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FOOL FOR A CLIENT: SOME REFLECTIONS ON REPRESENTING THE PRESIDENT

Margaret Raymond

INTRODUCTION

We’ve all heard the old joke. You’re in a room with a poisonous snake, a vicious lion, and a lawyer, and your gun has only two bullets. What should you do? The answer, of course, is to shoot the lawyer twice.

Much of the commentary about the lawyers who represented Bill Clinton in the Paula Jones matter and the Independent Counsel investigation sounds a bit like shooting the lawyer twice. Regardless of whether particular commentators disliked the sometimes lame and painfully legalistic defenses offered by Clinton’s counsel, or felt, by contrast, that his lawyers had not been aggressive enough, pretty
much everyone agreed that whatever it was that was wrong, it was the lawyers’ fault.³

³ Robert Bennett, Nat’l L.J., Feb. 22, 1999, at A27 (arguing that Bennett could not respond to Dershowitz’s allegations because of confidentiality and privilege). Mr. Olson concluded that “Mr. Dershowitz has spent too much time watching himself on television.” Id. But there were other critics as well. See, e.g., Greg Gordon, Bad Legal Decisions Costly for President, News & Observer (Raleigh, N.C.), Sept. 18, 1998, at A12 (quoting Professor Steven Lubet as saying that counsel should have instructed Clinton to decline to answer questions about Monica Lewinsky at the Jones deposition on the grounds the questions inquired into his private life). Professor Lubet also criticized Bennett for asking clarifying questions about the president’s denial of a sexual relationship with Monica Lewinsky, claiming that Bennett had violated “[o]ne of the cardinal rules of defending a deposition. . . . [which is] that you don’t ask unnecessary questions of your own client.” Id.; see also Adam Pertman, Against Pros, House Managers Faced “Mismatch” Lawyers Say, Boston Globe, Feb. 12, 1999, at A18 (“[N]early all observers agree he [Mr. Clinton] probably could have escaped the entire impeachment drama if his initial private lawyer, Robert Bennett, had persuaded Clinton to plead the Fifth Amendment rather than provide any substantive testimony during the Paula Jones civil suit.”); Letter by Michael Riikola, A Third Strategy Could Have Saved Clinton, Nat’l L.J., Mar. 1, 1999, at A20. Riikola contends that counsel should have instructed Clinton not to answer questions about Monica Lewinsky in the Jones deposition, should have sought interlocutory review of any order compelling such testimony, and should have persisted in the refusal even if the court struck his answer as a result, and notes:

It is appalling that Yale Law School could produce a lawyer in Mr. Clinton who is so naive as not to understand the rudiments of civil discovery, and worse yet that Bob Bennett could allow his client to undergo the worst possible suffering for no good reason and then try to rationalize it by invoking privilege.

Id.

Mr. Bennett was not the only lawyer subjected to criticism. Others criticized David Kendall “for not having his client come forward with the truth earlier, for letting him testify before the grand jury, [and] for allowing him to dig himself into even deeper legal trouble with his grand jury answers.” Marcus, supra note 1.

³ See Margolick, supra note 1 (“[W]hen blame for the Monica Lewinsky matter is apportioned, the finger-pointing goes in another direction: towards Mr. Clinton’s lawyers.”); see also Maureen Dowd, Power of Attorney, N.Y. Times, Sept. 20, 1998, § 4, at 15. Dowd comments:

It was inevitable, of course, that lawyers would destroy civilization. . . .

. . . . [I]t’s top-flight lawyers who bollix up everything and make a ton of money doing it . . . .

The capital is in a titanic twilight struggle between armies of lawyers . . . .

The First Lawyers owe more than $6 million to lawyers who have given them bad legal advice and allowed Mr. Clinton to turn his White House into a lying machine for seven months and dodge behind silly, tortured legalisms about sex.

Id.

The White House “even has spinner lawyers to put the best light on stupid things the lawyers are doing.” Id.; Richard Louv, Clinton in Crisis: Issues That Will Outlive the Clinton Controversy, San Diego Union-Trib., Sept. 30, 1998, at A3 (“To some of us, Clinton seems less a congenital liar than a congenital lawyer. His highly legalistic defense, ‘using a tortured definition of sex that has earned him great ridicule,’ could be related to the training that elite lawyers now get. . . .” (quoting David Margolick, supra note 1)); Cynthia Tucker, Clinton Must Cut to Chase, New Orleans Times-Picayune, Feb. 1, 1999, at B5 (“A lawyer himself, he [Clinton] surrounded himself with other shortsighted lawyers . . . who made legalistic decisions that served the
FOOL FOR A CLIENT

