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WHO'S IN CHARGE HERE?: PUTTING CLIENTS IN THEIR PLACE

Jason J. Kilborn*

The special information which lawyers derive from their studies insures them a separate rank in society . . . . This notion of their superiority perpetually recurs to them in the practice of their profession . . . and the habit of directing to their purpose the blind passions of parties in litigation inspires them with a certain contempt for the judgment of the multitude.¹

Quick: name the one and only federal law, regulation, or rule that requires a client to obtain her attorney's approval of her desired

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course of action. Hint: the attorney's approval must be in the form of a written and filed certification that the client's desired action represents a sound choice for the client. If you said Federal Rule of Civil Procedure 11, you are close, but not quite correct. Rule 11 simply requires the client to obtain from her attorney a very general, preliminary, low-level review of fact and law questions. The judge and jury will make final fact and law decisions later even if lawyer and client privately disagree on the merits. The attorney's "gatekeeper" role under Rule 11 is riddled with provisos and, ultimately, requires very little from the attorney.

The answer is buried in section 524(c)(3)(B) of the Bankruptcy Code. Sometimes a consumer debtor wishes to contract with a creditor to repay a debt that would otherwise be discharged in the debtor's bankruptcy case. If the debtor wishes to make such an enforceable "reaffirmation agreement," and if that debtor is

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3 Rule 11 requires only that the attorney certify that, "to the best of the [attorney's] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the client's legal contentions are "warranted" by colorable arguments under existing law or nonfrivolous extension of existing law, and that the client's factual assertions have or "are likely to have" evidentiary support. Fed. R. Civ. P. 11(b). This or a similar certification requirement appears in a number of federal rules and regulations. Fed. R. Bankr. P. 9011(b); U.S. Tax Ct. R. 33(b); U.S. Ct. Int'l Trade R. 11(b); Ct. Fed. Claims R. 11(b); 12 C.F.R. § 263.7(b) (2002) (governing matters presented to Board of Governors of Federal Reserve System); 17 C.F.R. § 201.153(b)(ii) (2002) (governing filings with Securities and Exchange Commission); 29 C.F.R. § 102.21 (2001) (governing answers submitted to National Labor Relations Board); 37 C.F.R. § 251.44(e) (2001) (governing submission of copyright pleadings); cf. 10 U.S.C. § 862(a)(2) (2000) (requiring military counsel representing United States in appeal from court martial to certify to military tribunal that appeal has not been taken for dilatory purposes and, if ruling being appealed is one that excludes evidence, is based on exclusion of evidence constituting substantial proof of material fact). Similarly, a number of rules and regulations call on attorneys to certify that, to the best of the attorney's knowledge and belief after reasonable inquiry, discovery requests, responses or objections are warranted by law and that disclosure has been complete and correct. Fed. R. Civ. P. 26(g); U.S. Tax Ct. R. 70(e); U.S. Ct. Int'l Trade R. 26(g); Ct. Fed. Claims R. 26(g). All of the other attorney certification requirements in federal law require one of two things. Some require that the attorney certify the accuracy of some simple fact within the attorney's knowledge. See, e.g., 28 U.S.C. § 1924 (2000); Fed. R. App. P. 32(a)(7)(C); Fed. R. Bankr. P. 2014(a), 4001(a)(2)(B), 8011(d); Fed. R. Civ. P. 65(b), 71A(d)(3)(B); U.S. Tax Ct. R. 232(d). Others require certifying the bona fides of the client filing a paper. See, e.g., 28 U.S.C. § 144 (2000); Fed. R. Civ. P. 11(b). None of these rules and regulations require counsel to express his or her opinion on the legal or equitable merits of the client's case.
5 A debtor might want to enter into such a counterintuitive "reaffirmation agreement"
represented by an attorney, the debtor must secure from her attorney a written certification that the reaffirmation agreement will not impose an "undue hardship" on the debtor or any dependent of the debtor. Without this attorney certification, a represented

for a number of reasons, including the following: (1) to protect a co-debtor or guarantor of the debt to be reaffirmed, (2) to maintain a relationship with a particularly important creditor, such as a friend or the only pediatrician in town, (3) to gain access to a continuing line of credit from a creditor, possibly in order to begin rebuilding a credit history after bankruptcy or to continue to have access to goods offered by that creditor, (4) to avoid foreclosure on property securing a debt, or (5) to ease the sting of moral guilt following a declaration of bankruptcy. For an insightful discussion of reaffirmation generally, see NATIONAL BANKRUPTCY REVIEW COMMISSION, BANKRUPTCY: THE NEXT TWENTY YEARS 145 (Oct. 20, 1997), available at http://govinfo.library.unt.edu/nbrc/report/06consum.pdf. Although many of these goals could be accomplished by voluntary repayments, which are specifically sanctioned by 11 U.S.C. § 524(f), some debtors want or need—and many creditors require—a binding agreement. 11 U.S.C. § 524(f) (2000).

If the debtor is not represented by an attorney, the judge holds a "discharge hearing" and performs the functions otherwise assigned to the debtor's attorney. 11 U.S.C. § 524(c)(6), (d) (2000).

Although this "certification" is generally a simple unsworn statement, some courts require that it take the form of an affidavit sworn under penalty of perjury. See, e.g., In re Adams, 229 B.R. 312, 315 (Bankr. S.D.N.Y. 1999) (mandating that reaffirmation agreement be accompanied by counsel's declaration or affidavit, not mere statement).

In this certification, which must be filed with the bankruptcy court, the attorney is also required to certify that the debtor's desire to enter into the agreement is fully informed and voluntary, and that she has informed the debtor of the effects of the agreement and the effects of a default under the agreement (that is, the debtor maintains personal liability for the debt, and the debtor can be sued and the debtor's property or wages can be seized to enforce the debt later). Id. § 524(c)(3)(A), (C). The attorney generally makes this certification by signing a statement appearing at the end of the reaffirmation agreement. For example, the Administrative Office of United States Courts released Official Form B240, Reaffirmation Agreement, on June 17, 1999, which is available on-line at http://www.abiworld.org/research/formB240.html (last visited Oct. 10, 2002). The attorney certification at the end of Form B240 reads as follows:

I hereby certify that 1) this agreement represents a fully informed and voluntary agreement by the debtor(s); 2) this agreement does not impose a hardship on the debtor or any dependent of the debtor; and 3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

debtor cannot make a legally enforceable reaffirmation agreement.\(^9\) No law, regulation, or rule of any kind offers any guidance as to how the attorney should identify a hardship that is “undue,” and unlike Rule 11, section 524 contains no provisos or safe harbors for construing “undue hardship” in the good faith exercise of professional judgment or based on a reasonable fact inquiry.\(^10\)

Section 524(c)(3)(B) is not simply a quaint exception in our exceptional bankruptcy law; it is a disturbing example of Congressional manipulation of the delicately balanced client-attorney relationship. It subjects debtors to their lawyers’ virtually unchecked paternalistic oversight, and it thrusts debtors’ lawyers into uncomfortable limbo between advocate and judge.

The attorney certification requirement in section 524(c)(3)(B) is just one overt piece of evidence of a persistent and anachronistic attitude toward attorneys, clients, and power in the United States. This Article challenges that attitude, using section 524(c)(3)(B) as a clear example. Based upon a review of the historical development of the client-lawyer relationship, this Article argues that in allowing lawyers—and arguably forcing them—to exercise veto power over their clients’ lawful decisions, section 524(c)(3)(B) reflects that legislators, judges, and lawyers have not yet shaken off stale views

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\(^9\) Although some lawyers refuse to sign the certification, instead dispatching their clients on their own to ask the court to approve the reaffirmation—a tactic that clearly signals to the court that the reaffirmation should not be approved—§ 524(c)(3) does not allow for this practice. 11 U.S.C. § 524(c)(3) (2000). If the debtor was represented by an attorney at the time the agreement was “negotiated,” § 524(c)(3) requires the attorney to approve or disapprove the agreement providing for no recourse to the court. \textit{Id.} In fact, the law as currently written provides for no judicial scrutiny of the attorney’s judgment whether she decides that the reaffirmation imposes an undue hardship or not, although a few courts have construed § 105 of the Bankruptcy Code to allow them to review attorney-certified reaffirmation agreements. \textit{See e.g., In re Bruzesse, 214 B.R. 444, 449-50 (Bankr. E.D.N.Y. 1997); In re Izzo, 197 B.R. 11, 12 (Bankr. D.R.I. 1996); In re Hovestadt, 193 B.R. 382, 386 (Bankr. D. Mass. 1996). But see, e.g., In re Kamps, 217 B.R. 836, 842 n.10 (Bankr. C.D. Cal. 1998) (stating Code is silent as to review of reaffirmation agreements when debtor has counsel). See generally Brendan C. Recupero, \textit{Note, Judicial Scrutiny of Reaffirmation Agreements}, 32 \textit{SUFFOLK L. REV.} 647 (1999) (discussing court’s authority to review reaffirmation agreements under § 105).

of lawyers and clients that threaten to erode a century of progress for client autonomy.

Part I traces the locus of decisionmaking power in the client-attorney relationship from antiquity through the present.\textsuperscript{11} It highlights how fundamental changes in American law and society in the middle of the twentieth century reshaped the American bar's view of its clientele and reversed a more than 2,000-year-old trend of lawyer domination of clients.\textsuperscript{12} Part II subjects section 524(c)(3)(B) to scrutiny under recent American professional regulation standards.\textsuperscript{13} It argues that inviting lawyers to act as judges and gatekeepers of their clients' ability to bear legal burdens contravenes all standards of modern legal professional responsibility.\textsuperscript{14} The few limited exceptions to the bedrock principle of client autonomy cannot support lawyer paternalism in this context. Finally, Part III exposes how section 524(c)(3)(B) was passed into law all but unnoticed through a creditor-driven, back-door process that gave no consideration to debtors, let alone their relationships with their lawyers.\textsuperscript{15} It dusts off the legislative history to reveal that the attorney certification provision snuck into law at the eleventh hour, as a result of closed-door haggling with lobbyists who wanted not to protect unsophisticated debtors, but to evade judicial controls and manipulate the client-lawyer relationship for the benefit of creditors.\textsuperscript{16} In criticizing section 524(c)(3)(B), this Article encourages a reevaluation of our profession's attitudes toward clients and their position in the never-ending power struggle with their lawyers.\textsuperscript{17}
I. FROM DOMINATION TO DEFERENCE: LAWYER POWER THROUGH THE AGES

