL RULES OF PROF'L CONDUCT R. 1.13 (1998).

138. See 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* §1.13:102 (2nd ed. & Supp. 1999) (discussing how Rule 1.13 affects an attorney's representation of groups); Ellmann, *Client-Centeredness*, *supra* note 8, at 1116.

139. Southworth, *supra* note 134, at 2465. Other authors have noted this problem. See, e.g., Ellmann, *Client-Centeredness*, *supra* note 8, at 1115-20; Leubsdorf, *supra* note 29, at 828.

dures, the lawyer should insist on the development of such procedures.¹⁴⁰ We question whether this is always the appropriate course of action. Even if it is appropriate, there are questions of which governance structure would be best for a particular group and who should decide.

Michael Fox suggests that the lawyer insist, as a prerequisite to representation, that the group create a decision-making structure and appoint a contact person.¹⁴¹ This approach is motivated primarily by practical concerns of the lawyer: having clear direction¹⁴² and, if the chosen course of action fails, being protected from accusations of having acted without proper authority. Fox argues that this approach has the added benefit of creating a process through which the group can better define its goals.¹⁴³ For Fox, however, that benefit is clearly secondary to the benefit of self-protection, and apparently he would advocate a formal decision-making structure even if the group had defined its goals through "an informal consensus process."¹⁴⁴ While the presence of more formal procedures may provide an organizational lawyer greater practical and ethical comfort, if a group is able to make and articulate decisions through informal processes, the self-interest of the lawyer is an insufficient reason to demand a change. Ethical guidelines should be constructed in light of the reality of practice; reality should not be forced into the presumptive framework of existing ethical guidelines.

If a group is truly so disorganized that it cannot make and convey decisions, it is unlikely to identify, let alone achieve, its goals. As a preliminary matter, it is worth considering whether a highly disorganized group is a group at all, or whether it is simply an aggregation of individuals. If it is the latter, Model Rule 1.7, the general rule on conflicts of interest, rather than Rule 1.13 would apply, and the question with which we are presently concerned would no longer be present. To make such a determination, a lawyer should consider the characteristics of groups discussed earlier in Part II. Assuming that there is sufficient connection among the individuals to consider them members of a group, the group will need to develop at least a rudimentary decision-making process for it to have

140. See Michael J. Fox, *Some Rules for Community Lawyers*, 14 CLEARINGHOUSE REV. 1, 3 (1980).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

a chance of succeeding. For the lawyer to simply demand that the group establish such a process, however, ignores the fact that members of nascent community groups may have limited experience making decisions under the circumstances they are likely to encounter in their new endeavor. Moreover, regardless of whether they lack such experience, the group could benefit from the lawyer's ability to present additional options and frame the relevant considerations. While the lawyer has no monopoly on knowledge, her insight and experience may provide an important contribution to the development of an effective decision-making process.

Recognizing this, Stephen Ellmann recommends that the lawyer actively participate in helping the group to develop a governance structure.¹⁴⁵ For example, he argues that the lawyer should work with the group leadership by "helping them to identify the relevant choices [of decision-making method] and offering her advice about what alternatives might be best."¹⁴⁶ He prefers working with a group's leaders to working directly with the membership because, he argues, it promotes the individual autonomy of group members as well as their connection to the group and the autonomy of the group as a whole.¹⁴⁷ However, Ellmann's deference to the group's leadership in choosing a decision-making process is not absolute. If the methods chosen fall "beneath a baseline threshold of democratic fairness," the lawyer is justified in challenging the leaders' process.¹⁴⁸ Ellmann defends such intervention first by assuming that the group embraces democratic values—defined as "fidelity to the principle that each person has an equal say in decisionmaking"—and second by favoring individual autonomy over group autonomy.¹⁴⁹

While we concur that a lawyer should help the group to create a decision-making structure, if that will serve the goals of the representation, we question whether it is always best to work through the leadership. One might, instead, work directly with the membership of a group. The method of making decisions, including the

145. See Ellmann, *Client-Centeredness*, *supra* note 8, at 1151 (advocating that a lawyer encourage group members to choose a leader).

146. *Id.* If no leaders exists, Ellmann states that the lawyer may need to encourage the group to select leaders, while recognizing that such a selection requires some form of process.

147. *Id.* (stating that the leaders are potentially more attuned to the "members' wishes and sensibilities" and in "empowering the leadership, the lawyer buttresses the autonomy of the group as a whole.").

148. *Id.* at 1152.

149. *Id.* at 1152-53.

decision of whom to appoint as leader, is a defining characteristic of a group.¹⁵⁰ Members may be more likely to feel committed to the group if they have had an opportunity to shape that characteristic. A strong sense of commitment, in turn, may enhance the vitality and effectiveness of the group.¹⁵¹

At this early stage in a group's development, it may be difficult for a lawyer to identify or ascertain the legitimacy of its leadership.¹⁵² It is likely that the group will have what the sociological literature terms an "emergent leadership."¹⁵³ Interacting with the membership may allow a lawyer to verify the legitimacy of the group's leaders and assess the efficacy of existing decision-making structures. Assessing the legitimacy of an emergent leader, however, is not an easy task. A lawyer must have enough contact with the members to be able to judge their degree of trust in the leadership and commitment to the group.¹⁵⁴ Moreover, this is not an assessment that can be made once and relied on for the remaining course of representation. Given the dynamic nature of the leadership-followership relationship, the lawyer must be constantly attuned to the question of legitimacy of the leadership.¹⁵⁵

In addition to our concerns with Ellmann's method for establishing a decision-making process in client groups, we question his contention that a lawyer must promote a particular kind of decision-making process, namely one that is participatory and democratic. Ellmann's focus on participatory democracy is grounded in his position that, for lawyers representing organizations, the guiding ethical principal is to protect the autonomy of individual group members.¹⁵⁶ Ellmann and others argue that group participation may be an exercise of individual autonomy insofar as an individual's identity, or selfhood, is substantially formed in and by her interrelations with other individuals and groups of individuals, particularly those with whom she knowingly and willfully interre-

150. See *supra* notes 75-77.

151. Of course, in some groups the membership is quite disinterested in participating. This is the problem of free-riding discussed *supra* Part II.C.3.

152. See Ellmann, *Client-Centeredness*, *supra* note 8, at 1151 (stating that a lawyer may need to encourage the group choosing a leader in order to place the decision-making responsibilities in the hands of the group).

153. Recall the discussion of emergent leadership *supra* notes 82-83 and accompanying text.

154. See *supra* notes 90-98 and accompanying text.

155. See *supra* note 98 and accompanying text.

156. Or more precisely, to protect the twin goals of "individual autonomy and mutual connection." Ellmann, *Client-Centeredness*, *supra* note 8, at 1133.

lates.¹⁵⁷ At times, individual autonomy and group connection are in tension,¹⁵⁸ but to the extent group participation is expressive of individual autonomy the goals are more likely to coincide.¹⁵⁹ When that occurs, group participation can provide disenfranchised individuals an experience that builds, rather than diminishes, self-esteem.¹⁶⁰ This results in “consciousness-raising.”¹⁶¹ Thus group participation promotes autonomy by recognizing and respecting the individual’s choice to interact with a group, yet dampens autonomy by subordinating the individual will to that of the collective.¹⁶² By insisting on a “baseline of democratic and participative process,”¹⁶³ the lawyer can meet her fundamental responsibility to “secur[e] some protection for individual autonomy within the groups of which the individual is a part.”¹⁶⁴

In a similar vein, William Simon argues that an important, if not primary, goal of community representation is to constitute non-hierarchical communities of interest.¹⁶⁵ In this vision of community practice, the lawyer strives to enhance the client’s ability to express the client’s interests in the context of community and, ideally, hold the lawyer and other members of a community of interest accountable.¹⁶⁶ Put somewhat differently, Lucie White argues that a community lawyer’s goal is to create non-hierarchical settings that enable individual participation.¹⁶⁷ The ideal of community practice endorsed by Simon and White, although differing from Ellmann in

157. *Id.* at 1122-23; Pepper, *supra* note 134, at 940-42.

158. See Ellmann, *Client-Centeredness*, *supra* note 8, at 1122.

159. We are using the term “expressive” in a somewhat different sense than R.F. Bales who uses the term to describe the ways in which group members interact. See *supra* note 63 and accompanying text. We use it to describe the degree to which the characteristics of a group correlate to the identity of an individual member, or, put another way, the degree to which group participation provides a member with an avenue for realizing her identity. Thus it describes the relation of group identity and individual identity rather than the behavior of individuals within the context of the group.

160. See Fox, *supra* note 140, at 6.

161. Lucie White, “Democracy” *In Development Practice: Essays on a Fugitive Theme*, 64 TENN. L. REV. 1073, 1084 (1997) [hereinafter White, “Democracy” *In Development Practice*] (describing that groups of impoverished women felt empowered not merely through income-producing products but combining that with consciousness-raising).

162. See Ellmann, *Client-Centeredness*, *supra* note 8, at 1122; Pepper, *supra* note 134, at 940 (describing the interrelated relationship between self and community).