We must, however, acknowledge the possibility that the lawyering in this case had very little to do with the lawyers. What if the client himself was largely in control of his representation, controlling the flow of information to his lawyers with at least some awareness of the consequences that the limited information he allowed them might have for the course of the matter? What if the client, in effect, chose to represent himself? I don't mean in the Faretta v California sense, but in the sense of making conscious decisions, with known consequences, to limit the information shared with the lawyers and, in turn, their ability to control and direct the representation. This Article addresses the lessons to be learned by lawyers from the Independent Counsel's investigation of President Clinton as well as from the Paula Jones matter. In Part I, President Clinton's behavior is considered in light of the behavior of former President Nixon. Part II discusses the tendency of powerful and sophisticated clients to engage in self-representation. Part III examines a lawyer's ethical obligations to a client who engages in self-representation. The Article suggests that the Clinton experience, rather than providing a lesson for lawyers, provides, perhaps, a lesson for clients who systematically ignore their lawyer's advice, pursuing their own course of action during their representation.

I. THE NIXON EXPERIENCE

We know that some decisions made in Mr. Clinton's representation were problematic, as indicated by the finding of the district court president poorly.

4. Others have made this suggestion. See, e.g., Olson, supra note 2 (arguing that Bennett could not respond to Dershowitz's allegations because of confidentiality and privilege).

Representing President Clinton in the Jones case had to have been one nasty little surprise after another. But Mr. Bennett won the Jones case. It was the president who lied in his deposition, erected a wall of falsehoods to mislead the Jones lawyers and scrambled like a cheap thief to hide all the shabby evidence. The president has no one to blame for his impeachment but his own unmanageable impulses and unprincipled defenses.

Id.; see also Marcus, supra note 1 (noting that "[s]ome cautioned against assigning fault to the lawyers" because "it was impossible to know whether Clinton had heeded their advice," and because "legal advice can only be as good as the information on which it is based, and that it was clear the president had been misleading and dishonest with his lawyers . . .").

5. 422 U.S. 806 (1975). Faretta deals with the constitutional right to self-representation. While "self-represented" defendants often are assigned advisory counsel by the courts to assist them in preparing for court proceedings, I do not mean to suggest that Mr. Clinton's situation is a case of constitutionally privileged "self-representation." See Paul H. Byrtus, Pro Se Defendants and Advisory Counsel, 14 Land & Water L. Rev. 227, 229 (1979).


holding Mr. Clinton in civil contempt of the United States District Court for lying in his deposition in Jones v. Clinton.\(^6\) Identifying the players who made those decisions is a different task, and one that is difficult to accomplish. Needless to say, we can't know what happened in the context of Mr. Clinton's relationship with his lawyers.\(^7\) That information is shielded by confidentiality and privilege, and it should be, not least because it makes it so interesting for us to surmise on limited information.

But we can look to roughly comparable situations, the most obvious comparison being Richard Nixon.\(^8\) The advantage here, of course, is extensive memoirs by some of the participants concerned, which shed some light on the nature of the relationship between Nixon and his lawyers.\(^9\) The story told by Nixon and by one of his lawyers is strikingly similar to President Clinton's.\(^10\) It suggests that Nixon retained

\(^6\) 36 F. Supp. 2d 1118, 1127 (E.D. Ark. 1999) (finding that "the record demonstrates by clear and convincing evidence that the President responded to plaintiff's questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process"); see also Suzanne Garment, Refreshing Ruling Blows Away the "Is, Is" Smoke, L.A. Times, Apr. 18, 1999, at M1 ("The president lied. Not great lies for reasons of state, the kind we must forgive, but little, low, rotten, squirmy lies of the sort that small boys tell for no reason higher than to protect themselves from deserved punishment.").

\(^7\) In Bob Woodward, Shadow: Five Presidents and the Legacy of Watergate (1999), Woodward suggests that Clinton did not trust his lawyers. During his years in the White House, Clinton had become increasingly isolated, to the point where he would not even confide in his own lawyers, despite their entreaties, nor be truthful with them. See id. at 515-16; see, e.g., id. at 259 (reporting that Clinton told Bennett he was "retired" from pursuing women); id. at 361 (reporting thorough questioning by Bennett about Monica Lewinsky, to which Clinton responded untruthfully). But Woodward's book is not a firsthand account, and his sources are not attributed. His account must, therefore, be viewed with some skepticism pending further development of the historical record.