Because of their social and professional status, legal representatives have always exerted significant control over their clients' legal decisions. Traditionally, lawyers arrogated to themselves total control over many—if not all—of their clients' legal decisions. In mid-twentieth century America, however, a dynamic period of legal and social unrest challenged traditional notions of lawyer dominance. As a result, revised American standards of legal professional responsibility direct lawyers to consult more carefully with and to heed the decisions of their clients. In particular, the lawyer may no longer legitimately oppose the client's determination of her own "interests" and how those interests are to be advanced. This Part divides the history of control in the client-lawyer relationship into three periods. First, Part I.A describes the social and legal institutions that placed lawyers firmly in control of their clients—or at least inhibited and ignored client autonomy—from antiquity to the beginning of the twentieth century.18 Then, Part I.B briefly recalls the turbulent period in mid-twentieth century American law and society that refocused attention on individual rights, values, and dignity.19 Finally, Part I.C traces the resulting incorporation of individual autonomy into all of the modern American statements of legal professional responsibility.20 From 1969 forward, American clients have enjoyed a clearly defined right to control their own legal decisions, free from their lawyers' paternalistic intervention.21

A. FROM ANTIQUITY TO THE BEGINNING OF THE TWENTIETH CENTURY

From the beginning of the Common Era until well into the twentieth century, the various systems of legal representation accepted and even encouraged legal representatives' control of the

18 See infra notes 22-110 and accompanying text.
19 See infra notes 111-52 and accompanying text.
20 See infra notes 153-213 and accompanying text.
21 See id.
decisions of the parties they represented. Societal inequalities had combined with formalism and elitism in the legal profession to repress or inhibit consideration of a directing role for the client in legal representation. Written and unwritten norms of lawyer-client interaction at best ignored the client’s interest in controlling her legal matters; at worst, they encouraged lawyers to substitute their moral or legal judgments for those of clients. Most clients had little choice but to submit to the total guidance of their advocates.  

Those who sought legal representation were in most instances relegated to handing over complete control to the legal expert and praying that the result obtained would suit them.

In ancient Athens, the earliest forms of legal representation arose in a context that could not yet give rise to any duty to the “client.” In fact, true representation by unrelated parties never developed significantly. Law was not viewed as an institution divorced from ethical custom and social structure in which special expertise might be necessary. Litigants were generally expected, often quite literally, to fight for themselves. The seeds of legal representa

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22 To be sure, during most of this period, litigation often involved wealthy litigants who occupied social status similar or superior to that of their lawyers, and many of these people were most likely able to assert greater control over the decisions made in their cases. Wilfrid R. Prest, The Rise of the Barristers: A Social History of the English Bar 1590-1640, at 24 (1986); see also Daniel Duman, The English Bar in the Georgian Era, in Lawyers in Early Modern Europe and America 86, 100-01 (Wilfrid Prest ed., 1981) (remarking on control exerted by clientele dominated by landed gentry over seventeenth century English bar). The historical record, particularly the materials discussed in Part I.A, however, suggests that client domination of lawyers was the rare exception rather than the norm.

23 See Robert J. Bonner, Lawyers & Litigants in Ancient Athens 99, 110-11 (1927) (calling Greece “nation of lawyers” because of close connection between law, politics, and society); Richard Garner, Law and Society in Classical Athens 111-12 (1987) (discussing connection between law and society in plays of ancient Greece); J. Walter Jones, Historical Introduction to the Theory of Law 1 (1940) (discussing fact that legal questions usually were resolved with public interest in mind); Steven Johnstone, Disputes & Democracy: The Consequences of Litigation in Ancient Athens 126-27 (1999) (discussing influence of social values on litigation); Roscoe Pound, The Lawyer From Antiquity to Modern Times 28-29 (1953) (discussing connection between social customs, control, and law) [hereinafter Pound, The Lawyer]. Indeed, at least one scholar suggests that Athenians participated in litigation so frequently, either as jurors or litigants, that the average Athenian citizen was a legal expert in his own right. Bonner, supra, at 110-11.

24 See Garner, supra note 23, at 59-71 (discussing ubiquitous trial by combat).

25 See, e.g., Anton-Hermann Chroust, The Legal Profession in Ancient Athens, 29 Notre Dame L. Rev. 339, 346-47 (1954) (describing Athenian practice of representing oneself) [hereinafter Chroust, Athens]. While the head of each kin group spoke for the members of his group, this was not really representation in the sense in which we know it.
tion were sown after the legal reforms of Solon around 590 B.C.E. in the practice of some litigants to enlist the aid of a speaker (*synegoros* or *syndic*) or, more commonly for wealthy litigants, a speechwriter (*logographer*) to aid them in preparing and delivering their legal argument before the popular tribunal. Nonetheless, the notion of a legal profession or of legal professional ethics did not arise in ancient Greece. In any event, a duty to respect the client's decisions had little chance to develop in a system in which the resolution of the "trial" depended entirely upon the orator's ability to win over a jury of between 201 and 6,000 men whose fickle will reacted more to emotion and entertainment than to arguments about the simple facts of the case or the law.

Indeed, it was not uncommon for a Greek orator to betray his "client" to his adversary. Chroust, *Athens, supra* note 25, at 376, 381-85. This odious practice evidently continued to some extent in Rome as well. See *Henry Butreau*, *L'Ordre des Avocats* [*The Order of Advocates*] 54 (Paris, Librairie du Recueil général des lois et des arrêts et du Journal du Palais 1895); *Th. Grelet-Dumazeau*, *Le Barreau Romain* [*The Roman Bar*] 252 (Moulins, Desroisiers 1851).

Indeed, the Greeks described court battles as wrestling or boxing matches. *Garnier*, *supra* note 23, at 61. One scholar has observed that "[a]t times, Athenian legal procedure surrendered completely to the spirit of political election and athletic competition." *Id.* at 70; see also *Bonner*, *supra* note 23, at 36-37, 74-75, 78-80, 85-88, 90, 99-100 (discussing heliasts and discasteries, character of Athenian courts, and Athenian litigiousness); *William Forsyth*, *Hortensius the Advocate* 26-32 (Jersey City, Frederick D. Linn & Co. 1882) (discussing Aristophanes' satire of the dicasts, comedy of "Wasps"); *Johnstone*, *supra* note 23, at 18-19 (discussing structure and history of Athenian juries); Chroust, *Athens, supra* note 25, at 368-70, 379-80, 387 (discussing Athenian juries' desire to be entertained).
Third-party advocacy and a legal profession\textsuperscript{32} really developed from a Roman institution that charged the powerful with guardianship of the weak. That institution was the early patronage system of Roman patricians acting as protectors, not only of their kin group members, but also of non-patrician households who sought support and protection from powerful households.\textsuperscript{33} Patricians fulfilled a civic duty by acting as "\textit{patronus causarum}" for their plebeian "\textit{cliens}" by, among other things,\textsuperscript{34} delivering advocacy speeches in legal disputes.\textsuperscript{35} Domination of the represented by their representatives in this era was part and parcel of the social structure of dominance of "second-class citizens" by societal leaders.\textsuperscript{36} Later, after legal representation evolved from a gratuitous civic duty of well-heeled patricians\textsuperscript{7} into a paid "profession" by "status-inferiors,"\textsuperscript{35} the idea of the relationship between dominant \textit{patronus} and \textit{cliens} was much broader than that of modern lawyer and client (and apparently similar to the later feudal relationship between lord and vassal). The \textit{patronus} acted as general protector of his \textit{cliens}, even against the \textit{patronus}'s own family members. See 1 D\textsc{UPIN} A\textsc{ÎNÊ}, \textsc{PROFESION D'AVOCAT \[THE PROFESSION OF ADVOCATE\]} 28-29 (Paris, Alex-Gobelet 1832). On the evolution and reciprocal obligations of the \textit{patronus-cliens} relationship, see generally GRELET-D\textsc{UMZEAU}, supra note 29, at 2-9.

\textsuperscript{32} For an interesting critique of the application of the term "profession" to Roman legal experts, at least before the fifth century, see CROOK, supra note 28, at 37-46.
\textsuperscript{33} Id. at 31-32, 172.
\textsuperscript{34} The relationship of \textit{patronus} and \textit{cliens} was much broader than that of modern lawyer and client (and apparently similar to the later feudal relationship between lord and vassal). The \textit{patronus} acted as general protector of his \textit{cliens}, even against the \textit{patronus}'s own family members. See 1 D\textsc{UPIN AÎNÊ, PROFESSION D'AVOCAT [THE PROFESSION OF ADVOCATE]} 28-29 (Paris, Alex-Gobelet 1832). On the evolution and reciprocal obligations of the \textit{patronus-cliens} relationship, see generally GRELET-D\textsc{UMZEAU}, supra note 29, at 2-9.
\textsuperscript{35} See FORSYTH, supra note 31, at 81-82 (discussing assistance provided by \textit{patronus} to \textit{cliens}); POUND, \textsc{THE LAWYER, supra note 23, at 44-46 (explaining that dependents were entitled to be protected by patron and that patron was both legal advisor and trial lawyer); Anton-Hermann Chroust, \textsc{The Legal Profession in Ancient Republican Rome, 30 NOTRE DAME L. REV. 97, 109 (1954) [hereinafter Chroust, Republican Rome]} (listing duties of lawyers in ancient Rome). A similar system later placed European feudal lords in a position of advocacy for their vassals. See HERMAN COHEN, \textsc{A HISTORY OF THE ENGLISH BAR AND ATTORNATUS TO 1450, at 7-10, 19-29 (1929) (describing vassalage, \textit{patronus} system)}; R.G. HAMILTON, \textsc{ALL JANGLE AND RIOT: A BARRISTER'S HISTORY OF THE BAR 21 (1986) (analogizing circumstances of lord and vassal in England to \textit{patronus} and \textit{cliens} in Rome)}; see also PAUL BRAND, \textsc{THE ORIGINS OF THE ENGLISH LEGAL PROFESSION 2 (1992) (detailing payment for expert assistance in English ecclesiastical courts)}.
\textsuperscript{36} See CROOK, supra note 28, at 32 (describing mentality of "\textit{noblesse oblige}" in Roman thought, which "inculcated the protection of the lower in status by the higher"); GRELET-D\textsc{UMZEAU, supra note 29, at 31 ( remarking that patronage system was "essentially a feudal institution designed to maintain order in a nascent state" and that "[d]iverted from its legitimate path by the spirit of domination and by the avarice of the patricians, this institution did not take long to become for the plebeian a cause of misery and oppression") (author's translation).
\textsuperscript{37} For a discussion of the degeneration of the patronage system, see GRELET-D\textsc{UMZEAU, supra note 29, at 9-25, 31-32.}
\textsuperscript{38} See DUPIN AÎNÊ, supra note 34, at 32; CROOK, supra note 28, at 39 (discussing status
and dependent _cliens_ persisted.\(^3\) Long after the socially elite lost their monopoly on legal assistance, the Roman bar continued to relegate the client to an inferior position of dependence and deference.\(^4\) Cicero, for example, described his consultation with a client, Cluentius, who wished to forego a dispositive technical legal defense in order to have his case tried on the merits to save not only his civic rights, but also his character. Cicero explained that he complied with the request only because he felt that the client had a complete defense on the merits, adding, "I by no means ought to do so on all occasions."\(^4\)

After the Western Roman Empire fell to Germanic invaders in the fifth century, the notion of legal representation all but disappeared in secular European courts. Litigants generally reverted to the old requirement of self-representation, often in trials by combat or ordeal, until late in the twelfth century.\(^4\) Third-party representation continued, however, in disputes before church tribunals under ecclesiastical law.\(^4\) But, ecclesiastical law generally was concerned with salvation of souls and establishing a closer connection between law and morality.\(^4\) The common client's wishes cannot be expected to have influenced religious "legal" representatives—mainly clerics—whose primary vocation involved the pursuit of objective morality and spiritual salvation, not championing their clients' rights. Decisions regarding the "right" path were dictated by the

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\(^4\) See GRELET-DUMAZEAU, _supra_ note 29, at 32 & n.1.