163. Ellmann, *Client-Centeredness*, *supra* note 8, at 1145.

164. *Id.* at 1146.

165. Simon, *supra* note 8, at 485.

166. See *id.* at 486-89 (discussing attorney-client relationship through the lens of Critical Legal Studies).

167. White, “Democracy” *In Development Practice*, *supra* note 161, at 1081.

the relative importance of connection over autonomy, is similar in the importance they place on participation and collaboration among group members and their lawyers.

We agree with much of what Ellmann, Simon, and White advocate. Lawyers should be sensitive to the autonomy of individual members within a group. Enabling individuals to participate meaningfully and to express their interests within the groups with which they self-identify can have tremendous empowering effects. We disagree, however, with the preeminence these authors place on expressive values. Our first disagreement is that in the typical situation, obtaining desired substantive outcomes is more important to the client than protecting individual autonomy or promoting non-hierarchical participation. Second, assuming that protection of individual autonomy and creating and maintaining communities of interest is important, a highly participatory process is not necessarily the best way of achieving those goals.

Groups generally do not seek legal representation for the purpose of promoting the autonomy of their individual members or to constitute a community of common interests.¹⁶⁸ Rather, they usually seek representation in order to understand and/or address a perceived problem.¹⁶⁹ They hope to improve living conditions or prevent displacement, promote small businesses, combat inadequate health services, provide better education or child care, or perhaps obtain payment as compensation for some injury. To promote non-hierarchical participation, or the protection of individual autonomy above the attainment of substantive goals, as the fundamental principal of responsible lawyering will inevitably lead to instances in which the lawyer's actions undermine the very basis for representation.

For example, in the case of Arabella, if the lawyer had insisted that the group adopt a more participatory process, it is possible that Arabella would have opted out of her leadership role. Given the constraints that 1) most members of the group were only

168. There may be instances where the primary goal of representation, as defined by the clients themselves, is to enhance connection or to constitute a community of interest. For example, Lucie White describes a program in which women participated in a weekly mutual support group that eventually made a quilt depicting the life stories of the participants. *See id.* at 1081-83. Although the program produced few tangible outcomes other than the quilt itself, the women involved found it to be empowering.

169. *See* Stefano Agostini, *Advertising and Solicitation: A Comparative Analysis of Why Italian and American Lawyers Approach Their Profession Differently*, 10 TEMP. INT'L & COMP. L.J. 329, 359 (1996) (stating that individuals seek "legal advice to resolve a controversy after it has occurred").

weakly committed to it, or were free riders, and 2) no other member possessed Arabella's skills, it is likely that no one would have stepped in to replace her which would cause the group to disintegrate. Even if someone did step in, there may be little incentive or need to create a participatory decision-making structure in order to resolve a one-shot problem that is both time and space specific.

The cooperative case, on the other hand, warrants a more participatory process. This is true not to protect autonomy, though that might be an added benefit, but to obtain the substantive goal of effective cooperative ownership. Cooperatives, because they are long term, multi-faceted undertakings, depend upon a participatory process. Each member should share in and take responsibility for the management of the property and the conduct of the cooperative's affairs. The need for a participatory process will be similarly important to any collective endeavor in which a significant interdependence of task is essential to achieving and maintaining the group's goals. To the extent group participation also synthesizes autonomy and connection, the group's expressive and instrumental goals will reinforce one another; each member's enhanced sense of connection to the group will translate into greater dedication to the task at hand, and the resulting fruits of that effort will translate into a greater sense of connection.¹⁷⁰

Even if autonomy and connection are important goals in themselves, it is unclear that a lawyer must ensure a participatory and democratic process in order to protect or promote them. What if a group deliberates and decides that it will delegate virtually all authority to one or a few leaders, with only the most fundamental questions being referred to the membership?¹⁷¹ Such a decision could be viewed, not so much as an abdication of autonomy, but rather as a common form of human interaction and organization. Similarly suppose that the group is composed of members of an ethnic or national group who adopt the decision-making structure

170. The synthesis of autonomy and connection can also enhance the instrumental value of groups. Participation in an expressive group can generate the "collective ability to analyze and act upon complex social problems [that] can be more powerful than the aggregate of each individual's capacities for analysis and action." White, "Democracy" *In Development Practice*, *supra* note 161, at 1087.

171. Most corporations and many nations are organized in this way. Perhaps this is because, as Ellmann himself recognizes, autocratic leaders may "inspire and mobilize their members." Ellmann, *Client-Centeredness*, *supra* note 8, at 1124. "Sometimes people voluntarily join, and feel deeply loyal to, groups in which they know that their views will not be taken into account on many or most questions." *Id.* at 1133.

commonly used by similar organizations in their culture, and that structure does not resemble participatory democracy.¹⁷² Such a structure might better express the group member's identities. Decision-making structures other than ones that are highly participatory may be more reflective of the characteristics which define a group and form its connections. Thus, a lawyer's efforts to encourage a participatory, democratic process may further the lawyer's own values but hinder, rather than enhance, the expressive value of a members' group participation.¹⁷³

Furthermore, there may be methods, other than debates and elections, that permit members (or outsiders) to hold leaders accountable. For example, members may be able to exit the group if they learn of the leader's actions and disagree with them.¹⁷⁴ The effectiveness of exit as a mechanism for accountability will vary depending on the cost of exit.¹⁷⁵ In the case of Arabella, a tenant who sought to pursue litigation independently of the group may have been able to obtain as good a monetary settlement, although she would have had to expend more time and energy to achieve that result. In the case of the cooperative, the cost of exit is extremely high because it entails moving, perhaps in a difficult hous-

172. See Cruz, *supra* note 29, at 246-48 (relating how Native-Americans' legal choices are shaped by the different cultural norms which shape tribal and federal law).

173. One response to this critique is that the individuals who accept a non-participatory regime suffer from false-consciousness, and thus the community lawyer's practice should not be "designed to serve the clients' preexisting interests, but to reconstitute them as a community defined by common interests." Simon, *supra* note 8, at 486. In this vision, "[c]ommunication among clients and direct participation are valued for their potential to increase understanding and solidarity and to safeguard against hierarchy." *Id.* at 487. While we are sympathetic to these ideals, we question whether they are always the appropriate ends to pursue. Another response would be to point out that, at least in the first example, there was a first-order decision, made through a democratic process, to abdicate further participation. While we agree that initial participation of that sort is often critical to establishing the legitimacy of the leadership, as demonstrated by the second example, it is not always necessary. In addition, that limited role is far from what Ellman and others envision.

174. See James Gray Pope, *Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics*, 68 OR. L. REV. 1, 21 (1989) (discussing shareholders' option of exit); Southworth, *supra* note 134, at 2454.

175. Similarly, scholars have emphasized the importance of being able to opt-out of class actions in analyzing the need for greater accountability to class members. See Samuel Isaacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 367-68 (1999) (noting that the value of the right to opt-out varies depending on the value of the individual class member's claim); Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. REV. L. & SOC. CHANGE 487, 502 (1999) (noting that legal or practical constraints limit a class action litigant's ability to opt out even though her concerns are not being addressed).

ing market. In addition to the exiting option, outside entities, such as government agencies, lenders, or funders, also may be in a position to hold the leader accountable. The cooperative's bank, for example, requested copies of the minutes of the board. As a result, Ms. Johnson made a half-hearted attempt to reconstitute the board and began to hold meetings more regularly. Despite that external pressure, however, the renewed meetings did not translate into substantive reform in the cooperative's governance and Ms. Johnson continued her autocratic rule. Had the bank been more persistent or forceful, perhaps a true transformation would have occurred.¹⁷⁶

Returning to the question with which we began this section, we can now sketch an outline of the factors a lawyer must consider when determining whether the leaders with whom she interacts speak for the group. Usually the fundamental issue will be whether the purported leadership is legitimate. Model Rule 1.13 assumes the existence of an effective internal governance procedure to establish legitimacy. This approach ignores the realities of community practice, which is often characterized by client groups that are not highly organized in that sense. Ellmann and others go further, arguing that the lawyer should ensure the existence of a particular kind of governance procedure, one that is participatory and democratic.¹⁷⁷ While a democratic procedure may offer the lawyer a high degree of comfort in the leader's legitimacy, it is not the only, nor necessarily the best, way to achieve that assurance, and it may risk elevating process over product where such a priority is neither desired by the client nor an important goal of the representation. In the absence of such a process, the lawyer must look both to the nature of the group and to the followership dynamic of the membership. Has the leader attained and maintained a leadership position by establishing credibility and trust, or by manipulation or coercion? Does this question matter, is it important—particularly in a one-shot group that has instrumental (as opposed to expressive) goals—so long as the instrumental goals are being met? A benevolent Machiavelli might be the most effective, efficient and, perhaps, even desirable option from the standpoint of the members. In any case, the lawyer should determine whether

176. A lawyer's ability to involve outside stakeholder's in an effort to ensure the legitimacy of an organization's leadership is limited by her ethical obligation not to disclose confidential information. See Rule 1.6.