\(^8\) In treating Nixon's situation as comparable to Clinton's, I express no opinion about whether the wrongdoing involved in the Clinton situation was or was not of comparable seriousness to that involved in the Watergate cover-up. The similarity that interests me here is how a beleaguered president, whose political survival is threatened, shapes the relationship with his legal advisers.

\(^9\) Before we proceed with the discussion of what we know about Nixon's lawyers, an interesting question is whether it was proper for us to learn about it. Leonard Garment, in his memoir Crazy Rhythm, discusses at some length his representation of Nixon as White House counsel, including verbatim reports of Nixon's statements to him and discussions of strategy, tactics, and advice. See Leonard Garment, Crazy Rhythm 245-302 (1997). Whether Garment obtained Nixon's express consent to publish the book before Nixon's death, or felt that the 1978 publication of Nixon's memoirs in effect opened the attorney-client relationship to the public view, is unclear. Garment does not discuss the matter in his book.

\(^10\) One might expect after-the-fact retellings to have something of a finger-pointing quality. These do, but only in the most limited contexts—namely, the disagreement about whether the tapes should have been destroyed, which Nixon says he avoided on Garment's advice, while Garment argues that Nixon, conscious of his role in history, did not want to destroy them and would not have done so regardless of legal advice. See id. at 281-82. But the sense of the distribution of authority and information in the lawyer-client relationship comes through consistently in both versions.
control of his representation, limiting and rationing the information available to his lawyers and making decisions himself based on his own assessment of the legal and factual significance of particular facts and circumstances.

What did the lawyers say about the relationship? While White House counsel and an associated group of government lawyers represented the interests of the Presidency, Nixon, early on, resisted entreaties to hire private outside counsel to represent him as an individual. He decided, instead, in the words of White House counsel Leonard Garment, "to manage his Watergate defense personally. He would be his own lawyer ... ."11

Having made the decision to control his own defense, Nixon also controlled the information available to his legal team. Most notable was his treatment of the White House taping system and the audiotapes of critical conversations that had taken place in the White House. Nixon ordered Alexander Haig, then White House Chief of Staff, to withhold from the lawyers the existence of the White House taping system.12 Ultimately, Garment indicates, it became apparent to the lawyers that "Nixon ... had a secret cache of information that he would not show us, and increasingly it seemed probable to Fred [Buzhardt] and me that this information was of the type that might compromise our ability to represent him in court and in public if we knew its nature."13 Perhaps that explains the fact that, while the two apparently agreed that Nixon "must have had a large cache of tapes that he was using selectively to 'refresh' his recollection," they evidently did not press the President to disclose to them what he knew.14 Only on July 10, 1973, after John Dean had already testified before the Senate Judiciary Committee, was the existence of the secret White House taping system fully disclosed to Garment, then counsel to the President.15

The result of Nixon's reluctance to make full disclosure to his law-

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11. Id. at 268. Garment went on to say that Nixon planned to proceed, "working principally through Haig and doling out spoonfuls of time and information to Buzhardt and [Garment] while conferring personally and at length with the private lawyers for ex-aides H. R. [Bob] Haldeman and John Ehrlichman and with Haldeman himself." Id. at 268. Al Haig, then chief of staff, "was the principal communications link between Nixon and his lawyers." Id. at 266. Nixon in fact proceeded on this tack. At the same time that Garment was agreeing to take on Watergate as counsel to the president, Nixon was meeting with other advisers to devise strategies for addressing Watergate. Garment was not told of these meetings and was not a participant in them. See id. at 256. It was not until December 1973 that Nixon engaged outside counsel James St. Clair. See id. at 291.

12. See id. at 271.

13. Id. Fred Buzhardt was special counsel for Watergate affairs. See Ken Gormley, Archibald Cox 274 (1997). Buzhardt and Garment began to suspect that "Nixon, in revising our drafts, was consulting extracts from tape recordings." Garment, supra note 9, at 271.

14. Garment, supra note 9, at 271.

15. See id. at 275.
yers, in Garment's view, was to "isolate him from his so-called advis-
ers and make us powerless to give sensible advice." 16 Nor did the law-
yers press the president for details; Buzhardt, in Garment's words, "tiptoe[d] through the evidence with Nixon, accepting detailed repre-
sentations of fact without pressing Nixon about their source." 17 Even
at the point when the existence of the tapes had been disclosed and
the President's legal advisors were considering how to proceed with
them, the legal team had still not heard any of the critical tapes;18
when the decision was made to turn over the subpoenaed tapes, Gar-
ment still had not heard any of them.19