\(^5\) Forsyth, _supra_ note 31, at 110-11 (quoting Cicero, Pro Cluentio, ch. 52).

\(^6\) Id.

\(^7\) See Dupin Ainé, _supra_ note 34, at 41; Brand, _supra_ note 35, at 2-3 (noting lack of legal professionals in England until middle of twelfth century); André Damien, _Les Avocats du Temps Passé [Advocates of Times Passed]_ 13, 16 (1973); Pound, _The Lawyer, supra_ note 23, at 61, 70 (discussing lack of legal representation under Germanic law); Chroust, _Imperial Rome, supra_ note 38, at 614-16 (discussing demise of Roman legal profession with invasion of Germanic tribes).

\(^8\) Dupin Ainé, _supra_ note 34, at 41-42; Pound, _The Lawyer, supra_ note 23, at 62.

\(^9\) Theodore F.T. Plucknett, _A Concise History of the Common Law_ 287 (1948); Pound, _The Lawyer, supra_ note 23, at 63-64.

\(^10\) See, e.g., Damien, _supra_ note 43, at 21-22, 33-34; Brian P. Levack, _The English
guiding hand of those expert in the canon law and in moral obligations.

Even after third-party representation returned to secular European courts in the twelfth and thirteenth centuries, paternalism and social and professional elitism among most lawyers eliminated virtually any role for the client in directing legal decisions. Lawyers were drawn largely from the clergy early on, and later from the very privileged classes. Particularly after the sixteenth century, lawyers were more focused on preserving the exclusiveness and prestige of the profession and climbing the social
ladder than on advancing individual client autonomy or improving attorney-client relations. To be fair, these lawyers were a predictable product of their time. Plagued by deep-rooted social and economic inequalities, societies like those in pre-twentieth century Europe and America could hardly be expected to accommodate a philosophy of respect for the individual client. Ideas of self-determination and respect for individual values had no chance to gain a foothold in societies that embraced absolute monarchy, feudalism, and slavery.

When commentators began to analyze the client-attorney relationship, they embraced a view of the lawyer's protective role harking back to the Roman model. To the lawyer, they ascribed professional discretion and independence; from the client, they called for docile deference. Blackstone, for example, in describing the client-lawyer relationship in mid-eighteenth century England, observed that the English advocate's clients were "like the dependants upon the antient [sic] Roman orators." The bar's persistent contempt for the client appears more prominently in an early eighteenth-century French collection of fifty-eight proposed rules to govern attorney conduct. One particularly explicit and condescending proposal instructs that "a Client should be docile and follow the advice of his Lawyer; otherwise he is not worthy of the aid of his Defender."
Lawyers' disdain for clients and their pedestrian concerns was a natural result of the attitudes of those on the other side of the bench. Continental courts and legal scholars focused not on shaping the law to aid the people it governed, but on rediscovering the logical meaning and abstract scientific spirit of classical Roman law, often to reinforce and legitimize the desired actions of the monarch. Common law courts similarly applied "legal science" in enlisting detached reason to resolve legal disputes and ensure order in society. Even as to new law embodied in legislative acts, particular wording, syntax, and logic—rather than a policy of public rights or the empowerment of the individual citizen—often governed the interpretation and construction of statutes.

(discussing rise and defense of lawyers' professional authority to "ensure that the client would surrender his sovereignty").

55 See, e.g., DUPIN AINÉ, supra note 34, at 30-32; JONES, supra note 23, at 21-23 (stating that "[t]he Courts, in which the professional had for the most part displaced the popular element, were now in possession of a definite body of written doctrine claiming unquestioned authority"); PLUCKNETT, supra note 45, at 295-300 (discussing Roman law); ARCHIBALD YOUNG, AN HISTORICAL SKETCH OF THE FRENCH BAR FROM ITS ORIGIN TO THE PRESENT DAY 32-33 (Edinburgh, Edmonston & Douglas 1869). See generally PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 38-118 (1999).

56 See KARPIK, supra note 47, at 30-32.

57 See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 38-42, 70 (Oxford, Clarendon Press 1765) (stating "the law is the perfection of reason...what is not reason is not law"); DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW, at iii (1941) (describing Blackstone's observations as having made of law "at once a Conservative and a Mysterious Science"); EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW 75-76 (6th ed. 1938) (describing development of precedent system in thirteenth through seventeenth centuries in England and explaining that King's Courts had adopted "the celebrated theory of the immemorial antiquity of the Common Law"); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 10-15 (1990) (describing Coke's and Blackstone's view of "artificial reason" underlying common law, which was accessible only to lawyers, noting that view continued in America in such legal formalists as Christopher Columbus Langdell, despite utilitarian movement led by Jeremy Bentham); POUND, HISTORY AND SYSTEM, supra note 25, at 57-58, 60, 71, 73, 86, 116 (discussing sources of decisions at common law). Indeed, the first avowed purpose of the foundation of the American Bar Association in 1878 was to "advance the science of jurisprudence." Proceedings of the Conference Called for the Purpose of Organizing a National Bar Association, and of the First Annual Meeting of the American Bar Association, 1 A.B.A. REP. 5, 16 (1878) (introducing Article I of proposed Constitution of American Bar Association).

58 See, e.g., PLUCKNETT, supra note 45, at 332-34, 343-50 (discussing logical basis of traditional law); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 5 (3d ed. 1966) (describing common law at time of colonization of North America as "rigid," "feudal and tyrannical," and explaining resistance to its adoption in early America due to its failure to address popular life).
When professional lawyers first began to actively ply their trade in early America in the late seventeenth and early eighteenth centuries, English-trained barristers often filled the need for experts versed in the nuances of English court procedure and the "science" of law. These men brought with them from London—and passed on to their successors in America—an approach to legal

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59 Before the eighteenth century, the American colonies were hostile to lawyers generally, and they tried to varying degrees to get by without lawyers, relying on sources like local religious leaders and Biblical law to resolve disputes. See, e.g., 1 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 23-24, 26-27 (1965) [hereinafter CHROUST, LEGAL PROFESSION] (discussing disregard of English precedents in Colonial America); POUND, THE LAWYER, supra note 23, at 130-42 (discussing role of lawyers in colonial America); WARREN, supra note 58, at 3-19 (discussing early American lawyers); Stephen Botein, The Legal Profession in Colonial North America, in LAWYERS IN EARLY MODERN EUROPE AND AMERICA 129, 130-33 (Wilfrid Prest ed., 1981) (discussing characteristics of early colonial lawyers).

60 English barristers were especially helpful in navigating the new complexities and technicalities of American court practice following the English imposition of centralized court administration in the late seventeenth century. Botein, supra note 59, at 134-35.

61 See CHROUST, LEGAL PROFESSION, supra note 59, at 18 (describing influx of educated men from England into America after execution of Charles I); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 85 (1973) (noting effort to aid governance by bringing English lawyers to colonies in seventeenth and eighteenth centuries); POUND, THE LAWYER, supra note 23, at 157-58 (describing custom in eighteenth century America of sending sons to study at Inns of Court); WARREN, supra note 58, at 17, 188 (describing influence of English training in common law on American lawyers); WEEKS, supra note 52, § 25, at 33 (explaining that "[w]hen England sent out her colonies, the bar, like most other institutions, reappeared upon the new soil, and held a similar position to the one it held at home"); Botein, supra note 59, at 132-35 (detailing legal careers in colonial America, and influence of English-trained lawyers).

62 See, e.g., CHROUST, LEGAL PROFESSION, supra note 59, at 33-34, 36-37 (noting that "[t]he professional influence which these English-trained lawyers had on the colonial bar is beyond imagination. They frequently became the mentors of the next generation of colonial lawyers . . . "); POUND, THE LAWYER, supra note 23, at 157-63 (noting that "the influence of these English trained lawyers, as preceptors of those who later became preceptors of many practitioners was great and wholesome"). The influence of English law practice on the American bar was inevitable, as the primary early sources of legal training for aspiring American lawyers were apprenticeship, reading Coke or Blackstone in the office of an English-trained barrister, and study in one of the English Inns of Court. See, e.g., WARREN, supra note 58, at 164-66, 177-80, 187-88 (discussing methods of learning law in America, given meager resources); Botein, supra note 59, at 136 (noting English training and local apprenticeship as means to legal education); W. Hamilton Bryson, The History of Legal Education in Virginia, 14 U. RICH. L. REV. 155, 157-70 (1979) (explaining ways to obtain legal education in colonial Virginia); Alan F. Day, Lawyers in Colonial Maryland, 1660-1715, 17 AM. J. LEGAL HIST. 145, 151-52 (1973) (discussing clerkship, apprenticeship, self-training, and English training as means to obtain legal education); see also WEEKS, supra note 52, § 25, at 33 (explaining that earliest American lawyers "soon acquired professional habits, and an esprit de corps similar to that of their English brethren"); Day, supra at 129-30 (mentioning
groups of mid-eighteenth-century American lawyers as "self-conscious new elites" who looked to English imperial authority to sustain legal professionalism in America).