177. Ellmann, *Client-Centeredness*, *supra* note 8, at 1148-49 (agreeing with Binder that it is the lawyer's responsibility to design a decision-making process).

there are mechanisms that permit members to hold the leadership accountable, at least for the honest pursuit of their goals, even in the absence of direct participation in decision making.

B. Decisions and Dissonance

Assuming that a group has a legitimate leader, a lawyer may nonetheless face dilemmas when directed by the leader to pursue a certain strategy. There might be a significant group faction that believes the course of action is improper, resulting in discord within the group. The dissenting faction might seek to recruit the lawyer as an ally in promoting its competing vision. Or, with or without the presence of dissent, the lawyer might believe that the group's decision, as expressed by a legitimate leader, is the wrong one, either because it is not in the best interest of the group or because it is not in the best interest of the community. Faced with any of these dilemmas, a lawyer must decide whether, and in what manner, to participate in or instigate a debate on the issue.

1. *The Rule of Deference*

If a lawyer were to turn to Model Rule 1.13 for direction on whether to intervene in group decision making, she would conclude that the proper course of action would be, except in a limited range of situations, to stand aside and abide by the result of the group's decision-making process. This is the implication of the Rule's admonition that an organizational lawyer should follow the instructions of a duly authorized constituent unless the lawyer believes the actions of a member were or would be in violation of that member's obligation to the group or that they constitute a legal violation that could be imputed to the group and such actions are likely to result in substantial injury to the group.¹⁷⁸ Absent such injurious wrongdoing, and assuming the group has not invited the lawyer's participation, there is nothing in the rule that requires, or encourages, a lawyer to ensure the full airing of dissenting or alternate views.¹⁷⁹

178. See *supra* note 131 for text of Model Rule 1.13.

179. See Rule 1.13, cmt. 3 (noting that "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."). *But see* Rule 1.13, cmt. 4 (stating that "[e]ven in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client . . . matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.").

Proponents of Rule 1.13's hands-off approach argue that it protects the lawyer from political quagmires and promotes client autonomy (although now at the level of the group, as well as at the level of the individual members). It contributes to a lawyer's self-preservation, because "[l]awyers who have kept a little distance from different factions within a group will best survive the inevitable factional dispute."¹⁸⁰ By staying out of the fray, the lawyer casts herself in the role of a technician who is not concerned with the cohesion of the group or the quality of the decision that is reached, but simply performs tasks as directed. Proponents also argue that this approach is most consistent with the value of autonomy. Assuming the decision is the result of a fair process chosen by the members, any incursion by the lawyer would be paternalistic.¹⁸¹ Intervention is appropriate only when accountability is in doubt and only to the extent necessary to reinstate accountability.¹⁸²

Most lawyers in a community practice, however, will find this aloof approach personally unsatisfying, despite any perceived protective benefits it may have. For those concerned with autonomy, a lawyer's efforts to facilitate group cohesion may enhance, rather than diminish, individual autonomy by strengthening valued group connections. As Ellman observed, "many people may not be deeply moved by fair process when they feel the wrong decision has been made."¹⁸³

180. Fox, *supra* note 140, at 6. For similar reasons, Scott Cummings criticizes the vision of lawyer as organizer. "The simplest strategy for averting conflicts is for the lawyer to avoid simultaneously serving as an organizer and a legal representative." Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 513 (2001).

181. DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 148-49 (1977) (concluding that the lawyer cannot usually determine which decision will give the client the greatest satisfaction because the client may place different value on the various consequences of the decision). See Ellmann, *Client-Centeredness*, *supra* note 8, at 1151 (finding leaders are better positioned to make decisions that reflect their members' wishes); see also Pope, *supra* note 174, at 53-54 (stating that there is less need for a lawyer intervening if the group has strong leadership and constituents are capable of protecting themselves).

182. See Southworth, *supra* note 134, at 2469 (noting that "[t]he more reliable the decisionmaking structures and opportunities for exit by individual members, the less direct responsibility the lawyer should bear for discerning the interests and preferences of the group's members and responding to evidence of dissent within the group."). Ellmann suggests that even if the process is sufficient to ensure that minority views are heard and to hold the leadership accountable, it might be appropriate for a lawyer to advise dissenters to seek independent counsel. Ellmann, *Client-Centeredness*, *supra* note 8, at 1161.

183. Ellmann, *Client-Centeredness*, *supra* note 8, at 1154.

Beyond concerns of autonomy, a lawyer's helping members to reach a more unified decision could contribute to the strength and longevity of the group, and thereby help it achieve long-term goals.¹⁸⁴ Moreover, by promoting and participating in a healthy debate, the lawyer encourages the group to engage in creative problem solving, organizational maturation, and also challenges individual members to reexamine their own views.¹⁸⁵ Finally, the lawyer may have strong views as to how well the course of action chosen by the group corresponds to the lawyer's own perceptions of the group's interests or the larger community. Permitting the lawyer to express those views could enhance the discussion, while prohibiting such participation would surely limit the lawyer's own autonomy.¹⁸⁶

Certainly some client groups, particularly well-established, sophisticated groups, often prefer the distance associated with the lawyer-as-technician approach, and such a preference should be respected.¹⁸⁷ Yet, while such representation presents fewer instances when it is appropriate for a lawyer to participate in intra-group debates, it surely will present a few. Even the most sophisticated corporations look to their counsel for advice during times of

184. See *id.* at 1170-73 (discussing the transformative process that can occur as the lawyer and the community are influenced and respond to their interaction with each other); Simon, *supra* note 8, at 482 (arguing that where group members who hold a minority viewpoint are encouraged to press their position, "[a] potential byproduct of such efforts is to contribute to the democratization of the organization or class, to strengthen it by making its leadership more sensitive to its members or by broadening patterns of member participation."); cf. Bell, *supra* note 130, at 512 (suggesting that a lawyer should play a role of negotiator, innovator, and organizer rather than simply litigating their client's position to resolve group conflicts).

185. Cf. Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 *FORDHAM L. REV.* 2339, 2354 (1999) [hereinafter Margulies, *Legal Services Lawyer*] (arguing that an ethical prohibition against one lawyer advocating inconsistent legal positions on behalf of two community groups "hampers the reframing of issues, freezing old dichotomies and frustrating the serendipitous discovery of common ground"). Margulies also acknowledges "the positive effects of group conflict, which can make groups more accountable and democratic, refine shared objectives, and promote surfacing of new objectives as the context of disputes changes over time." *Id.* at 2361; see also Simon, *supra* note 8, at 482 (finding that intraclass conflict can create a stronger group with more responsive leaders and wider membership).

186. Diamond, *supra* note 9, at 114, 122. Consider, however, whether these same issues arise in an instrumental, one-shot situation, particularly when the members have *chosen* to remove themselves from the decision-making process or when they are free riding on the efforts of the leader.

187. Fox, for example, argues that "relatively experienced community groups want their lawyers to act as technicians." Fox, *supra* note 140, at 6; see also Marisco, *supra* note 11, at 657 (recounting an organization's preference to have the lawyer fulfill its legal needs without acting collaboratively with the lawyer).

turmoil and those that fail to do so ignore an important source of experience and expertise.

Not only does Rule 1.13 address too narrow a range of situations in which intervention is required, it also sets forth a method of intervention that has limited relevance to community lawyering. Rule 1.13 admonishes the lawyer to “proceed as is reasonably necessary in the best interest of the organization,” which according to the Rule ordinarily means referring issues up the organization’s chain of command.¹⁸⁸ Recourse to the organization’s highest authority is recommended only if “warranted by the circumstances,”¹⁸⁹ and a response other than referral up the chain of command, the comment’s suggest, is reserved for a relatively limited set of circumstances.¹⁹⁰ Community groups, particularly younger and less hierarchical groups, are less likely to have formal policies or more than one layer of hierarchy to which an attorney could appeal for resolution. Instead, it is likely that issues must be raised and resolved in a directors’ meeting or in sometimes chaotic membership meetings. In any case, these issues, when raised by a lawyer, are likely to expose dissensions in the group and perhaps engender hostility among the factions and against the lawyer, outcomes that often appear contrary to the best interests of the organization.

2. *The Need for Engagement*

If Rule 1.13 takes too narrow a view by addressing lawyer intervention only in cases of injurious unlawful behavior and by circumscribing the method of intervention, the question then becomes when, and in what manner, is it appropriate for the lawyer to actively play a role in the resolution of a group’s internal dispute or question a group’s undisputed decision? Integrating the entity theory of representation and principals of agency law, Geoffrey Hazard and William Hodes argue that, “when a deep division of opinion arises within the entity that threatens its well-being or even its survival, . . . the lawyer may have to take action within the or-

188. ANN. MODEL RULES OF PROF’L CONDUCT R. 1.13(b) (1998).

189. *Id.*

190. See ANN. MODEL RULES OF PROF’L CONDUCT R. 1.13(b), cmt. 4 (amended 2003). An earlier version of Rule 1.13 recommended a range of measures rather than narrowly focusing on the chain-of-command approach, while at the same time placed a greater emphasis on taking steps that would minimize disruptions to the organization. See ANN. MODEL RULES OF PROF’L CONDUCT R. 1.13(b) (1998) (stating that “[a]ny measures taken shall be designed to minimize disruption of the organization . . .)

ganization to resolve this matter, because this is in the best interest of the organization."¹⁹¹ As a preliminary matter, it must be acknowledged that this is more an alteration than an internally consistent expansion of Rule 1.13. Rule 1.13 and Hazard and Hodes' statement suggest very different answers to the question of how a lawyer ascertains the best interests of the organization. Rule 1.13 directs the lawyer to respond to divisions by listening to the organization's duly authorized constituents, while Hazard and Hodes direct the lawyer to listen, at least in part, to her own independent assessment of the situation.