Nixon's own account is in many respects similar to Garment's.
Early discussions of ways to contain the Watergate situation, dis-
cussed in his Memoirs,20 did not include counsel.21 Nixon did not con-
sult with White House Counsel John Dean on the matter, expecting
others to do so and desiring only that Dean be admonished "not to
contrive a story that might not succeed." 22

Nixon, by his own account, was unquestionably in control in his re-
lations with his lawyers. He comments at one point that the cover
story for payments to the Watergate burglars would be that a "Cuban
committee" had "taken care of the defendants." 23 Told by Dean
"[t]hat isn't of course quite the way it happened," Nixon responded, "I
know, but it's the way it's going to have to happen." 24 Throughout
the investigation, Nixon relied on his own legal judgments.25 While ap-

16. Id. at 272.
17. Id. at 271.
18. "[N]one of us, as far as I know, had heard any of the tapes with the possible exception of Buzhardt who might have heard fragments . . . ." Id. at 278.
19. See id. at 288. Garment hypothesizes that Nixon's attempt to control the situa-
tion accounted for the way Nixon sounded on the tapes; "one reason why the Nixon
of the Watergate tapes sounds so wandering, repetitious, contradictory, and at times
almost incoherent" was that he "was aware of where he was heading and created a
smoke screen of circumlocution so that nobody else would see his design." Id. at 258.
21. These included the suggestions that "every time the Democrats accused us of
bugging we should charge that we were being bugged and maybe even plant a bug and
find it ourselves!" id. at 637, suggestions that the break-in could be explained as a
"Cuban story," id. at 638, as well as the "smoking gun" proposal to have CIA director
Richard Helms ask the Acting Director of the FBI, Patrick Gray, to stop the investi-
gation by claiming falsely that it would impinge on CIA interests. See id. at 640.
22. Id. at 661.
23. Id. at 797.
24. Id. Nixon also stated that everyone should agree that payments to the Water-
gate defendants were not used to obstruct justice—"I don't mean a lie, but a line." Id.
at 825.
25. See, e.g., id. at 807 (noting in his diary that "there might not be any legal basis
for prosecution for people paying blackmail"); id. at 821 ("I still could not believe that
the prosecutors could charge Haldeman and Ehrlichman with conspiracy simply be-
because they had been asked whether it was all right to raise the money [for the Water-
gate defendants] in the first place"); id. at 826 (noting charges leveled by Richard
Kleindienst based on statements by John Dean "did not seem to me to be sufficient
evidence to indict either [Haldeman or Ehrlichman]"); id. at 832 ("I told myself that I
parenently cognizant of the value of counsel,26 Nixon rarely listened to the advice of lawyers.27 It is almost astonishing now to consider how little lawyering Nixon received.28

A stingy and selective sharer of information, Nixon appears to have been unwilling to disclose the critical facts to his lawyers. Again, the treatment of the tapes stands out. Nixon identified a number of conversations that were likely to be of concern.29 But he kept them to

had not been involved in the things that gave them [Haldeman and Ehrlichman] potential criminal vulnerability."). Nixon also refers to his discussion style—thinking “a problem through out loud, even considering totally unacceptable alternatives in the process of ruling them out” as “a lawyer’s typical mental exercise.” Id. at 843. For another example of Nixon relying on his own legal judgment, see Garment, supra note 9, at 276-77. Garment reports that in his Memoirs, Nixon claimed shock that any witness would disclose the existence of the taping system rather than invoking executive privilege. See id. at 276. Garment notes:

I do not believe such a claim would have had the slightest legal merit; but this is an academic judgment, since none of the White House lawyers ever had the opportunity to discuss options before the crisis was upon us. If there had been reasonably open communications between the president and us, we would at least have had time to canvass the possibilities. But there wasn’t and we didn’t.

Id. at 276-77.

26. Nixon observes that when Ehrlichman took over the authority for handling Watergate from Dean, Ehrlichman, “[i]n order to establish a lawyer-client privilege... drew up a letter for me to sign, officially charging him with these responsibilities.” Nixon, supra note 20, at 812.

27. The first reference in the Memoirs to outside counsel in connection with Watergate is a discussion of a request to have a lawyer, Chappie Rose, meet with Nixon “to give [him] some outside counsel.” Id. at 839. The meeting is hardly a classic attorney-client conversation. It was Pat Buchanan who “summarized the options” at the meeting. The advice that Rose gave—that requiring the premature resignation of Haldeman and Ehrlichman might prejudice their rights—was disregarded. See id.