63 See supra note 57 and accompanying text (noting use of reason to resolve legal questions); see also FRIEDMAN, supra note 61, at 96 (describing importation of English statutes and common law into American legal system); Roscoe Pound, The Ideal Element in American Judicial Decision, 45 HARV. L. REV. 136, 145 (1931):

[T]he nineteenth-century analytical jurists took the science of law to be a mere comparative anatomy of developed systems of legal precepts. They rigidly excluded all questions of what ought to be. Any ethical consideration was irrelevant. Jurist and lawyer and judge were concerned only with the "pure fact of law." Law was an aggregate of laws, logically interdependent and self-sufficient for yielding grounds of decision for any case when logically manipulated.

Id.

64 See, e.g., HARRY KIRK, PORTRAIT OF A PROFESSION: A HISTORY OF THE SOLICITOR'S PROFESSION, 1100 TO THE PRESENT DAY, at 19 (1976) (describing seventeenth-century bar's decision to leave ministerial tasks and day-to-day client contact to attorneys/solicitors in part to improve prestige of barristers); Duman, supra note 22, at 101-02 (describing institutional importance to bar of split between solicitor/attorneys and barristers, noting this "established [barrister's] dominance vis-à-vis both lay clients and attorneys," and "limited the layman's ability to play the role of patron to his advocate").


66 For a description of the role of the attorney in early English law, see BRAND, supra note 35, at 86-89.

67 See, e.g., WEEKS, supra note 52, § 29, at 44 (explaining that barrister "can argue the
the client’s issues and the barrister’s independent judgment. Indeed, it was considered improper, especially by the early eighteenth century, for barristers to have any direct contact with the client. This system effectively isolated the client from the major drivers of the judicial process. The barristers, who enjoyed the greatest prestige and who all but monopolized the ranks of future judges, rarely if ever met, let alone consulted with, their “clients.” These barristers and their exclusive, clientless view of the legal process were primarily responsible for cultivating future generations of American lawyers.

Legal professional ethics became a hot topic in America in the nineteenth century, as commentators and nascent bar associations appealed to lawyers’ moral conscience and sound professional cause of the client in court, which the English attorney cannot,” and describing job of barrister “to give counsel in legal matters, and take charge as advocates of the causes which the attorneys have prepared for trial”).

68 TIMOTHY TYNDALE DANIELL, THE LAWYERS 5-7 (1976); see also BRAND, supra note 35, at 95-98 (describing practice of medieval serjeants meeting before trial to brief facts and synchronize tactics); FORSYTH, supra note 31, at 350-51 (discussing counselor’s obligation to present as evidence information given by client); C.P. HARVEY, THE ADVOCATE’S DEVIL 54-58, 68-69 (1958) (noting this system has been criticized for “break[ing] the line between the client and his adviser,” quipping—only partially in jest—that as between instructing attorney/solicitor and lay client, “the former is, at any rate for the young practitioner, the more significant” for barrister); POUND, HISTORY & SYSTEM, supra note 25, at 50; POUND, THE LAWYER, supra note 23, at 78-79, 82-86 (noting modern English practice of hiring counselor to serve as intermediary between client and attorney or solicitor). An English judge writing in the twentieth century, in describing a model of proper advocacy, related the story of one barrister/serjeant who “wisely insisted” upon the notion that “the client retains counsel’s judgment, which he has no right to yield to the wishes or opinions of anyone else,” including the wishes and opinions of the client or the client’s attorney/solicitor. EDWARD ABBOTT PARRY, THE SEVEN LAMPS OF ADVOCACY 75-76 (1923).

69 See, e.g., Weeks, supra note 52, § 25, at 35; Duman, supra note 22, at 101-02.

70 See KIRK, supra note 64, at 168-73, 200-15 (describing status of barristers); WEEKS, supra note 52, § 29, at 44-45.

71 See BRAND, supra note 35, at 29 (describing increasing number of lawyers becoming justices in thirteenth century); DANIELL, supra note 68, at 11 (stating that all Common Law Judges had been serjeants-at-law until around 1975); JENKS, supra note 57, at 201 (noting practice of promoting serjeants to justices continued “for centuries”); KIRK, supra note 64, at 181-83 (noting “monopoly which the Bar enjoyed in respect of judicial and other appointments”); POUND, HISTORY & SYSTEM, supra note 25, at 55; POUND, THE LAWYER, supra note 23, at 82 (describing progress of assumption that judges would have previously been lawyers).

72 See, e.g., 1 ARCHER POLSON, LAW AND LAWYERS 70 (London; Longman, Orne, Browne, Green & Longmans 1840) (suggesting English barrister, unlike doctor, had little opportunity to develop public reputation for eccentricity, because “[w]ith his client he is rarely brought in contact”).
judgment to restore honor and dignity to law practice. Although several commentators nonchalantly endorsed respecting clients' legitimate decisions, they devoted an overwhelmingly greater amount of discussion to lawyer power and discretion and explicitly forbade clients from interfering with their lawyers' "orderly conduct" of their cases. Aiming to impede rather than enhance clients' autonomy interest, nineteenth century commentators urged lawyers to exert professional control to stem their clients' supposedly improper desires and to restrict access to the legal system only to "worthy" causes.

Two particularly influential nineteenth-century models of legal professional ethics sought to elevate the profession through more fastidious application of professional discretion and personal conscience, particularly in opposition to the client's imprudent judgments. In 1836, David Hoffman published his suggestions for a course of legal study for aspiring lawyers, to which he appended fifty "Resolutions" for "professional deportment." Although Hoffman proposed that lawyers should "greatly respect [the client's] wishes and real interests" with respect to settlement, he left to the lawyer the job of determining those "real interests." Hoffman devoted substantially more attention to encouraging lawyers to act as preliminary judges in controlling access to the legal system and quelling the client's negative passions. For example, a lawyer who believes that his potential client's cause "cannot, or rather ought not, to be sustained" should avoid "lending [himself] to a dishonorable use of legal means."

Similarly, Hoffman suggested that a good lawyer ought to refuse to become "a partner in [the] knavery" of a client who seeks to plead the statute of limitations as a defense to

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73 These sources would influence heavily the development of the early state legal ethics codes, as well as the American Bar Association's professional ethics and responsibility standards. See infra notes 98, 104 and accompanying text (discussing early development of legal ethics).


75 DAVID HOFFMAN, A COURSE OF LEGAL STUDY, Addressed to Students and the Profession Generally 720, 752-75 (1836), reprinted in 31 A.B.A. REP. 717-35 (1907).

76 31 A.B.A. Rep. at 722 (Resolution XIX).

77 See id. at 717 (Resolutions XI, XII, and XIII).

78 Id. at 719 (Resolution XI) (emphasis added).
a debt that the client "is conscious he owes" and against which he has no other defense. As to both statutes of limitations and the defense of infancy, Hoffman urged lawyers to resolve that "I shall claim to be the sole judge (the pleas not being compulsory) of the occasions proper for their use." Lawyers should "neither enforce nor . . . countenance" their clients' insistence on "captious requisitions, or frivolous and vexatious defences." Hoffman's resolutions comprise a credo clearly written by and for lawyers, designed more for service to the court than to the client. The client appears as an incompetent idiot at best—and an immoral louse at worst—who, in either case, is in need of the lawyer's infallible judgment and keen sense of moral righteousness.

This lofty spirit of professional integrity is equally heralded—and respecting the client's values and directions is equally neglected—in the lecture of George Sharswood on the "aims and duties of the profession of the law." In a clean break with Hoffman, Sharswood absolved the lawyer who takes on questionable causes. After all, as Sharswood recalled, "[t]he advocate is not the judge." Nonetheless, Sharswood pointed out that the lawyer ought to be "the keeper of the conscience of the client." To this end, a lawyer ought "not to suffer [the client], through the influence of his feelings or interest, to do or say anything wrong in itself, and of which he would himself [Vol. 37:1

79 Id. (Resolution XII). Hoffman counseled likewise against assisting clients in asserting a defense of infancy. Id. (Resolutions XII and XIII).
80 Id. at 720 (Resolution XIII) (emphasis added). Hoffman similarly suggested that a lawyer resolve that he "shall ever claim the privilege of solely judging to what extent to go" in situations in which the lawyer is "satisfied from the evidence that the fact is against [the] client." Id. at 719 (Resolution XIV) (emphasis added).
81 Id. at 719 (Resolution X).
82 At the time he delivered these lectures, Sharswood was Dean and Professor of Law at the University of Pennsylvania and a Pennsylvania state court judge, and he later would become Chief Justice of the Supreme Court of Pennsylvania. Marston, supra note 74, at 494-95; Russell G. Pierce, Rediscovering the Republican Origins of the Legal Ethics Codes, 6 GEO. J. LEGAL ETHICS 241, 248-50 (1992).
85 Id. at 100.
86 Id. at 110. One of the most important tasks of the lawyers, Sharswood explained, is to "moderate the passions of party." Id. at 109.
afterwards repent." Sharswood made no mention of consulting with the client on this point; presumably the lawyer is sole judge of the boundaries of "wrong." Acknowledging the lawyer's uncomfortable predicament, Sharswood assured that this "guardianship [over clients] may be carefully, and at the same time kindly, exerted." Sharswood preserved the age-old notion of the lawyer as his client's legal and moral guardian.90

The theme of lawyer authority dominates another late nineteenth century work that purported to be the first American treatise exhaustively treating "the law governing the attorney as an officer of the court and as the representative of his client." In the broad scheme of general case management, one section explained, "[T]he attorney has a very extensive authority, which springs mainly from his general retainer. He has the free and full control of a case, in its ordinary incidents, and as to those incidents is under no obligation to consult with his client." This strong statement was mitigated by a casual suggestion that "in important matters, however, he should [consult with his client], and take his client's instructions." No attempt was made, however, to identify characteristics of "important" matters. Moreover, the next several pages went on to amplify the attorney's broad discretion "in all the ordinary occur-

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97 Id. at 110-11.
98 Sharswood suggested that the lawyer's guidance might be needed, for example, to avoid the client giving false oaths, concealing assets from creditors, or intentionally delaying proceedings. Id. at 111-15. In less extreme examples, Sharswood did not explain how the lawyer was supposed to identify his client's potential faux pas that merit intervention.
99 Id. at 111.
100 The image of the lawyer as his client's general protector, like the Roman patronus, appears repeatedly in eighteenth- and nineteenth-century discussions of the client-lawyer relation. See, e.g., WILLIAM ALLEN BUTLER, LAWYER AND CLIENT: THEIR RELATION, RIGHTS, AND DUTIES 15-16, 18 (New York, D. Appleton & Co. 1871) (noting that "it was the honor and reverence paid by the suitor to the advocate for his care of his interests which gave rise to the name of client" and describing lawyer's obligation to "the man who, unable to act for himself, seeks him out and places himself in his hands"); SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS 1750-1900, at 85 (1991) (describing early nineteenth century lectures of United States Supreme Court Justice James Wilson and his comparison of lawyers to pilots of a ship to whom passengers (clients) have ceded total control).
101 WEEKS, supra note 52, at iii.
102 Id. § 220.
103 Id.
rences which take place in a cause."94 This discretion allowed the attorney "generally [to] assume the control of the action" even in direct opposition to his client's instructions, as "the client has no right to control the attorney in the due and orderly conduct of a suit."95 Thus, while the first American treatise on legal professional responsibility admitted a role for the client's instructions in "important" matters, it maintained the lawyer's firm grip on control of his client's case through the exercise of broad professional discretion.96