Because we find Rule 1.13 to be inadequate in addressing the representational realities in this regard, we are less concerned with whether Hazard and Hodes are true to the Rule than whether their formulation provides an adequate guide to the community lawyer. While we agree that a lawyer should be permitted to bring her own independent judgment to the table, we find their formulation misdirected in other ways. Hazard and Hodes want the lawyer to watch for elements that threaten the well-being and longevity of a group.¹⁹² Well-being (in the *degree of groupness* sense) and longevity, however, are not always in a group's best interest. For example, too deep a set of compromises for the sake of unity might have the effect of overwhelming the original purposes of the group. In addition, longevity for its own sake can lead to oligarchic bureaucratization and stultification.¹⁹³ And although encouraging unity can have many advantages,¹⁹⁴ it is primarily a means to an end rather than an end in itself. Even for those who prize connection, the unity of a group is not a desirable goal if there are divisions within the group that are so profound that the dissenting members feel sufficiently alienated so that the group is no longer expressive of their identity.¹⁹⁵

191. 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 17.5 (3rd ed. & Supp. 2004).

192. *Id.*

193. See, e.g., Robert Michels, *Democracy and the Iron Rule of Oligarchy*, in *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* 345-61 (Eden & Cedar Paul trans., Dover Publ'n 1959) (1915) (exploring the contradiction in syndicalism and labor movements where the group, representing the "masses," must be led by representatives who then become their own oligarchy within the movement).

194. See *supra* note 70 and accompanying text.

195. See Ellmann, *Client-Centeredness*, *supra* note 8, at 1158, 1161-62 (discussing the lawyer's role in relation to the group's harmony or disharmony); cf. Simon, *supra* note 8, at 482 (noting that disaffiliation may rob the group of the strength it may achieve by addressing the dissatisfied members' objections).

A different focus of representation is required when a lawyer finds herself representing a group client whose members disagree, or with whom she disagrees. The lawyer should not simply use her skills to bring factions together; she should also provide advice that is informed by an understanding of the group and the goals of representation. Model Rule 2.1 provides a guarded endorsement to this approach: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."¹⁹⁶ While this rule requires a lawyer to express advice, even if it runs contrary to the wishes of the client, and permits that advice to be based on a range of factors, it does not call for the proactive role we envision. Indeed, when read in light of Rule 1.13, it seems clear that the Model Rules expect a lawyer to challenge an organizational client, if at all, only with great caution.

More consistent with our view is the notion of "counsel to the situation," attributed to Justice Brandeis,¹⁹⁷ in which the lawyer strives to serve the totality of the interests intertwined in a matter instead of representing each of the individuals involved.¹⁹⁸ Interestingly, Stephen Pepper, an author who, like Ellmann, emphasizes individual autonomy and group connection, adopts a counsel-to-the-situation approach in arguing that the attorney should intervene if she perceives that a leader is acting contrary to the best interests of the group, even if the leader's action results from a fair decision-making process. He presents the example of a lawyer who has represented a family business for many years.¹⁹⁹ The business has been characterized by amicable labor relations, close family involvement in the business, cooperative relationship with the union, and a perception of employees as highly valuable and part of the business family.²⁰⁰ Over time, management has devolved to a single, younger member of the family.²⁰¹ Based on her perception of

196. ANN. MODEL RULES OF PROF'L CONDUCT R. 2.1 (1998).

197. John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702 (1965).

198. HAZARD & HODES, *supra* note 138, § 2.2:102; see also Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. LAW L. REV. 963, 980-81 (1987) (characterizing the lawyer for the situation model as seeking to attain or sustain human harmonies resting in part on "a common reality prior to the individuals . . . and in part on a hope for this common reality").

199. Pepper, *supra* note 134, at 964.

200. *Id.*

201. *Id.*

the business environment, that individual informs the lawyer of her plans to reduce compensation and aggressively counter any union opposition to that plan.²⁰² Pepper recommends three things: accurate legal advice;²⁰³ a "full conversation"²⁰⁴ or "moral dialogue"²⁰⁵ with the leader reminding her of the group's history and tradition;²⁰⁶ and going directly to other group members to explain what might happen and advising them as to how they could prevent undesired consequences.²⁰⁷

While Pepper's application of the concept of lawyering for the situation goes a considerable distance towards providing effective guidance for the lawyer, it falls short. Importantly, he supports intervention by the lawyer based on the lawyer's informed view of what is in the best interest of the group even in the absence of any shortcomings in the decision-making process. This position should be qualified by the understanding that a group's interests are not static, but rather are constantly evolving through dialogue and interaction.²⁰⁸ The significant shortcoming of Pepper's vision, however, is the restrictiveness that stems from his emphasis on protecting autonomy and connection rather than outcomes. For example, he acknowledges that the lawyer should adopt the same course of action if the facts were altered and the manager sought to deviate from a historically harsh approach to labor and improve employee rights and relations.²⁰⁹

This unquestioning allegiance to the client group does not square with our vision. When a lawyer's practice is oriented to identifying and furthering overarching community goals, the decisions and actions of the client group must be measured against those goals. If the divergence is qualitatively and quantitatively significant, the lawyer confronts a difficult decision. Shauna Marshall argues that a lawyer's decision whether "to work with one constituency over another; to try and stay in the middle and serve as an intermediary;

202. *Id.*

203. *Id.*

204. *Id.* at 964.

205. *Id.* at 960, 965 n.70.

206. *Id.* at 965.

207. Pepper's approach arguably lacks internal consistency. While he rejects the notion that a lawyer could have a better sense of an individual client's community connections and identity than the client herself, he does not seem troubled by the notion that a lawyer can have a better conception of a group's identity than a member of the group, even a "duly authorized" member.

208. Simon, *supra* note 8, at 482-83.

209. See Pepper, *supra* note 134, at 965 n.70.

[or] to abandon a project”²¹⁰ should be “guided by the knowledge that the community lawyer has about her community, its priorities, its values, its commitments.”²¹¹ The decision should be guided by “a defensible set of community goals” as adopted by the lawyer.²¹²

This view differs somewhat from that of Simon, who conceives of counselor to the situation as a “practice [that] is not designed to serve the clients’ preexisting interests, but to reconstitute them as a community defined by common interests.”²¹³ The goal, in our view, is not simply to “enhance the client’s capacity to express her own interests.”²¹⁴ The lawyer must also engage the client, as an equal, in a dialogue on the merits of an issue, informed by both the lawyer’s understanding of the client-group’s community and her understanding of the interests of the broader community she seeks to serve. Thus, a lawyer is confronted with a number of questions when determining the appropriateness of engaging in an intra-group debate or fomenting debate around an uncontested decision. She should ask whether the outcome of that debate will shape or reshape the group’s goals and/or its ability to achieve those goals and whether a particular course of action would be inconsistent with the group’s interests or the interests of the broader community.

3. *The Risks of Engagement*

Intervening in intra-group disputes or challenging undisputed decisions presents substantial risks. By expressing a view, even in the context of a discussion structured to bring out differing positions and to work towards consensus, the lawyer could further exacerbate divisions within the group. If the lawyer challenges the leadership, either directly or by siding with a dissenting faction, it

210. Marshall, *supra* note 136, at 220.

211. *Id.*; see also Cruz, *supra* note 29, at 260 (stating that the lawyer understanding the individual’s relationship to the community and “understanding the legal issue from a historical, cultural, social and political perspective as well as from a legal perspective” can be crucial for successful community representation); Diamond, *supra* note 9, at 115-16 (remarking that “[i]t is necessary for one who aspires to be a community lawyer to understand the issues confronting the community and the goals and aspirations of its residents.”); cf. Pepper, *supra* note 134, at 964-65 (recommending that the lawyer give accurate advice and engage the individual in a “full conversation” that includes the community’s norms).

212. Diamond, *supra* note 9, at 115. Our view differs from Margulies, who thinks the lawyer should be guided by the overarching goal of “social access” and under that rubric should be able to represent “the multiplicity of interests in the community being served.” Margulies, *Legal Services Lawyer*, *supra* note 185, at 2339, 2362.

213. Simon, *supra* note 8, at 486.

214. *Id.*

could cast doubt on the legitimacy of the leadership.²¹⁵ The lawyer also risks undermining her own credibility if she is seen as an intruder or manipulator. In light of these concerns, we largely agree with Ellmann that the lawyer, in giving advice, must guard against destabilizing and dominating the group. Thus, “[i]f the lawyer who gives advice based on her own values risks alienating or dividing the group, perhaps she can partially overcome these dangers by showing the group members that she in fact shares their core convictions.”²¹⁶ Moreover, the lawyer has “an obligation of constant vigilance against her own overreaching.”²¹⁷ While it is certainly true, as White has noted, that “[s]uccessful collective actions require very skillful facilitation,”²¹⁸ a lawyer should exercise caution before assuming such a role. If possible, it is better for a lawyer to strengthen the existing leadership’s ability to facilitate and to participate in the dialogue while the lawyer acts merely as an advisor.