28. Nixon noted that a staff of fewer than 10 lawyers assisted him, including Fred Buzhardt, Len Garment, Professor Charles Alan Wright on a part-time basis, and several young lawyers. See id. at 873; see also Garment, supra note 9, at 264 (“There was, sad to say, not a single experienced criminal defense lawyer in the ‘firm.’”). Nixon’s private counsel, James St. Clair, was not engaged until late 1973. See Nixon, supra note 20, at 973. Nixon commented: “[W]e were like a high school team heading into the Super Bowl.” Id. at 873. According to Garment, the lack of a large legal team was partly “appearances: The president had proclaimed his innocence and presumably did not need a large legal team.” Garment, supra note 9, at 267. Another reason was Nixon’s unwillingness to trust a private law firm with presidential confidences. See id. But the willingness to proceed without private counsel is surely a reflection of a different era. When Alex Butterfield was called before the full Senate committee to testify about the White House taping system, he asked Garment whether Garment would represent him. Garment explained that he could not, for “technical conflict reasons,” but that “he didn’t really need a lawyer. Since he was going to be on national television, it was more important for him to get a good haircut.” Id. at 277.

29. One was the March 21, 1973 conversation with John Dean in which Dean warned Nixon that knowledge of the break-in and active involvement in the coverup extended deeply into the White House, the so-called “cancer” close to the presidency discussion. See Nixon, supra note 20, at 791. Another was the June 23, 1972 conversation with Haldeman in which the two discussed the possibility of deflecting the FBI’s investigation of the break-in by getting the CIA director to ask the FBI’s acting director to desist by claiming falsely that the break-in was a CIA operation. See id. at 639-
himself and to his political advisers, rather than sharing them with the lawyers, who first listened to those tapes only after their client, had already been ordered by the Supreme Court to produce them. The lawyers, it appears, did not insist on being apprised of all the facts, and the client most certainly did not offer to convey them. Either way, the dynamic of the relationship was hardly the sought-after model of full disclosure and considered advice. Like many clients, Nixon did not trust lawyers, because he believed his lawyers did not understand what to him was the essentially political nature of the controversy. He used different advisors in different contexts to play various strategic roles—a political skill he would naturally bring to his own self-defense. But the Nixon case is a persuasive example of a situation in which a president, as a client, was routinely engaged in self-representation.

II. CLIENT SELF-REPRESENTATION

The tendency of presidents to engage in self-representation suggests three things. The first is that we may not be able to apply ordinary models of attorney-client relations to lawyers who represent the President. Highly knowledgeable, highly powerful, and cognizant
first and foremost of the political consequences of their legal situations, presidents are simply not typical clients. While that may be true, it is not a matter of much consequence. Very few lawyers have the opportunity to represent the President of the United States (though such representation may be becoming something of a growth industry).

The second point, more significant for this discussion, is that we ought to be very careful about drawing conclusions about what is wrong with lawyering in the United States from observing the way Bill Clinton's lawyers behaved in the Monica Lewinsky matter. Lawyers representing such uniquely situated clients, who are likely to be directing their own representation to a significant degree, may not be responsible for everything that happens in such representation. At the very least, they do not present examples about which we can easily generalize.

The third point is that perhaps this self-representation model goes beyond presidents, and that we ought therefore to examine with more care the obligations of the lawyer representing a knowledgeable and sophisticated client. Such clients, whether corporate CEOs or cabinet secretaries, have a knowledge base, a power base, and a set of interests to protect that may create a different dynamic between lawyer and client—and in turn require some different responses.

Existing codes of ethics do not help us much with the complex dynamics of the lawyer's relationship with a powerful and sophisticated client. To the extent the ethical rules reflect a vision of the attorney-client relationship, it is a monolithic—and admittedly simplistic—notion that lawyers are knowledgeable and clients are naive. The pri-
mary concern reflected by the Model Rules is that lawyers will use their power over their clients to dominate the lawyer-client relationship inappropriately. The "normal relationship" envisioned by the Model Rules is one in which the lawyer clearly takes the lead, educating and assisting the client to enable him to make those decisions that are proper for him to make.

We assume client naivete in other contexts, as well. The voluminous literature about client perjury, for example, assumes this same unschooled client. The only client who will create a problem for his lawyer by telling him one set of facts and then seeking to testify to another—the classic perjury paradigm—is a client who doesn't know...
that this course of conduct will create a conflict with the lawyer's obligation of confidentiality. Attempts to "educate" the client about this obligation are criticized on the basis that they create a sophisticated client who is knowledgeable enough to tell the lawyer what the lawyer wants to hear and to conceal from the lawyer those facts that will render the client better off if the lawyer does not know. By telling the client what the rules are, you suggest to him what the most optimal answers would be; warning a client about the lawyer's obligation in the face of false testimony protects the lawyer, but perhaps at the client's expense. It is argued in opposition to claims that counsel should advise clients of the consequences of telling the lawyer of intended perjury that the lawyer giving such a warning is, in effect, abandoning the client to self-representation, requiring him to self-edit and report to the lawyer only what the client thinks the lawyer wants to hear.