The first official American statements of legal professional ethics continued the trend set by these commentators. The first codes of lawyer ethics focused on the lawyer's duties to the legal system, entirely disregarding the client's interest in managing her legal representation. After the American legal profession had sunk to its nadir in 1865,97 bar leaders began to make efforts to unite the bar and to restore professionalism, ethical standards, and discipline. This process moved forward with the founding of the New York Bar Association in 1870 and the American Bar Association (ABA) in 1878.98 Between 1887 and the turn of the century, eleven state bar associations adopted codes of professional ethics.99 Only one

94 Id. § 221.
95 Id. This demand for total control is a descendant of the power that English barristers asserted over their cases. See HABER, supra note 90, at 76-77 (stating that "[a]s long as the lawyer was retained, he had exclusive control of the litigation").
96 Even though domineering lawyers were not criticized in legal professional literature, mid-nineteenth century popular literature contained some high-profile critiques of the lawyer-client relationship. For example, in Bleak House, which appeared in 1853, Charles Dickens paints a very critical picture of a paradigmatic domineering lawyer in the person of the solicitor Tulkinghorn, whose arrogant advancement of his view of the "best interests" of his client leads to the client's ultimate destruction. See generally CHARLES DICKENS, BLEAK HOUSE (George Ford & Sylvese Monod eds., Modern Library 1985) (1853). For a wonderful discussion of the novel from the perspective of lawyer criticism, particularly the dangers of lawyers acting in their clients' presumed "best interests," see Michael K. McChrystal, At the Foot of the Master; What Charles Dickens Got Right About What Lawyers Do Wrong, 78 OR. L. REV. 393, 397-404 (1999).
98 MICHAEL BIRKS, GENTLEMEN OF THE LAW 260 (1960); POUND, HISTORY & SYSTEM, supra note 25, at 123.
99 In an appendix to its 1907 report on the state of legal ethics rules in America, the ABA Committee on Code of Professional Ethics prepared a "Compilation of the Codes of Ethics Adopted by the State Bar Associations in Alabama, Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia, Wisconsin, and West Virginia," 31 A.B.A. REP. 685 (1907). Alabama's code was the oldest, adopted in 1887, and served as the model for the rest. Id.
provision in these codes dealt with deference to the client’s decisions, and it pertained only to the client’s choice between two battling positions held by joint legal counsel. Many more provisions encouraged lawyers to intervene to control their clients’ abusive desires. In 1905, the ABA resolved to produce uniform ethical guidelines for the legal profession, and in 1908 it adopted its Canons of Ethics. The drafters of the Canons drew heavily upon the work of Hoffman and Sharswood. Like their predecessors, they focused on maintenance of the integrity of the legal system through lawyer control, discretion, and morality.

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100 See id. at 707 (providing this rule at number 48, which ultimately became Canon 7 of ABA Canons of Ethics).

101 See, e.g., id. at 693-94 (prohibiting “unscrupulous tactics at client’s behest,” in provision number 11, which ultimately became substance of Canon 15 of ABA Canons of Ethics); id. at 701 (discouraging unprofessional use of “rough tongue” to please client who wishes to see opponent “vilified” (provision number 29), and discouraging pandering to client’s prejudices and desire to abuse opponents (provision number 30)); id. at 702-03 (bestowing on attorney right to control incidental matters at trial, in provision number 33, which ultimately became Canon 24 of ABA Canons of Ethics); id. at 706 (encouraging lawyers to use best efforts to restrain clients from doing what lawyer himself would not, in provision number 44, which ultimately became Canon 16 of ABA Canons of Ethics).


104 See id. at 56 (stating that drafters based work on Sharswood); id. at 567-68 (stating drafters included Hoffman’s resolutions in report and recommended reprinting Sharswood’s work as volume of A.B.A. Reports); see also 31 A.B.A. REP. 717-36 (reprinting Hoffman’s fifty resolutions); id. at 676, 680 (reporting Sharswood’s Essay on Professional Ethics would be reprinted as separate volume of A.B.A. Reports); id. at 678, 680, 685 (observing eleven existing state bar codes of ethics were based largely on 1887 Alabama Code, which itself drew heavily on Sharswood’s essay).

105 When the Committee on Code of Professional Ethics returned with its report in 1906, it underscored the need for ethics rules by remarking that the “lawyer is and must ever be the high priest at the shrine of justice.” 29 A.B.A. REP. 600 (1906). The Canons begin and end with genuflections at this shrine. Note, for example, that the Canons begin with the lawyer’s duty to maintain the “supreme importance” of the courts, and they conclude with an exhortation to “impress upon the client and his undertaking exact compliance with the strictest principles of moral law.” Final Report of Committee on Code of Professional Ethics, Canons of Ethics, 33 A.B.A. REP. 575, 584 (1908); see also id. at 583 (stating in Canon 29 that lawyers should be “Upholding the Honor of the Profession”).

106 See id. 33 A.B.A. REP. 581 (1908) (providing Canon 24, “Right of Lawyer to Control the Incidents of Trial”); id. at 579-80 (stating in Canon 16 that “[a] lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do”).

107 See id. at 579 (stating in Canon 16 that “[t]he office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane.
Also like their predecessors, they made virtually no mention of any obligation on the part of lawyers to respect the directions of their clients. In fact, the only Canon that really dealt with the allocation of decisionmaking authority between lawyer and client reserved to the lawyer the right to control "the incidents of the trial." 9 In the eyes of the American bar, the relationship between lawyer and client had changed very little in the 2,000 years since Roman *patroni* exercised unfettered discretion on behalf of their dependent plebeian *cliens.*

B. LEGAL, ECONOMIC, AND SOCIAL UNREST: 1908-1969

The Preface to the report on the American Bar Association's 1969 Code of Professional Responsibility explained that the old Canons of Ethics had been revisited and essentially rewritten for four reasons, one of which was that "[c]hanged and changing conditions in our legal system and urbanized society require new statements of professional principles." 10 A brief reflection on a few key

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10 See id. at 579 (stating in Canon 15 that "[a lawyer] must obey his own conscience and not that of his client"); id. at 584 (stating in Canon 32 that "[a lawyer] advances the honor of his profession and the best interests of his client when he renders services or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law").

10 Id. at 581. Canon 24 stated "the lawyer must be allowed to judge" the proper approach to case management, and "no client has a right to demand that his counsel be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety". Id. at 581-82. As to settlement decisions, Canon 8 encouraged lawyers to advise their clients to avoid or end litigation that can be "fair[ly] adjust[ed]," but it was conspicuously silent as to following the client's direction to settle or not to settle. Id. at 577-78. Finally, Canon 7 delegated to the client the power to choose between two positions espoused by joint counsel who could not agree, but this rule focused on conflicts with and duties to other lawyers, not to the client. Id. at 577.

10 Id. at 579.


developments in law and society in America between the ABA's adoption of the Canons of Ethics in 1908 and the Model Code of Professional Responsibility in 1969 reveals the tremendous significance of these "changed and changing conditions."\textsuperscript{12}

At the turn of the twentieth century, forty years after the end of the Civil War, the war of the few of "us" against the many of "them" had not abated. Social and economic relations in the United States groaned under the burdens of continuing racial tensions, massive immigration, and the beginnings of migration from rural areas to the cities.\textsuperscript{13} These trends and others developed rapidly over the next sixty years to reshape life in America radically, including life in law offices and in the courts.

Both the substance and the practice of the law were forced to recognize numerous shades of grey at the intersection of lawyers' black and white view of the world. Legal thought moved away from abstract reasoning and demanded a closer look at the law in action as it affected those whom it governed.\textsuperscript{14} Many more non-upper class members of society were able to make their way into the ranks of lawyers.\textsuperscript{15} Women, African-Americans, and those accused of crimes began—albeit very slowly—to enjoy fundamental civil and political rights; they finally began to be viewed not as groups of outsiders to be ignored and abused, but rather as individuals worthy of respect and freedom.\textsuperscript{16} After World War II, a boom in economic welfare brought many more people into the "mainstream."\textsuperscript{17} Many of those who became lawyers were better able and more willing to empathize with their clients, and those who sought legal representation enjoyed a new sense of self-sufficiency and self-respect.\textsuperscript{18} They expected their legitimate wishes, based on their unique circum-

\begin{footnotes}
\item[12] Id.; see also John W. Johnson, American Legal Culture, 1908-1940, at 3 (1981) (stating, "[w]ithout question, one of the most dynamic periods in American legal history was the early twentieth century").
\item[13] See, e.g., American Legal History 400-01 (Kermit L. Hall et al. eds., 1991) [hereinafter Legal History].
\item[14] See infra notes 123-25 and accompanying text.
\item[15] See infra notes 138-52 and accompanying text.
\item[16] See infra notes 126-37 and accompanying text.
\item[17] See infra notes 138-52 and accompanying text.
\item[18] See infra notes 153-213 and accompanying text.
\end{footnotes}
stances, to be heeded as they more frequently came into contact with lawyers.