In addition, it is critical that the lawyer make her conception of community goals known to the client from the outset. Marshall suggests that the lawyer and client group engage in a “moral dialogue,” in which the parties examine their goals and values, identify the goals of the representation, develop possible strategies for achieving those goals, anticipate potential problems, and establish problem-solving structures.²¹⁹ She further suggests that the results of this dialogue be memorialized in a retainer agreement.²²⁰ Similarly, the result of such a dialogue will inform the lawyer’s decision of whether to work with a particular client group and will help the lawyer assess whether the group’s goals conform to the defensible set of community goals with which the lawyer entered the dialogue.

215. See Ellmann, *Client-Centeredness*, *supra* note 8, at 1152 (stating that a “lawyer who does try to block the leadership’s running of the group might undercut the autonomy of the group—the ability of the group as an entity to work its will—and her conduct might seem inconsistent with the acceptance of group representation”).

216. Ellmann, *Client-Centeredness*, *supra* note 8, at 1165-66.

217. *Id.* at 1169.

218. White, “*Democracy*” *In Development Practice*, *supra* note 161, at 1086.

219. See Marshall, *supra* note 136, at 221-22.

220. *Id.*; cf. *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 *FORDHAM L. REV.* 1751, 1756-57 (1999) (Recommendations 10 and 16, arguing that once representation begins, group/community conflicts generally should be resolved in favor of the group/client subject to limitations described in retainer).

IV. THE DEMOCRATIC MAELSTROM: SHELTER FROM THE STORM

In beginning this article, we sought to examine the concept of participatory democracy as it relates to decision making in community groups. In particular, we were interested in the relationship between the participatory ideal, the success of community groups, and the legitimacy of their leaders. In Section I, we recounted two stories that described very different, but not uncommon, difficulties in group dynamics. They involved the problem of autocratic leadership and the absence of meaningful membership participation in decision making. The groups and their members had dissimilar responses to the incursions on the democratic process by their leaders. These differences highlight important, but neglected, questions about the correlation between participation and success (as defined by the groups, themselves). In this section we address the “groupness” of the assemblages of people described in our two narratives and discuss some of the significant differences between them. We hope to reach some conclusions about the role of lawyers in reference to the problems presented and about the relationship of democracy to the legal representation of groups in a community setting. Finally, we address the lack of effective guidance provided by the Model Rules for lawyers engaged in a community practice of the sort we envision and suggest a starting point for re-examining professional conduct in this practice setting.

A. Groupness in Context

Earlier, we examined the nature of groups and the factors that set them apart from mere aggregations of individuals.²²¹ We pointed out that while there is no universally accepted definition of a “group,” most commentators believe that certain elements must be present before an aggregation may be properly so described.²²² We then described different types of groups and some of the factors—such as self-identity, identification by others, the social and governance structure (or its absence) of a group, the interdependence of its membership and the goals (whether expressive or instrumental) of a group—that help to define them.²²³

We went on to discuss some of the characteristics of leadership, followership and free-riding.²²⁴ In distinguishing between leader-

221. See discussion *supra* Part II.A-B.

222. See *supra* notes 37-51 and accompanying text.

223. See *supra* notes 37-65 and accompanying text.

224. See discussion *supra* Part II.C.

ship and dominance and between formal and emergent leadership, we attempted to describe the nature of leadership and the relationship between leaders and followers, including why people join groups and why people become leaders.²²⁵ We pointed out that within the concept of followership, there is a complex and dynamic interaction between the parties, with several opportunities for role transitions and defection.²²⁶ Followership was distinguished from free riding or social loafing and we examined the effect of these phenomena on group dynamics and legitimacy on the role of a lawyer.²²⁷

In an effort to refine the meaning of "group" and of "leadership/followership," we will apply some of the concepts and theories about groups, leaders and followers to the associations that we portrayed in our narratives. We will then examine some of the less obvious political issues that confront lawyers who represent such groups. Finally, we will suggest a more nuanced prescription of the role of lawyers in such representation.

The two associations of residents that we depicted had, according to most definitions, several elements of groupness. They each involved, to one degree or another, a set of face-to-face interactions around essentially common goals. In Arabella's case, residents sought to obtain a payment for their agreement to vacate their building.²²⁸ In the cooperative situation, the residents sought to own and maintain affordable housing on a cooperative basis.²²⁹ While the cooperative was more formally structured than Arabella's group, each had a certain structure that residents recognized and accepted or, at least, in which they acquiesced. In each case, participants recognized themselves as members of a group and outsiders who observed them also identified them as members.

These aggregations also exhibited several elements that suggested the absence of groupness. For example, Arabella controlled both the agenda for her organization and its activities, resulting in almost no interdependence of task among the residents.²³⁰ In the cooperative, what began as a truly interdependent undertaking deteriorated (as far as groupness is concerned) into an autocracy controlled by Ms. Johnson.²³¹ A role transition²³² took place as

225. See discussion *supra* Part II.C.

226. See *supra* notes 105-13 and accompanying text.

227. See discussion *supra* Part II.C.3; see also discussion *supra* Part III.A.

228. See *supra* notes 31-32 and accompanying text.

229. See *supra* notes 32-33 and accompanying text.

230. See discussion *supra* Part I.B.

231. See discussion *supra* Part I.B.

members began to seek opportunities to exit the cooperative. While outsiders still viewed residents as members of the group, the residents' self-identification as group members became weaker. Resentments arose against Ms. Johnson but most residents seemed to believe it would be easier to move out rather than to oppose her leadership. Residents began to think of themselves as powerless—as if they were tenants rather than owners.

The instrumental goals of the cooperative were failing at the same time the expressive goals were dying. The property was falling into disrepair and its funds were being diverted to non-cooperative purposes. The residents were losing the benefits of decent and affordable housing while the neighborhood was losing the benefits of an effective community institution. If one believes that community groups should be vehicles that contribute to achieving some commonly accepted goal, regardless of whether they involve member participation, one could question whether this once vibrant cooperative could continue to be called a group.

B. Leadership, Dominance, and Manipulation

Questions involving the existence of a group necessarily involve questions about its leadership. In the two situations we have examined, a comparison of their leadership with the idealized democratic model produces a series of ambiguities and contradictions. Clearly, Arabella and Ms. Johnson dominated the decision-making process of their respective organizations. There was little or no member participation in either group. Indeed, in the cooperative, there were signs of disaffection and dissociation. Can Ms. Johnson and Arabella be called leaders without resorting to a domination-based criterion?

1. *Arabella, a Flawed Leader*

Arabella is an example of the so-called emergent leader.²³² While she assumed the title of president of the tenants' association, she had not been elected to the position. She succeeded to leadership upon the death of her father, the founder and long time leader of the group. During his tenure, the residents waged an ongoing struggle with the owner of their building to improve conditions and to reduce rents. When the founder died, several pieces of litigation were pending between the parties. Conditions had not dramati-

232. See *supra* notes 104-12 and accompanying text.

233. See *supra* text accompanying notes 82-83.

cally improved during the struggle and many tenants had left the building and their units had not been re-rented by the owner. Upon his death, Arabella sought to continue her father's work and propelled herself into the leadership role.

Her efforts were not outwardly opposed by any member. There are several possible explanations for this acquiescence. As we previously mentioned, Arabella was intelligent, articulate and professed to have the members' best interests at heart.²³⁴ She had the available time and resources to undertake the role and the energy to perform it.²³⁵ Other members did not have Arabella's talents, resources or energy. They believed she would protect their interests and fight for them.

During her tenure, the goals of the group changed.²³⁶ It no longer fought to improve building maintenance.²³⁷ It now fought to extract the largest possible payoff from the owner in exchange for its members vacating the building.²³⁸ Interestingly, it is not clear who initiated this change of direction nor how it was adopted by the membership. In hindsight, one could surmise that Arabella had a hidden agenda²³⁹ of personal enrichment and either dictated or manipulated the change of direction for her own benefit. Nevertheless, she aggressively maintained the various suits with the owners, largely on a pro se basis, while she sought a financial settlement with them. She assumed that the cost of the litigation, together with the legitimate possibility that the tenants would prevail, would push the owners into a satisfactory payment to the tenants.