How, then, should we deal with the client who comes to the representation as a highly knowledgeable and powerful strategic thinker, likely to feel himself confident and competent at managing his own representation, equipped with knowledge about many matters of which we assume clients are ignorant in the ordinary course?\(^\text{39}\) In light of this knowledge, this client might make several choices that will have a substantial impact on the process of his representation. He might, for example, choose to tailor or alter facts told to his lawyer, withhold selected evidence, mislead the investigation, or tamper with witnesses. He might do this because he wants the lawyer to have a certain vision of the facts. He might do this because he understands the lawyer's obligation to disclose testimony the lawyer knows to be perjurious, and he sees the potential need to offer perjured testimony down the line. He might do this because he wants the lawyer to proceed to develop the case in a certain direction—one the lawyer is less likely to pursue if he knows all the information the client has to share. He might do this because he is engaging in self-delusion. He might also do this because he perceives it as a strategic way of dealing with what he views as his primary problem, which he may view as a political, business, or personal problem rather than a legal one.

This description sounds like the typical criminal defense client. But this client is different—or thinks he is. This is because he understands—or believes he does—the consequences of his choices. He has made a conscious decision not to rely on the advice of his lawyer. He is, in some significant respect, representing himself.

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\(^{39}\) The idea that we might consider applying different categories of ethics rules to different categories of client is not new. See, e.g., Zacharias, *Reconceptualizing Roles*, supra note 35, at 170-71 (discussing how "[a] unitary approach to legal ethics carries with it several serious consequences").
III. THE LAWYER’S ETHICAL OBLIGATIONS

Once it has been identified that a powerful client prone to self-representation exists, what are the lawyer’s ethical obligations when dealing with this client? The first, of course, is to acknowledge the likelihood that this client, confronting some legal difficulty, thinks it likely that he can handle it best himself and may be likely to engage in some degree of self-representation. From here, the principles that might be controlling take us in somewhat different directions.

The first is the principle of equality: Clients should be treated equally to the extent that such equality is possible. If the goal were to treat clients equally, then there should be some attempt to equalize the situations of the knowledgeable and the unsophisticated client. If equality were the guiding principle, then the reason to be concerned about the knowledgeable client would be that he is situated differently—for better or worse—than the naive client, and that some systematic attempt ought to be made to equalize the situations of the two clients.

The principle of equality has intuitive appeal. Clients need lawyers to level the playing field and provide the expertise in dealing with the legal system that the traditional naive client typically lacks; there is something troubling about providing representation that differs, in some significant respect, based on the level of knowledge or sophistication the client brings to the attorney-client relationship. It seems fairer to strive for a situation in which having a competent lawyer will put a client in at least as good a position as he would have been in had he himself possessed a sophisticated understanding of the law. At the same time, the principle runs the risk of representation that focuses on the needs of other clients, rather than this client.

How could we give force to the equality principle and equalize the situations of the knowledgeable and naive client? One possibility, as some have suggested, is a routine “Miranda-type” warning to all clients explaining the pertinent rules, including the rules governing confidentiality and client perjury. This would level the playing field

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40. The Model Rules of Professional Conduct reflect some attempts in the direction of the “equality” value, one example being clients operating under a disability, see supra note 37, where Model Rule 1.14 makes clear that the lawyer is to treat those clients, to the extent possible, like any other client.
42. See Marvin E. Frankel, Clients’ Perjury and Lawyers’ Options, 1 J. Inst. Study Legal Ethics 25, 35 (1996) (discussing the need to disclose to clients the possibility that their confidences will be disclosed if they perjure themselves and the lawyer knows it: “[T]he client, entitled to the autonomy that was always to be respected and is today properly extolled, has the right to a candidly advised choice. Autonomy also
somewhat. But no five-minute script can eradicate the difference between a client with power, authority, and a legal education and a client who has been given a five-minute briefing by a lawyer in the context of what may be a terrifying and unfamiliar situation. Moreover, while such warnings have equality benefits, they expand the potential for client fabrication and manipulation. There is also a concern about what such a warning does to the trust-building phase of the attorney-client relationship. So some significant doubts exist about the utility or appropriateness of giving the naive client equal information.