In the face of such social upheaval, the practice of law and the standards governing client and lawyer interaction had to acknowledge and embrace the rise of individual rights and self-determination. The primary objectives of law had migrated away from maintaining the purity and inviolability of the legal system; they now moved toward engaging the system to advance individual rights. In a society coming to grips with diversity of race, gender, culture, and economic condition, lawyers could no longer maintain their homogenous notion of "the client" and her "interests." Lawyers' formerly monolithic concept of "the good" collapsed into a multitude of acceptable and legitimate alternative outcomes driven not by objective truisms, but by subjective individual values. In this environment, the lawyer simply was not equipped to maintain a monopoly on prudent legal decisions. Only the client could assess and appreciate the multitude of individual, subjective factors that would lead to the "right" choices. Inevitably, American society's reexamination of itself led the drafters of regulations for the legal profession to cede substantial decisionmaking control explicitly to the client.120

1. From the Science of Jurisprudence to Legal Realism. Hostility to a priori metaphysical reasoning rose steadily among American intellectuals through the first decades of the 1900s. In the law at the turn of the century, more scholars began to reject the old formalism and follow Holmes's "functional" approach as it affected real actors in real life.121 By the 1920s, new theories in mathematics and anthropology, in particular, had demonstrated that the old "Euclidean" reasoning from "universal" principles could be challenged, and that other starting points and other societies could

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119 See infra notes 126-37 and accompanying text.
120 See infra notes 153-213 and accompanying text.
121 See EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY 76 (1973) (citing Louis Brandeis's and John Chipman Gray's adoption of functional approach). One of the more famous aspects of this movement was the advent of the "Brandeis brief," filled not with formalistic legal reasoning, but with sociological data. Id. The most famous of these briefs was filed in Muller v. Oregon, 208 U.S. 412 (1908). PURCELL, supra, at 76.
suggest "truths" different from those produced through traditional logical reasoning.\textsuperscript{122}

Several leading legal thinkers took hold of this "non-Euclidean" mode of thought in the 1920s and 1930s, and the movement toward Legal Realism, Sociological Jurisprudence, and a new legal liberalism took flight.\textsuperscript{123} Legal intellectuals rejected sterile deductive reasoning in a vacuum as a basis for development of law. They moved instead toward a greater emphasis on empirical and experiential bases for analyzing the law as it affected real people.\textsuperscript{124} They demanded an approach to law that allowed for flexibility and adaptability to a variety of social and cultural conditions.\textsuperscript{125}

When legal analysts began to view society not as a unitary concept, but as a collection of diverse individuals with their own thoughts, motivations, and values, they laid the groundwork for clients and their goals to escape from the traditional model of law practice. Clients and their lives were no longer variables to be manipulated to conform to an objective equation. A new functional approach to law would call on lawyers to begin viewing their clients

\textsuperscript{122} PURCELL, supra note 121 at 47-54.

\textsuperscript{123} See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 169-92, 202 (1992) (discussing origin, development, and precepts of "Legal Realism"); JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 2:29 (3d ed. 1994) (noting influence of social science on early twentieth century jurisprudential revolution); Jerome Frank, Mr. Justice Holmes and Non-Euclidean Legal Thinking, 17 CORNELL L.Q. 568, 571-72 (1932) (noting Holmes paved way for overthrow of legal dogmatism); Karl N. Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222, 1251-56 (1931) (encouraging courts' use of full freedom provided by precedent to draw proper conclusions); Roscoe Pound, Sociology of Law and Sociological Jurisprudence, 5 TORONTO L.J. 1, 6 (1943) (looking to sociology for principles to be applied to practical problems); Roscoe Pound, Law in Books and Law in Action, 44 AM. L. REV. 12, 35-36 (1910) (commending departure from historical legal text when sociology, economics, or philosophy required); see also PURCELL, supra note 121, at 80-86.

\textsuperscript{124} See HORWITZ, supra note 123, at 187 (stating "[a]ll Realists shared one basic premise—that the law had come to be out of touch with reality"); LEGAL HISTORY, supra note 113, at 456-57 (describing legal Realism and Sociological Jurisprudence); PURCELL, supra note 121, at 62-63, 82 (stating "[b]ehavior was real, whereas legal argumentation was simply verbal game playing").

\textsuperscript{125} See, e.g., PURCELL, supra note 121, at 80 (describing critique of restatements as too rigid). Although the "Realists" disagreed with the "Sociological Jurisprudentialists" on the conclusions to be drawn from empirical observations, see id., at 86, and Realism ultimately fell out of favor due in large part to its moral relativism, see id. at 159-78, the legacy of the Legal Realism movement and its focus on observation of the law as it affected real individual actors has persisted. HORWITZ, supra note 123, at 193-212.
as people whose decisions and interests might legitimately diverge from an assumed societal paradigm.

Lawyers had to open their eyes to a virtually infinite range of motivations, levels of risk aversion, moral standards, and values that could bear on legal rights and decisions. Lawyers no longer could identify the correct path through abstract reflection on "objective" moral and legal principles. Devotion to a functional approach to law meant that individual lives and decisions, not logic, would move the development of law into the twenty-first century. Individual clients' wishes and decisions not only mattered, they were the driving forces behind the development of law increasingly based on individual rights and experiences, and behind acceptance of alternative measures of prudent decisionmaking.

2. From Group Repression to Individual Empowerment. While notions of alternative societies and alternative truths were catching hold in legal philosophy, members of such alternative societies started demanding that their voices be heard. Organizations and movements arose to claim rights, attention, and respect for individuals who had been written off en masse in the past. Indeed, "[t]he essence of each liberation movement," most notably the civil rights movement, was "the demand that society treat each individual as an individual, a unique person; and not as a member of a race, class, religion, gender, or group." 126 By the 1950s and 1960s, "[n]obody, of whatever color or condition, seemed willing to accept a lower or desppicable status, in law or in fact; to accept the detrimental definitions that an outside majority (or minority) had fastened on its head." 127

The period between 1908 and 1969 witnessed the explosive growth of individual "rights consciousness" 128 that would inevitably affect relations between the public and the bar. The civil rights movement is a salient representative example of the rise of individual rights in the American social consciousness. 129 It is difficult for

127 FRIEDMAN, supra note 61, at 576.
128 See LEGAL HISTORY, supra note 113, at 497-545.
129 The civil rights movement is one of many examples of the individual rights shift in the American social structure that occurred between 1908 and 1969. At least one other
many of us today to understand the horrifying oppression and discrimination that confronted the National Association for the Advancement of Colored People (NAACP) at its founding in 1909. Even more difficult to understand is that almost a quarter-century later, critics of the miserable civil rights situation of African-Americans were able to report that 3,753 lynchings had occurred between 1889 and 1932. After a wave of African-American servicemen returned home from fighting in World War II to rejoin the women and nonwhite citizens upon whom the American industrial machine had come to depend during the war, the time had come for African-Americans to be acknowledged as individuals with meaningful rights. The famous battles to end segregation in public schooling ushered in a new era of legal activism to protect the rights of individuals not in the small governing cabal. Other battles in this new domestic war on hate and marginalization gave

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130 Along with the NAACP, the American Civil Liberties Union (ACLU), founded in 1914, made great strides during this period to shape the development of individual rights, such as free speech and privacy. See, e.g., JOEL F. HANDLER ET AL., LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 22-24 (1978) (outlining work of these organizations); LEGAL HISTORY, supra note 113, at 401-02.


African-Americans the right to vote in primary elections\textsuperscript{135} and the right to be free from police brutality.\textsuperscript{136} Even after the march of Dr. Martin Luther King, Jr., on Washington in 1963 and the adoption of the new Civil Rights Act in 1964,\textsuperscript{137} the civil rights war did not end, but America's view of itself and of the significant rights and value of its diverse population had undergone dramatic change.

By 1969, the American bar had to admit that it could no longer legitimately expect to dictate legal strategy to its clientele based on short-sighted views about the interests of “similarly situated” people. Substantial segments of the American public would no longer accept lawyers' pigeon-holing them and their presumed “interests.” Individual power naturally follows individual rights, and it would not do for lawyers to appropriate their clients' power to exercise hard-won rights. As preconceived notions faced attack from all sides, the stage was set for lawyers to accept their clients' entitlement to be respected as individuals with unique characteristics and legitimate values that had to be brought to bear on legal decisions.

3. From Economic Crash to the Baby Boom. Finally, the roller-coaster ride from the Great Depression through the New Deal and into the post-World War II economic upswing reconfigured the class structure in America, bringing large numbers of middle- and lower-class Americans from a variety of cultural backgrounds into the legal profession and into contact with the legal profession. After the Great Depression destroyed the nation's comfortable ideas about wealth and class, the American consciousness was primed for re structuring by Roosevelt's New Deal legislation. The 1935


\textsuperscript{136} See, e.g., Screws v. United States, 325 U.S. 91, 113 (1945) (overturning verdict as result of torture-induced “confession”). This period also saw the Warren Court's development of such other important individual rights as the right to counsel for felony defendants, as in Gideon v. Wainwright, 372 U.S. 335 (1963), and the right to be informed of this and other rights upon arrest, as in Miranda v. Arizona, 384 U.S. 436 (1966). JETHRO K. LIEBERMAN, MILESTONES! 200 YEARS OF AMERICAN LAW: MILESTONES IN OUR LEGAL HISTORY 313-38 (1976).

National Labor Relations Act,\footnote{National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169 (2000).} for example, empowered huge numbers of people to have their voices heard and respected by the small governing class.\footnote{See, e.g., KELLY ET AL., supra note 132, at 535.}

The post-World War II era breathed life into New Deal individual rights with renewed economic and social vigor at many levels of society, which gradually changed the face of law practice.\footnote{See Friedman, supra note 126, at 537 (citing dizzying changes during period from 1956 to 1991).} Veterans returning from the war utilized the G.I. Bill, which made a legal education possible for many who could never have considered it in the past.\footnote{See, e.g., LEGAL HISTORY, supra note 113, at 496 (noting that in mid-1950s, average American family had more than three children, likening movement along timeline of this swell in population to "a large mass being digested by a snake").}

These veterans—many from nonwhite, non-protestant, and immigrant families—swelled the ranks of lawyers and challenged both the "club" mentality of the old guard of the legal profession and notions of social stratification in American society.\footnote{HYMAN, supra note 141, at 70-71; LEGAL HISTORY, supra note 113, at 401; Friedman, supra note 126, at 531-33.}

The new generation of lawyers—especially in the 1960s—began to take an anti-establishment stand for the advancement of labor unions, poor people, and progressive reform in law and society.\footnote{HYMAN, supra note 141, at 70-71; LEGAL HISTORY, supra note 113, at 401; Friedman, supra note 126, at 536; see also Michael E. Parrish, The Great Depression, the New Deal, and the American Legal Order, 59 WASH. L. REV. 723, 747 (1984) (describing rise of minorities and other "outsiders" in New Deal reform machine). Indeed, at least one observer has argued that the opening of the legal academy thanks to the G.I. Bill facilitated the civil rights revolution in the 1950s and 1960s. See HYMAN, supra note 141, at 72 (stating "[s]uch judicial verdicts [as the school desegregation cases], and the upsurge in levels of life and labor that the G.I. Bill and related programs fueled made the 1960s and the 1970s decades of high aspirations and achievements for social justice and individual fulfillment"); see also LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 5 (1985) (describing emergence of new expectations for justice and respect of minority rights).}

These new lawyers were better positioned to empathize with the problems and feelings of members of nonelite classes, including their resentment of control by the socially and economically
privileged. The bar was moving inexorably toward a new approach to client-lawyer interaction.