Why did Arabella seek her leadership position? There are several possible, non-mutually exclusive answers. On the most generous level, Arabella might really have had the best interests of the members at heart. She might have seen herself as offering the best chance of their achieving their goals. Another possibility is that she saw it as her obligation, or her challenge, based on her father's position of prominence in the building and in the group. Further, she might have believed that other residents would not take on the tasks of leading the group.²⁴⁰ Less generously, she might have seen leadership as an opportunity to advance her personal agenda con-

234. See discussion *supra* Part I.B.

235. See discussion *supra* Part I.B.

236. See *supra* notes 30-33 and accompanying text.

237. See *supra* notes 30-33 and accompanying text.

238. See *supra* notes 30-33 and accompanying text.

239. See *supra* note 126 and accompanying text.

240. See *supra* notes 124-25 and accompanying text.

cerning status or career. On the least generous level, she might have seen the leadership position as offering the possibility for acquiring a significant and disproportionately larger share of any settlement, the result that ultimately came to pass.²⁴¹

Whatever her motivations, she assumed effective control of the group. Other members did not object and seemed willing to allow Arabella to take and to continue to hold the role. They accepted her strategic decisions and may have accepted her decisions about goals. They essentially left everything to her and, while members met periodically, the purpose of the meetings was generally that Arabella could update them and tell them what she had decided to do. At some of the meetings, Arabella asked for, and received, confirmatory votes from the membership.²⁴² Ultimately, when challenged about the size of the bonus she allocated to herself, Arabella responded that the members had approved it at a meeting during which the bonus had been disclosed.²⁴³

The motivations of the members in permitting Arabella to act without supervision, accountability or feedback are also unclear. They may have believed that Arabella was, in fact, an effective spokesperson and advocate for their position. They may have trusted her and agreed with her actions as disclosed at the periodic meetings that were held. Alternatively, they might have thought that she was the most capable person to assist them in attaining their goals. Her education, language skills and aggressiveness might have been seen as important assets in their struggle, assets that could not be replicated by the other members. Finally, they might have determined that allowing Arabella to lead and act for them gave them a good chance of obtaining some benefit without

241. See *supra* notes 31-32 and accompanying text.

242. It should be noted that many members who voted to confirm her decisions did so without understanding the decisions or their implications. This was due to a variety of obstacles including language difficulties among the membership (there were at least five different primary languages represented among the members), limited educational backgrounds and lack of interest in the details (as opposed to the results) of the members' struggle.

243. When the membership was questioned about this approval, approximately half of those questioned (which only comprised about a quarter of the total membership) said they did not know of the bonus and would not have approved had they known. Of the other members who were questioned, about half said they knew there was a bonus but understood it to be approximately \$3,500 rather than the ultimate \$114,000 Arabella had allocated to herself. They approved the smaller number but would not have approved the larger number had they understood its magnitude. The remaining members both knew of the magnitude of the allocated bonus and approved of it.

putting forth any significant effort of their own. In other words, they might have made the decision to free ride.²⁴⁴

Whatever the motivations, the group functioned in apparent harmony while the struggle to obtain a satisfactory settlement continued. When a tentative deal was struck, however, the harmony gave way to overt bickering and accusations of usurpation and fraud. The followers, who had left Arabella largely on her own throughout the dispute, began contesting her decisions when they learned of her self-allocated bonus. People who had been inactive suddenly came forward forcefully and articulately to complain about her tactics and about her distribution scheme. The show of assertiveness at this juncture bolsters the possibility that many members may have been free riding on Arabella's efforts.

2. *Ms. Johnson: The Descent to Despotism*

Ms. Johnson was a different kind of leader. She was a participant in a formal group²⁴⁵ and was elected president of the cooperative according to formal procedures. Almost from the beginning of her tenure, however, Ms. Johnson began the dismantling of the cooperative's procedural and administrative structure. She amended the by-laws without a proper meeting or membership vote.²⁴⁶ The amendment purported to increase her term of office beyond what was permissible under local law. She began making decisions that bound the cooperative without the approval (or even the knowledge) of its board of directors. Eventually, after having digested a steady diet of autocratic decisions (without any contrition by Ms. Johnson), board members resigned or simply stopped participating in the cooperative's affairs.

As in the Arabella narrative, Ms. Johnson's motivations are unclear. She might have acted out of bitterness for her earlier rejection by the cooperative's members or because she saw an opportunity for personal profit. It is conceivable, but unlikely, that she thought she could improve the position of the cooperative through her leadership. In any event, her actions caused the deterioration of the cooperative and of the building it owned.

In this situation, it is less likely that Ms. Johnson could be called a leader.²⁴⁷ There came a time when she clearly did not have the

244. See *supra* notes 116-18 and accompanying text.

245. See *supra* note 41 and accompanying text.

246. See *supra* notes 32-33 and accompanying text.

247. Recall discussion of leadership *supra* note 90-97 and accompanying text.

support of a majority of the membership²⁴⁸ but the members gave up rather than struggle to unseat her.²⁴⁹ Ms. Johnson did not seem to utilize overt coercion to achieve her dominance but the force and aggressiveness of her personality may have dissuaded members from active dissent. Many of those who could leave did so, using the tactic of exit to protect their interest.²⁵⁰ Those who could not exit because of the difficult local housing market, cut their losses by directing their time and energy to other activities. That strategy was only partially successful, however, because they continued to be negatively impacted by Ms. Johnson's actions.

C. A Short Typology of Groups

In Arabella's tenant association, by the time the lawyer became involved, the residents' purpose had shifted from a long-term fight with the building's owner over conditions and rents to a more narrowly focused attempt to obtain the largest possible financial settlement in exchange for the tenants vacating the building. The residents had no real organizational structure and Arabella had merely assumed leadership after the death of her father. Arabella ran the group manipulatively and autocratically, although she did give a superficial nod to participatory democracy. Nevertheless, the residents succeeded in obtaining a large amount of money to settle the various disputes with the owner and to vacate the building.

This is in contrast to the housing cooperative where there was no single event in the group's existence to which members could point and say that they had accomplished their purpose and could disband. The group's purpose was to provide cooperative housing indefinitely into the future. The cooperative had formal procedures in place which had been followed, with significant participation by the membership, for some time. In fact, Ms. Johnson, the cooperative's president, had been duly elected under those procedures. Once in office, however, Ms. Johnson discarded those procedures and ruled autocratically and despotically. Members of the group ceased to participate and at least part of the goal of the organization, cooperation and participation among members, was lost. It also appears that another of the goals, the provision of decent and affordable housing, is in jeopardy.

248. See *supra* notes 32-33 and accompanying text.

249. See *supra* notes 32-33 and accompanying text.

250. See *supra* note 172 and accompanying text.

1. *Value-added by Participation*

Groups are formed for several purposes. These purposes may be instrumental,²⁵¹ that is, leading to a particular, concrete goal, or they may be expressive²⁵² by providing a vehicle for members to grow personally and by increasing their feeling of belonging and of self-worth. Often these purposes coincide in a single group. The expressive purpose is often enhanced by the participation of members in a reciprocal and democratic manner. But do all groups seek expressive outlets? The answer to this question may depend on whether the group has a finite goal that will be accomplished over a short time span or whether it has multiple goals, including its own continued existence.

a. Democracy and One-shot Groups

The purpose of a one-shot group is almost always instrumental.²⁵³ If a group has a single goal, it typically disbands when it has reached that goal. While expressive aspects may be present in such groups, such aspects usually surface only incidentally in the pursuit of the group's instrumental goal.

In the Arabella group context, how would group member benefit from democratic participation? Three discrete possibilities leap to mind: the choice of group goals, the choice of a leader, and in the approval of the proposed settlement. Yet it is conceivable that democratic participation would be detrimental to the instrumental purpose of the group were it to have been employed in other areas.

Goal setting, for example, would seem to be a crucial point for member participation. On closer examination, however, participation may be less compelling than it appears at first blush. Assume an individual identifies a problem and seeks to involve others in attempting to rectify it. As the individual publicizes the problem and solicits participation, potential participants will evaluate, first, whether they really perceive a problem of the sort the individual describes and, second, whether the problem negatively affects them in a serious way. If a potential participant determines there is not a problem of the sort suggested or, even if there is, that she is not seriously affected by it, she will not join the group. On the other hand, if potential participants recognize a problem that seriously affects them, they will engage in a cost-benefit analysis to

251. See *supra* note 54-56 and accompanying text.

252. See *supra* note 54-56 and accompanying text.

253. See *supra* note 64.

determine how much they will be willing to contribute to resolving the problem.²⁵⁴

If their analysis is classically rational, part of the calculation will be to determine whether they can count on someone else to carry the load in pursuing a satisfactory result and, if so, the likelihood of that person's success without a major contribution from them.²⁵⁵ If they decide that they are best served by letting others, perhaps the convening individual, pursue a remedy, they will join the group, support its existence and its goal but acquiesce in another's leadership and agenda setting. In the typical situation, they will allow the leader to determine the method of achieving the goal.

If this analysis is plausible, it suggests that a goal is accepted merely if a potential member joins a one-shot group. It is then entirely conceivable that the leadership of such a group would be supported because of the benefits of free riding by constituents or, in some cases, due to a loosely constructed followership. That would leave only one area where participation remains central to group needs: the identification of a successful outcome. Here the members must determine whether the benefit to the group and, perhaps, derivatively to each member (we will address this latter point shortly), is sufficient for them to give up their individual claims or grievances. Even here, there is a subtly coercive feature (in the nature of a prisoner's dilemma) that pushes the group to accept a result that the leader thinks is adequate even though many members may disagree. Assume no other members have contributed significantly to achieving the outcome. In that case, if the group rejects a proposal negotiated and recommended by the leader, there is the risk that the leader will cease her efforts and no one else will step in to the leadership position. This would mean that no benefit would be forthcoming if the proposed settlement is rejected, even though some members may believe it is inadequate.