Another way to equalize the treatment of the two clients would be to treat more skeptically information that came from a sophisticated client who was aware of the pertinent rules. All else being equal, a person who knows how to manipulate the rules of a game to his advantage is more likely to cheat than is a person who is unaware of what the rules are. Applying that general rule to this particular situation, the odds are greater that the sophisticated client has tampered with the information he has given to the lawyer. This would suggest that it might be appropriate to treat this client’s statements with more skepticism. Perhaps in representing these clients, the lawyer should have a duty of independent investigation, to further explore physical and documentary evidence, to interview additional witnesses, and to use other avenues to confirm the truth of what the client has said, because the client’s knowledge maximizes his power to manipulate the information given to his lawyer.

This is interesting, because it is the opposite of the bias under which most of us operate. Imagine a lawyer—perhaps a public defender—representing a client in a routine burglary case. The client assures the lawyer that the case is one of mistaken identity and that he has an air-tight alibi, notwithstanding circumstantial evidence that points strongly to his guilt. Most of us would think that it would be a mistake in judgment for the lawyer to accept on blind faith the client’s assertion that he has an alibi and encourage the client to step forward and tell it to the police. Most of us would say that the lawyer has some obligation to investigate the facts, to determine whether the alibi is plausible and consistent with the existing physical evidence, before encouraging the client to tell his story to the cops.

Yet make the client the President, or another powerful and sophisticated individual, and all of a sudden we have our doubts about an independent duty of investigation. Instead of viewing the client’s

carry burdens, for clients and everyone. An informed judgment about whether to tell the truth is a proper client responsibility.”); see also Pizzimenti, supra note 41, at 487 (arguing that lawyers should have a duty to inform clients about limits on the duty of confidentiality).

43. Consider Professor David Luban’s analysis of why we might not want to modify the legal ethics rules to equate knowledge and “conscious avoidance of actual knowledge of the fact in question.” David Luban, Contrived Ignorance, 87 Geo. L.J.
story with skepticism, we are worried about undermining the relationship of trust and confidence between the lawyer and client.44 We are worried about requiring the client to bear the costs of this adversarial role his lawyer is going to play. We are worried about the lawyer's role as advocate. We are worried about the client's autonomy and control. Should not the client be able to define the scope of the representation?

Why do we view these two clients differently? It might be because we do not have any faith that the burglar is making a competent decision,45 but we have faith in the competency of the powerful client. It might be because we do not identify with the burglar in the same way we do with the President; accordingly, we think the burglar is more likely to lie. For whatever reason, the equality principle would suggest that our natural inclination to avoid this investigatory obligation with more powerful and sophisticated clients is precisely backward. It is the sophisticated client the lawyer should trust the least and check up on the most.

As opposed to the principle of equality, we could adopt the second governing principle of the attorney-client relationship: the autonomy principle. This principle says that a client should be entitled to control

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957, 976 (1999) (discussing possible amending language to the Model Rules of Professional Conduct Terminology 9) (footnote omitted). He argues that this would fundamentally change the nature of legal practice—and that this would impact sophisticated clients:

Sophisticated clients with something to hide would have reason to actively frustrate their own lawyers' factual investigation of their case, because they would know that their lawyer is ethically required to ferret out guilty information that she might then be ethically required to disclose. (Under the current rule, if the client has something to hide, the lawyer can elect to leave well enough alone, and the client can signal her to do so.) The worried client may frustrate the lawyer's investigation even of innocent facts that the lawyer needs, because the client does not know the facts are innocent.

Id. at 976-77.

44. Similar concerns were raised under Rule 11 of the Federal Rules of Civil Procedure.

45. Frightened of conviction and unschooled (though not necessarily unsophisticated) about the criminal justice process, we think the client may poorly judge the risks he exposes himself to by offering what may be a manufactured alibi. In contrast, we are troubled by the notion that the President cannot make those decisions effectively and needs to be second-guessed by his own lawyers.
his representation to the degree he is able. Powerful, sophisticated clients will control their representation almost completely, but under this principle the consequence is the appropriate one, considering who the client is.

We spend a lot of time worrying about protecting and preserving the autonomy of clients.46 But for the most part, we are worried about clients who do not have enough autonomy.47 The chorus of voices advocating for increased client autonomy is lodged in concerns about client impotence, weakness, and inferior knowledge.48 Clients who, by virtue of class and social status or knowledge base, feel themselves to be powerless in the relationship between lawyer and client are subject to the lawyer's manipulation and control. Our interest in client autonomy seems directed at protecting these clients and assuring them the power to make their own choices.