Similarly, economic and legal development brought more and more nonelite clients into contact with lawyers and thrust the legal profession into the public view. By the mid-1960s, the bulk of lawyers in Chicago, for example, reportedly served as "social workers," or at least as small business managers, for the middle classes. With the appearance of Ford's Model T in 1908 and aggressive financing practices to put cars in the hands of the consumer mass market, a new area of law practice arose that would have a massive impact on the numbers and kinds of people who found themselves in a lawyer's office. By the 1950s, forty percent of some appellate court dockets were occupied by auto accident cases. Similarly, the advent of products liability law with MacPherson v. Buick Motor Co. in 1916, and the development of worker's compensation law around 1910, would support thousands of lawyers across the country for years to come. These developments brought a very different, more mainstream clientele into the law office, exposing a much greater portion of the population to lawyers.

When these new clients encountered the age-old practices of overbearing, dominating lawyers, their reactions were not surprisingly negative. After World War II, American sociologists intensely scrutinized the professions, including law. By the 1960s, their appraisal of the legal profession had degenerated markedly. Their mood had shifted from admiration of professional expertise to intense criticism and disapproval of professional use of monopolistic power to "impose on consumers [the professionals'] own conception

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144 Stevens, supra note 141, at 533.
146 FRIEDMAN, supra note 61, at 588. The effect on trial court dockets and the average attorney's files must have been exponentially greater. See, e.g., Erwin N. Griswold, The Legal Profession, in TALKS ON AMERICAN LAW 251 (Harold J. Berman ed., 2d ed. rev. 1971) (remarking that auto accident cases made up considerable portion of trial work throughout country in early 1960s).
148 FRIEDMAN, supra note 61, at 587-88.
149 ELIOT FREIDSON, PROFESSIONAL POWERS 28-29 (1986).
150 Id.
of what is needed."^{151} As one scholar remarked, "a political monopoly over the goals of professional work does not seem necessary to sustain its integrity . . . . Goals, after all, are not a function of technical expertise, but rather of human values and of choices, which all are entitled to make by virtue of their humanity."^{152} Such observations paralleled decades of both Legal Realism-related law development and the struggle for recognition of individual rights for widely diverse communities. Sociologists in the 1960s captured the mood of an American population more in tune with their rights and more defensive of challenges to their individuality. Respect for clients' prerogative to identify the goals of their own legal matters would become the cornerstone of new standards of client-lawyer relations in the last quarter of the twentieth century.

C. A NEW APPROACH: CODE, RULES AND RESTATEMENT, 1969-2000

Academic and popular attacks^{153} on the domineering attitude of the legal profession toward clients did not go unnoticed. By the mid-1960s, the legal profession finally accepted^{154} that the time had come for regulation of client-lawyer relations to adapt to "change and changing circumstances in our legal system and urbanized society."^{155} Consequently, on August 12, 1969, the ABA replaced the antiquated Canons of Ethics with a new Model Code of Professional Responsibility ("Model Code").^{156}

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^{152} Freidson, *Are Professions Necessary?, supra* note 151, at 23.

^{153} For one famous popular criticism, see generally MURRAY T. BLOOM, *THE TROUBLE WITH LAWYERS* (1968).

^{154} In fact, it had recognized the fundamental shortcomings of the various codes of lawyer ethics at least as early as the mid-1930s. See *MODEL CODE OF PROF'L RESPONSIBILITY* Preface, at vi (1969) (quoting Justice Stone's 1934 critique of "petty details of form and manners which have been so largely the subject of our Codes of Ethics").

^{155} See *supra* note 112 and accompanying text (describing influence of current conditions on codes of ethics).

The very opening words of the Model Code signaled a new dedication to the client and her central role in directing her legal representation. A comparison of the preambles to the Canons and the Model Code highlights this fundamental shift. The preamble to the Canons comprised a string of platitudes about the scientific efficiency and integrity of the legal system, divorced from any notion of respect for the client or for her autonomy:

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.187

This preamble reflects a sterile and introverted view of legal practice and the law itself, and a narrow and exclusionary view of a male-dominated society. "The people" were no longer willing to accept this outmoded approach sixty years later.

The preamble to the Model Code introduced a strikingly different view of society and the proper role of lawyering within that society. By 1969, the ABA had abandoned the notion that the stability of government and the future of the republic depended on rigid scientific purity, efficiency, and internal integrity within the legal system. Instead, the Model Code drafters ushered the individual client and her dignity and autonomy onto center stage with these opening lines:


187 Final Report of the Committee on Code of Professional Ethics, 33 A.B.A. REP. 567, 575 (1908) (emphasis added). Note that the approval of "just women" does not seem to have been considered a goal of the system.
WHO'S IN CHARGE HERE?

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.158

This new introduction attests to the rights revolutions of the 1950s and 1960s, as the ABA recognized that lawyers no longer could maintain a monopoly on uniform truth and righteousness. Justice under the new liberal legal theory could be achieved only through law that respected individual dignity and each individual's capacity for autonomy.159 Lawyers in the late twentieth century were finally called upon truly to listen to their clients and to be guided by clients' "capacity through reason for enlightened self-government."160 Indeed, the preamble to the new Model Code announced new goals for law practice. It left behind preservation of objective, scientific purity in the law and endorsed facilitating the dignity and self-determination of the client.

The client-centered spirit of the Model Code's preamble foreshadowed client-empowering rules that made their debut in the Model Code. Disciplinary Rule 7-101(A)(1) forbids a lawyer from intentionally "fail[ing] to seek the lawful objectives of his client through reasonably available means permitted by law and [other] Disciplin-

158 Report of the Special Committee on Evaluation of Ethical Standards, 94 A.B.A. REP. 729, 731 (1969) (emphasis added) (footnote omitted). The omitted footnote appears at the end of the first sentence, and it invites the reader to compare the Model Code's preamble with that preceding the Canons. Id. at 732 n.2. This suggests that the fundamental change in focus from system to client was deliberate and significant in the eyes of the drafters.

159 See, e.g., Robert D. Dinerstein, Client-Centered Counseling: Reappraisal and Refinement, 32 ARIZ. L. REV. 501, 513 (1990) (stating that "[r]ecognizing a person's autonomy is essential to according respect to that person; respect for autonomy is a cornerstone of liberal legal theory and of the American political system").

ary Rules." At last, professional regulations explicitly protected the client's right to define her own lawful objectives and to be free from paternalistic and egotistic interference from her lawyer. So long as the client's objectives were "lawful," the Model Code prohibited lawyers from rejecting their clients' objectives.

Other provisions of the Model Code elaborated on the directive in DR 7-101(A)(1). Two "Ethical Considerations" clarified the extent of the client's power to make decisions affecting her legal rights. The Model Code preserves the lawyer's professional authority over issues "not affecting the merits of the cause or substantially prejudicing the rights of a client." But if a matter "affects the merits" of the client's case, Ethical Consideration 7-7 assigns exclusive and binding authority to the client, stating, "[T]he authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer." The client could hardly have received a more resounding endorsement of her power. Similarly, the Model Code allows the lawyer to dissuade the client from pursuing legal rights by pointing out moral considerations bearing on the matter or the possibility of "harsh consequences" for the client. Once the lawyer has offered her counsel, though, Ethical Consideration 7-8 prompts

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161 MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (1969). The Model Code consisted of three different parts as follows: (1) "Canons," which served essentially as nothing more than chapter titles; (2) "Ethical Considerations," which were designed to be "aspirational in character" to suggest the "objectives toward which every member of the profession should strive"; and (3) "Disciplinary Rules," which laid out the real "rules" that were "mandatory in character" and could serve as the basis for professional discipline. Preliminary Statement to Model Code of Professional Responsibility, 94 A.B.A. REP. 731-32 (1969). The Ethical Considerations were designated by the abbreviation "EC," while the Disciplinary Rules were designated "DR." See generally MODEL CODE OF PROF'L RESPONSIBILITY (1969).

162 See infra notes 164, 166 (discussing authority of lawyers and client over matters affecting merits of client's case).

163 Beyond being simply "aspirational guidelines," the Ethical Considerations were designed to offer enforcement agencies "interpretive guidance" as to the proper application of the Disciplinary Rules. See Preliminary Statement to Model Code of Professional Responsibility, 94 A.B.A. REP. 731-32 (1969) (describing intended uses of proposed Model Code). Therefore, one can appreciate the significance of DR 7-101(A)(1) only by considering the Ethical Considerations alongside it.

164 MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1969).

165 Id. Whether to accept or reject a settlement offer is cited as the first example of decisions left exclusively to the client. Id.

her to step back, noting, "In the final analysis . . . the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself." The client’s values and lawful wishes—not the lawyer’s speculation about what those values and wishes are or ought to be—were intended to control legal representation in the Model Code era.

Commentators overwhelmingly supported the Model Code’s client-centered view of legal representation. A few years after the adoption of the Model Code, Douglas Rosenthal contributed a particularly accessible and influential critique of lawyer usurpation of client decisionmaking authority. Rosenthal argued simply that “[p]ractical consequences provide a ready tool for stripping complexity down to essentials.” That is, the person who is expected to deal with the practical consequences of each case must be allowed to control her destiny. Rosenthal observed that certainty is unattainable in a legal system like ours, plagued by vague and ambiguous law administered by fallible judges and juries. Accordingly, our system must accept uncertainty and cope with it by balancing risks and psychic responsibility for them. Because the results—good or bad—of each case will be visited upon the client, only the client is in a position to determine, based on sound counsel from her lawyer, which burdens she is willing to bear and how she is willing to balance risks. The specialized knowledge, compe-
tence, and integrity upon which lawyers' stranglehold on power historically was based no longer could support lawyer hegemony in a system that was neither scientific nor predictable.

Rosenthal's approach was reflected in a new devotion to client autonomy in legal work related to political activism in the 1960s and 1970s, which advanced the development of clinical legal education and gave rise to the overwhelmingly successful client-centered counseling movement. This new model of initial client interaction urged lawyers to take care in identifying and respecting their clients' subjective values, which pointed the way to maximum client satisfaction. Proponents of the client-centered counseling model sought ways to empower clients to make legal decisions according to their own values, free from influence—even passive influence—by their lawyers. As Rosenthal had argued, the client-centered counseling model proposed that clients were much more likely to accept the ramifications of decisions they had made themselves because clients know better than their lawyers which risks and possible burdens are acceptable to them.

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174 Dinerstein, supra note 159, at 518-19.