Other areas of group activity might be more efficiently conducted without the norm of democratic participation even being an issue. This is particularly likely when the decisions involved do not address significant policy concerns. Thus, strategic decisions that might be made by a lawyer, for example, under Model Rule 1.2,²⁵⁶ might be made with equal legitimacy in the group context by the leader. To the extent the decisions do not stray too far from what

254. See discussion on free riding, *supra* Part II.C.3.

255. See *supra* notes 116-17 and accompanying text.

256. Model Rule 1.2 defines the Scope of Representation. See *supra* note 198 and accompanying text.

members would find acceptable, the members who tend toward free riding will not intervene.²⁵⁷ In fact, long discussions about strategies might prolong the process of settlement and produce internal strife and factionalization among the members.

b. Formal Procedures, Longevity, and Democratic Participation

The narrative about the housing cooperative describes a group with very different needs. The group's goals were both instrumental, providing decent and affordable housing, and expressive, allowing members to feel a sense of belonging and of self-worth. Indeed, there is a perceived symbiosis between those goals, as a greater sense of belonging will result in higher quality housing at lower costs.²⁵⁸ Because of this, the procedures of cooperatives are specifically designed to encourage participation and interaction.²⁵⁹

When Ms. Johnson was chosen as the president of the cooperative, there was no cause for concern about the participatory process. Once in office, however, Ms. Johnson soon showed herself not only to be insensitive to the participatory ideals of cooperatives but also to be an autocratic and exclusionary leader. She established new procedures by fiat that contradicted the spirit of the cooperative movement and violated that particular cooperative's bylaws as well as provisions of local law.²⁶⁰ In contrast with Arabella's case, the absence of a participatory process demonstrably undermined the goals of the cooperative group. Members exited, either physically or psychologically, and the cohesiveness of the group and financial well-being of the building deteriorated. The attorney's failure to challenge Ms. Johnson's actions, at least to bring their impropriety to the attention of the board, contributed to that deterioration.

257. If the member is a free rider, she has already determined that the benefits to be derived do not warrant her involvement, particularly since someone else is performing the essential activities. Even in followership situations, the relationship, although fluid, is one in which the followers remain relatively quiescent in the absence of a strong stimulus to become active.

258. HOUSING—THE COOPERATIVE WAY 89 (Jerome Liblit ed., 1964); see RUTH H. LANDMAN, CREATING COMMUNITY IN THE CITY: COOPERATIVES AND COMMUNITY GARDENS IN WASHINGTON, D.C. 81-96 (1993) (extolling the benefits of cooperatives).

259. LANDMAN, *supra* note 258, at 83-96.

260. The new procedures had the effect of entrenching Ms. Johnson in power and giving her a broad scope of authority to take action that was previously reserved to the cooperative's board of directors or membership. See *supra* notes 32-33 and accompanying text.

2. *Lawyers, Group Clients, and the Significance of Democratic Participation*

As we have seen, situations arise in which a community group operates solely on the strength of its leadership and without any significant participation from its members. How should a lawyer who represents such a group deal with the absence of a democratic, participatory process? The answer may depend on the nature of the group, its membership composition and its purposes as well as on the relative priority the attorney places on democratic procedures.²⁶¹ In the next two sections, we will address some of the issues raised by our narratives and attempt to refine the paradigm of a lawyer's representation of a group client.

a. *One-shot Groups, Instrumental Goals and Democratic Participation*

As the previous discussion about the Arabella group suggests, in the absence of a desire by members for democratic participation, the lack of a democratic process may not be, in and of itself, a serious problem. This is true regardless of whether the group made an autonomous and informed choice to cede authority to its leadership or whether such authority arose as the result of passive acquiescence. Thus, after being convinced that democratic participation is not a high priority of the group members and such participation would not necessarily enhance the group's ability to achieve its goal, we believe that a lawyer should not insist on democratic participation as a condition of taking on the representation. Nor should a lawyer attempt to foist such a model on her client to further the lawyer's sense of appropriate procedures.²⁶²

Arabella's case presented an additional complexity beyond the lack of a participatory process. Arabella seemed to have pursued her own "hidden agenda" in seeking to appropriate a disproportionately large share of any settlement proceeds for her personal benefit. Determining what would be an appropriate response to this situation by the group's attorney is not as clear as one might

261. See, for example, Ellmann's discussion of the importance of democratic procedures as an end in and of themselves. Ellmann, *Client-Centeredness*, *supra* note 8, at 1152-53 (discussing the lawyer's responsibilities if the leader starts to employ methods with fall "beneath a baseline threshold of democratic fairness").

262. This does not prevent the lawyer from raising and discussing the advantages or disadvantages of such a model with the client. We merely suggest that the lawyer should not insist on this model nor, of course, contrary to Ellmann's position, should the lawyer manipulate the group into accepting it. See *supra* notes 166-70 and accompanying text.

suspect. If Arabella's desire to lead was opportunistic, it is possible that removing the rewards of leadership, assuming this could be accomplished, would cause her to abandon her instrumental role. Recall that no one else in the group was prepared to take on the leadership role. In this particular group, it is also likely that none of the other residents would have been as effective as Arabella in pursuing the group's goals because of language, educational, financial and citizenship limitations. Therefore, even an attorney who highly valued democratic participation and altruistic leadership might be forced to accept an autocratic manipulator in order to preserve the possibility of a satisfactory substantive outcome for the group.

There is a third possibility. Upon being convinced of Arabella's hidden agenda, the unlikelihood of dissuading her from attempting to divert benefits that could go to members, and the dissatisfaction of a majority of the group with such a diversion, the attorney could conceivably assume Arabella's leadership role. If the group is primarily concerned with the most materially beneficial outcome it can achieve, and is not devoted to internal leadership, one might argue that the attorney should assist the members in deposing the manipulative leader and to take on her responsibilities. Remember that this is a one-shot group. Its goals are instrumental and not expressive. After the goal is reached, the group will disband and disperse.²⁶³ The lawyer would have helped the client and its constituency to achieve the desired outcome by stepping out of the lawyer/client and participatory paradigms, arguably without doing harm (except in the most abstract way) to either.²⁶⁴

Several problems are raised by this third option. One is that the lawyer is often an outsider without inherent credentials for a leadership role within the group. On the other hand, this obstacle might be overcome by a lawyer who sees herself as a participant in community action and who is seen by community residents as com-

263. An argument against such an action by the attorney is that it deprives the membership of the long-term capacity-building benefits of participating in the process. Even if this group does not require such participation, the experience of having participated could enhance the member's capacity to participate which would, in turn, strengthen the next group those members join.

264. The lawyer, by intervening, has not usurped power from any legitimate holder of power nor has the lawyer short circuited an asset-marshaling process to create and utilize power. The power that was built has already been utilized to extract a large payment from an owner who resisted the tenants efforts to improve conditions. Since the settlement required the tenants to vacate the building (an action they were willing to take in exchange for compensation) and their subsequent dispersal, there was no ongoing institution that was upset by the lawyer's action.

mitted to their well-being.²⁶⁵ Another concern is the possible short-circuiting of capacity building among existing group members. Even though a group is a one-shot organization, the group's members may not be one-shot players. They are likely to continue to reside in the community and may be involved in additional community struggles. The benefit of a member's participation or command of a leadership position might carry over to the next group and to the one after that.

In Arabella's case, the empirical evidence seems to point in a different direction. No other member sought leadership. Each seemed to be content with Arabella carrying the load, at least until a group-wide result was achieved. This is true despite the fact that several people had sufficient ambition and skill to challenge Arabella when the size of her bonus became clear to the membership. It is unclear whether those individuals had previously remained in the background due to free-riding or due to action by Arabella that was intended to keep them at bay. It is certainly conceivable that these members had a well-developed sense of self-entitlement while not having as well-developed sense of strategic planning and action. Thus, if the lawyer and members had become aware earlier of Arabella's hidden agenda and that they could not deter her from pursuing it, the lawyer might justifiably assist in deposing her. The lawyer's first priority must then be to secure new leaders who should come from among the membership, if at all possible. If it is not possible, the lawyer may have to assume leadership.

If the lawyer and group become aware of the hidden agenda after a group-wide result has been achieved (e.g. a lump sum settlement to be divided by the group members), the lawyer's role is quite different. Then she must assist the group in establishing a process for the allocation of the group-wide benefit among the membership. In order to enhance the possibility of procedural and substantive fairness and the possibility of acceptance by members, the process must be participatory among those affected. There must be participation both in the creation of the process and in the allocation of benefits. The lawyer should not assume a leadership position here although she may counsel the members on the existence of various procedures and allocation schemes.