Here, though, exactly the opposite is true. The powerful client has maximum autonomy. The lawyer has no control over the client and cannot exercise any dominion over the attorney-client relationship. The lawyer's ability to provide adequate, competent representation is threatened; without truthful and complete information, the lawyer's representation is unlikely to be optimal. Worse yet, the lawyer knows that, after the fact, he will be critiqued for pursuing a strategy shaped and governed, in large part, by the client's ungovernable choices.

One answer to the argument that the client should be allowed to


47. Professor Fred Zacharias notes that differences in clients are "relevant to the rationales that aggressive counsel is needed to serve the 'dignity' and the 'autonomy' of their clients." Zacharias, Reconceptualizing Roles, supra note 35, at 187 n.87 (citing Philip M. Gassell et al., Representing the Helpless: Toward an Ethical Guide for the Perplexed Attorney, 5 W. St. U. L. Rev. 173, 187 (1978)).

48. See, e.g., Camille A. Gear, The Ideology of Domination: Barriers to Client Autonomy in Legal Ethics Scholarship, 107 Yale L.J. 2473 passim (1998). This article focuses on client autonomy issues in the author's clinic representation of Ms. Scott, "a thirty-five-year-old black woman who is HIV-positive, homeless, a substance abuser, and a domestic violence survivor," who is trying to regain custody from the state of her three-year-old HIV-positive son. Id. at 2474. The author expresses concern about "whether an ethical attorney would help Ms. Scott pursue her wishes." Id. at 2475. The author notes later that "[w]hile the ideology of domination affects all clients, regardless of their wealth and social power, poor clients may feel its effects most acutely because such clients are likely to present moral problems with which the lawyer is unfamiliar." Id. at 2485. Her goal is to "transform the attorney-client relationship into a space where a client can learn how to engage in autonomous moral decisionmaking." Id. at 2500; see also Simon, supra note 46, at 225 (the debate about client autonomy "expresses the anxiety that lawyers, especially those who represent clients socially distant from themselves, feel about getting to know their clients and about assuming responsibility for them"); Marcy Strauss, Toward a Revised Model of Attorney-Client Relationships: The Argument for Autonomy, 65 N.C. L. Rev. 315, 336-37 (1987) ("Client decision making is an inherent good because it recognizes individual dignity and personhood and the right of self-determination. . . . Making our own decisions affirms our sense of personhood—it tells us who we are.").
make his own choices is that the client may misperceive the lawyer's role. A lawyer is useful not only because she is trained, but also because she is detached. A client who is certain he can manage his own situation optimally may lack the objectivity and distance necessary to make rational choices for himself. But perhaps a client who is fairly apprised of this danger should be able to assess that situation and make those decisions for himself.

One way to honor the autonomy value while addressing this problem would be to give the client a warning, one tailor-made for a knowledgeable and sophisticated client. The warning could clearly acknowledge the client's potential inclination to self-representation and the client's power to control and manipulate the course of the representation. The warning should point out the potential dangers of doing so: that the client will, in effect, be operating without effective legal advice; that the client may lack the objectivity and perspective that the lawyer can provide; and that there is a danger of being found out in untruths or distortions that may have more severe consequences than the truth. The warning can urge the importance of telling the lawyer all relevant information.

Such a warning interferes to some extent with the autonomy principle. First, the warning itself suggests that the client's decisions about his case may be less than optimal; as such, it is a device of control and manipulation in the attorney-client relationship. Second, it leaves an open question: Is a lawyer always free, after the warning, to believe the client and proceed on that basis unless presented with clear evidence to the contrary? Does such a warning strike the appropriate balance between honoring a client's right to control the representation and warning him of the dangers of self-representation? Such a client, certain of his ability to outsmart his adversaries and to devise proper strategies, may view controlling the information to his lawyer as the best way to stay in control of the situation and maximize his options.

CONCLUSION

As I see it, we have two choices in dealing with sophisticated and powerful clients. We can treat these sophisticated and powerful individuals with more suspicion, giving force to the equality principle; or we can warn them frankly of the dangers of proceeding on their own and then allow them to make their own choices, giving force to the autonomy principle. As a practical matter, it will matter very little. Either way, these powerful clients are likely to possess the power, knowledge, and access to manipulate the lawyer's information, to force the lawyer's hand, and to require the implementation of certain strategies that would not be the lawyer's choice. Little that the lawyer says or does will affect the attempt. In those circumstances, we should think twice before we conclude that such a situation requires us to re-conceptualize the role of lawyers in American society. Remember
that it is not only lawyers, but also clients, who have the power to direct representation. Firing that gun twice at the lawyer may ignore the most dangerous person in the room.
Notes & Observations