265. See LOPEZ, *supra* note 7, at 50-51; Diamond, *supra* note 9, at 73 (stating that lawyers should "participate in a client's activities in more central ways, such as organizing the group and participating in its political actions").

b. *Ongoing Groups, Democracy, and the Expressive/Instrumental Mix*

Different issues are presented by the story about the cooperative. Given the apparent malfunctioning of the cooperative's board and the impermissible actions taken by Ms. Johnson, the lawyer needs to decide whether intervention is proper and, if so, how to proceed. The Model Rules do not provide much guidance on this issue (a subject to which we will return shortly). A lawyer representing a group client is to follow the dictates of the group's identified decision makers.²⁶⁶ If a lawyer cannot in conscience do so, the Rules allow a lawyer to withdraw from the representation in certain circumstances.²⁶⁷ Beyond this, the lawyer is on her own.

Thus, the lawyer's appropriate response in this situation appears superficially easy. The issue is whether there is, in fact, a legitimate decision maker. Normally, the lawyer should have called the illegalities to the attention of the board but it is unclear that the board or the membership was functioning. These bodies had certainly not addressed Ms. Johnson's usurpations in the past. The lawyer's role, therefore, might be to go further than merely informing the proper corporate functionaries. The lawyer might need to intervene to restore the democratic model with which the group began.

We take this position for two reasons. First our view is that the lawyer is not (or at least should not be) a neutral bystander in community group representation.²⁶⁸ The lawyer should participate in group planning and decision making so long as she does not attempt to dominate the group. The second reason is because, in this case, the group's ability to further its goals is in serious doubt without that intervention. Given a lawyer who sees community improvement as her professional calling, standing on the niceties of professional distance and client-centered aloofness removes the lawyer from the political and practical realities of the situation.²⁶⁹ Here, it is not only the procedural issue of Ms. Johnson's elimination of democratic participation that should activate the lawyer's intervention, but also the lawyer should act to help preserve insti-

266. See ANN. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 3 (1998) (noting that "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful").

267. *Id.* R. 1.16(b).

268. See Diamond, *supra* note 9, at 121-23 (advocating a proactive role for the community lawyer that acknowledges the lawyer's autonomy as well as the group's autonomy).

269. See *supra* notes 184-86 and accompanying text.

tutions of community power that are being diverted from their original course by rogue leaders.

The members of the cooperative had originally come together to create a tenant owned and operated building. This institution of community strength has value both practically through the provision of decent, affordable housing and symbolically as a standard bearer for the possibility of organization and the benefits to be derived from it. In many cases, such an institution is an anchor for the entire neighborhood. The lawyer who is committed to the community may act to prevent such institutions from being destroyed by autocracy. When the lawyer can argue in good conscience that the leadership of a group that she represents is illegitimate, the lawyer has, in our view, a duty to respond to the situation.

How should a lawyer intervene? This is a more difficult question because it is tied not to doctrinal or even theoretical models of behavior but to the individual psyche of each lawyer. Some will confront the leader on a bare-knuckled political basis. Other will use technical legal devices to proceed or involve outside stakeholders. What is clear, however, is that the membership must be brought back into the struggle. Without the members, the institution is devoid of content and bereft of meaning. Without intervention by the attorney, the group and the benefits it confers will be severely diminished or lost.

D. Ethical Guidance for Community Lawyers

In Part III, we discussed several situations of group representation in which the Model Rules either failed to provide any guidance to lawyers or where the guidance was designed to apply to a very different context from the community practice we described.²⁷⁰ This failing leaves lawyers to extrapolate from the existing rules in order to choose an appropriate course of action. While it is beyond the scope of this article to construct an alternative model of professional conduct for the community lawyer, we do have some thoughts that might provide a starting point for that endeavor.

Before suggesting any points for rethinking ethical conduct, we wish to emphasize our belief that the nature of practice in a community setting is different from traditional concepts of practice. Moreover, we believe that such practice *should* be different from

270. See *supra* notes 131-34 and accompanying text.

traditional practice. Therefore, we believe that a new body of ethical rules ought be added to the existing body in order to address more directly the kinds of issues that often arise in a community practice but do not usually arise in the standard litigation or transactional practice.

In approaching the question of which ethical rules should govern lawyers representing community groups, we start from three general propositions. First, the lawyer must be able to play an active role in the deliberations of the organization. Second, her actions should be directed towards realizing the goals of the organization. And third, the nature and extent of the lawyer's role will vary depending on the nature of the group and its leadership/followership dynamic. With those general propositions in mind, we suggest several factors for consideration in developing a modified set of ethical rules that are appropriate to a community practice.

Part of the lawyer's dilemma is resolving the traditional question of who the client is. As we discussed in Part II, the sociological literature has identified several characteristics of groups that are essential to understanding how they function and, correspondingly, how outsiders might interact with them.²⁷¹ Many of those characteristics relate to the concept of "groupness." Groups exhibit different degrees of groupness depending on factors such as the members' common fate, level of interaction, self-definition, and interdependence.²⁷² A lawyer who represents a collection of people that exhibits a high degree of groupness may be better able to ascertain and pursue the group's objectives, while a lawyer who represents a loosely affiliated aggregation may need to pay greater attention to the interests of individual members. But even this admonition does not suggest a fixed rule because groups are dynamic—the degree of groupness may vary over time, over subsets of members, and in relation to different objectives which means that the lawyer's obligation may also vary.

Another critical factor is the legitimacy of the leadership. Leadership is not, despite the direct but mechanical configuration of the Model Rules, simply a question of finding a "duly authorized constituent."²⁷³ Leaders can obtain their position through formal or informal mechanisms, and regardless of the mechanism, they can exhibit a wide range of legitimacy. The community lawyer must constantly evaluate the legitimacy of leaders, a task that can often

271. See discussion *supra* Part II.A-B.

272. See *supra* note 55 and accompanying text.

273. ANN. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (1998).

be achieved only through close interaction with group members and careful examination of leader/follower dynamics. As a general matter, the weaker the legitimacy of a group's leader, the more appropriate intervention by the lawyer may become. Even that formulation, however, presents problems. Where a group is largely populated by free riders, or where members do not strongly identify themselves with the group, intervention that unseats even a weak leader may lead to a vacuum that results in the death of the organization and its goals. Is a bad leader worse than no leader? That may depend on whether the group has a one-shot, instrumental goal or a multi-faceted set of goals that include both expressive and instrumental aspects.

A lawyer must also take into consideration the alternative mechanisms of accountability that are present in a group when deciding whether, when and how to intervene. There may be internal characteristics, such as the ease of exit, or the presence of other stakeholders, that impact decision making. If a lawyer fails to consider those factors, she may embark on an unnecessary or, worse, counterproductive course of action.

Finally, all of these factors must be weighed in light of the objectives of the group. That proposition, however, raises as many questions as it answers, given that the lawyer's ability to assess the objectives of a group will be directly affected by the legitimacy of leadership and the degree of groupness. The presence of a democratic process may not be necessary to a group's objective goals, but how can a lawyer know the group's objectives in the absence of a democratic process? While this is not an inescapable conundrum, it should not be dismissed lightly.

We contend that there is a need to fashion ethical rules for lawyers who are more actively involved in their clients' activities where the clients do not conform to the well-organized, formally hierarchical groups to which the Model Rules seem to be directed. In addition to the difference in structure, the activities and goals of the clients may be quite different from the discrete legal tasks envisioned by the drafters of the Model Rules. We believe the ethical rules must recognize that there are differences in clients and in practices. These differences require the recognition of a different kind of lawyer-client relationship, one that goes deeper than the provisions of Model Rule 2.1.²⁷⁴ This welcome expansion of a lawyer's scope of consideration is, nevertheless, not sufficient when it

274. Model Rule 2.1 permits lawyers to consider the "moral, economic, social and political factors" in matter. ANN. MODEL RULES OF PROF'L CONDUCT R. 2.1 (1998).

is often these very factors that are the heart of the client's claim and the center of the lawyer's representation.

V. CONCLUSION

Commentators discuss the need for organizing residents of poor communities in order to combat the poverty and injustice that they constantly confront. The benefits of organization include the acquisition of power that is to be used against the sources of oppression. The ideal of these organizations is that they are run on democratic principles with leaders that are duly elected or who emerge with the affirmative acceptance of the membership. We have seen in this article that the reality does not always conform to the ideal.

Many of the commentators who call for collective action by disempowered groups also discuss the need for, and the part to be played by, progressive lawyers who will represent the groups. The paramount role is the creation or maintenance of democratic procedures in these groups by a lawyer who adopts, on the whole, the group's substantive choices without significant participation by the lawyer in those choices. Moreover, this same commentary offers uncritical endorsement to the application of the democratic ideal to community groups.

We believe that a critical examination of the differences in groups and in their leadership will suggest different models of governance in different situations. There is no one-size-fits-all system that should be imposed on every group. It is our view that a lawyer should take a more participatory role in substantive decision making by group clients. To the extent a lawyer is committed to social change based on mobilizations of residents in poor neighborhoods, the lawyer must be prepared to expand her own horizons in terms of what she can do to assist in these efforts. The process between client and lawyer in these circumstances should be interactive and multi-disciplinary. In this way, the law and its practitioners can be effective in the struggle against poverty, subordination and injustice.