176 BINDER & PRICE, supra note 175, at 147-53.


178 See supra notes 169-73 and accompanying text; see also BINDER & PRICE, supra note
Legal academics in the 1970s and 1980s criticized the lawyer paternalism of the past and strongly endorsed the emphasis in the Model Code on clients' autonomy to make their own decisions based on their own subjective values. In one prominent example, David Luban observed that, in a society that places a premium on individual autonomy, paternalism "imposing constraints on [a person's] liberty for the purpose of promoting [that person's] own good" is very difficult to justify. Luban identified the central problem with paternalism: it is not at all clear what rational individuals would accept by way of protective intervention, and "there is an obvious danger in giving license to officious busybodies who are only too happy to assume that with their modest endowment of shrewdness they speak with the finality of demonstrative reason itself." The only justifiable paternalism, Luban argued, is constraining someone's liberty to do what that person wants in the heat of a moment because it is inconsistent with that person's subjective values; it is not acceptable to constrain someone's liberty based on presumptions about that person's objective interests based on the society in which she lives.

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179 See, e.g., Charles Fried, The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060, 1073 (1976) (stating that "the lawyer makes his client's interests his own insofar as this is necessary to preserve and foster the client's autonomy within the law"); William H. Simon, Visions of Practice in Legal Thought, 36 STAN. L. REV. 469, 470 (1984) (describing "established professional conception of the lawyer-client relation" as involving "bundle of interests" that are subjective because "the client is the only legitimate judge of what they are," and arguing several Model Code provisions are violated when lawyers paternalistically substitute their judgment for that of their clients); Spiegel, supra note 173, at 100-04 (noting client's "superior knowledge" of own case).

180 The Preamble to the Model Code makes clear that this is precisely the sort of society that had emerged in America after the rights revolutions of the 1950s and 1960s. See supra notes 157-59 and accompanying text (quoting Preamble and addressing changes in lawyering in 1950s and 1960s); see also Spiegel, supra note 173, at 75 (arguing that, in legal system designed to foster client autonomy outside legal system and in society, forcing clients to surrender their autonomy in legal representation is anomalous).


183 Luban, supra note 181, at 463-64.

184 Id. at 462, 473-74.
interests above a person's actual subjective values undermines that person's autonomy and attacks that person's integrity, because values form the core of our personality.185

The commentary of Rosenthal, Luban, and others echoed the theme of the Preamble to the Model Code: justice and our "free and democratic society" depend upon "respect for the dignity of the individual and his capacity through reason for enlightened self-government."186 Lawyers are rarely if ever able to identify a client's values187 and distinguish them from presumed interests.188 Accordingly, lawyer paternalism toward clients based on the client's "best interests" or her "own good" threatens the very foundations of justice.

The ABA renewed its commitment to the client's authority when it revised its legal ethics rules and introduced the Model Rules of Professional Conduct ("Model Rules") in 1983.189 Model Rule 1.2(a)

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185 See id. at 473.
186 MODEL CODE OF PROF'L RESPONSIBILITY Preamble (1969). Professor Dinerstein later described the problem particularly eloquently, "[T]he lawyer [who usurps decisionmaking authority from his client] risks simply perpetuating the sense of powerlessness that brought the client to see him in the first place. [T]he client may forgive him in the end but is not likely to feel the experience as ennobling." Dinerstein, supra note 159, at 548.
187 This is, in my view, the greatest danger of lawyer paternalism, namely, lawyers failing to appreciate communication breakdown across gender, class, and cultural lines. See, e.g., Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G, 38 BUFF. L. REV. 1, 14-51 (1990) (describing attempts of subordinated client to be heard at own hearing). Worse yet, there is a danger of lawyers "smugly attributing [their] own liberal upper-class moralism" to client values as a basis for decisions. See William H. Simon, Lawyer Advice and Client Autonomy: Mrs. Jones's Case, 50 MD. L. REV. 213, 221-22 (1991) (arguing client's goals and values simply are not accessible to lawyer, given time and other constraints). Particularly when the lawyer and client come from different cultural and class backgrounds, a power grab by the lawyer does not advance the client's "interests." Thus, "[g]rasping neither the true nature of their clients' problems, nor the contours of the solutions that would best meet their clients' wishes, lawyers may wield a power that benefits no one so much as themselves." Stephen Ellmann, supra note 177, at 720.
188 Admittedly, a person's actual subjective values sometimes coincide with her presumed interests, but this is by no means assured in a significant number of instances. See BINDER & PRICE, supra note 175, at 148-53 (illustrating that lawyers cannot know what value clients really place on various consequences in counseling process); Luban, supra note 181, at 472 (stating that person's values may coincide with what is in his best interests, but often do not).
189 In addition, the Model Rules reflect an interesting semantic shift. Whereas the Model Code referred to the "attorney-client" or "lawyer-client" relationship, the heading preceding Model Rules 1.1 through 1.17 is "Client-Lawyer Relationship." Compare MODEL CODE OF PROF'L RESPONSIBILITY Canons 2-9, 31 (1969) (listing "attorney" first), with MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983) (placing "client" first).
reiterated immediately the essential tenet that "[a] lawyer shall abide by a client’s decisions concerning the objectives of representation." In addition, it extended the client’s control by requiring the lawyer to consult with the client even on technical decisions concerning the means by which the lawyer would seek to achieve the client’s objectives. During the drafting process, an amendment was offered to omit this requirement of consulting with the client as to means. After all, the client hires a lawyer because the professional knows which means are best suited to the task at hand. In a powerful statement about how client authority had overtaken lawyer discretion over the course of a century, this amendment failed.

The Model Rules signaled a definite shift in the mindset of the late twentieth century legal profession toward client empowerment, even in matters like case management, which were traditionally jealously guarded as being within the lawyer’s exclusive professional discretion. Model Rule 1.2(a) decisively relegated to the past the days when lawyers enjoyed unchecked power over their clients’ decisions. The Model Rules plainly required lawyers to follow their clients’ lead with respect to the ends of each legal representation, and they prevented lawyers from dictating to the client where those ends should lie.

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191 Id.
193 Id.
194 See supra note 91 and accompanying text (discussing late nineteenth century treatise explaining attorney’s extensive authority over client).
196 To be sure, the Model Rules do not require a lawyer to aid clients in the attainment of ends that the lawyer believes are criminal or fraudulent, or even imprudent or repugnant. See Model Rules of Prof’l Conduct R. 1.16(b)(3) (1983) (allowing lawyer withdrawal from representation in such situations). But the lawyer cannot remain in such a representation and insist that the client comply with the lawyer’s view of the “right” approach. See infra notes 207-13 and accompanying text (discussing modern prohibition against lawyers’ control of client actions). Moreover, threatening to withdraw unless the client acquiesces in a course of action proposed by the attorney amounts to coercion and is inherently inconsistent with the principle of client competency reflected in EC 7-7, EC 7-8, and Rule 1.2(a). See Ellmann, supra note 177, at 722, 725 (discussing client coercion as violation of client competency.
The lawyer's duty to respect client autonomy had become axiomatic by 1998, when the American Law Institute adopted its Restatement (Third) of the Law Governing Lawyers. The Introductory Note to Chapter 2 of the Restatement, which is devoted to "the client-lawyer relationship," states at the outset that the relationship of client and lawyer is one of principal and agent. This explicit acknowledgment sets up a discussion in which the client is the center of control in the relationship. Agents, after all, are not entitled to determine the principal's "best interests" and act in a way that might be for the client's own good, even if it is not necessarily in the client's best interest. The client must have the final say about his or her life.

Despite this title, this is not the third time that the law governing lawyers has been restated. The American Law Institute's "Restatement" project is in its third series, so all restatements of various areas of the law published during this period are styled "Restatement (Third)." The law governing lawyers had not previously been restated. Although adopted on May 12, 1998, the Restatement in its final version—which included several revisions of the section numbering—was released in 2000. Note once again that, as in the Model Rules, the client appears first in the designation of the relationship as "client-lawyer," not vice versa.

Commentary on the Model Rules also acknowledged the implications of agency law. See ABA CTR. FOR PROF'L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 13 (4th ed. 1999) (noting that agency law provides "[n]o general framework within which to discuss the scope of the relationship between lawyer and client"). The Restatement, however, makes the connection more explicit in the text. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, Introductory Note (2000) (stating that "[t]he subject of this chapter is, from one point of view, derived from the law of agency"). Indeed, the Restatement highlights the sensitive nature of this agency relationship, explaining that the law of professional regulation "provides a number of safeguards for clients beyond those generally available to principals." Id. One of these safeguards is the notion that the client must be involved in decisionmaking, and the lawyer has no right to substitute her own judgment for her client's, even if the substitution might be "for the client's own good." Id. §§ 16(1), 20.
in contravention to the principal's stated desires; they must either follow lawful instructions or withdraw from service.\textsuperscript{202}

Section 16 of the Restatement continues the trend of Model Code DR 7-101(A)(1), EC 7-7 and 7-8, and Model Rule 1.2(a) by remarking that the lawyer "must, in matters within the scope of the representation, proceed in a manner reasonably calculated to advance a client's lawful objectives."\textsuperscript{203} The Restatement amplifies this bland directive from the very beginning, however, by clarifying that the "lawful objectives" at issue are not those that the lawyer believes the client should wish to pursue, but rather objectives "as defined by the client after consultation."\textsuperscript{204} The commentary further clarifies that "[t]he client, not the lawyer, determines the goals to be pursued, subject to the lawyer's duty not to do or assist an unlawful act."\textsuperscript{205}

Moreover, the Restatement goes beyond the Model Code and the Model Rules to add substance to the broad notion of client control set out in section 16. The third "Topic" of chapter 2 is dedicated solely to the allocation of decisionmaking authority between lawyer

\textsuperscript{202} See RESTATEMENT (SECOND) OF AGENCY § 385(1), (2), cmt. a (1958) (noting that agent cannot refuse to follow her principal's order on grounds that fulfilling order would be injurious to principal). For a compelling discussion of the agency aspects of the client-lawyer relationship, see generally James A. Cohen, Lawyer Role, Agency Law, and the Characterization "Officer of the Court", 48 BUFF. L. REV. 349 (2000). While I do not necessarily endorse Professor Cohen's rejection of a role for moral analysis in legal representation, I subscribe wholeheartedly to his discussion of the limitations that the lawyer's agency role places on lawyers' discretion, and on their power to substitute their own judgment for that of their clients. \textit{Id.} at 388. Cohen exposes the problem most effectively when he remarks that "[c]laims that lawyers should be free to disobey the client's lawful instructions must be scrutinized very carefully, lest the fundamental characteristic of lawyer role disappear and lawyers assume the role of judges." \textit{Id.; see also id.} at 403 (stating "[t]he agent cannot say, 'your goal is completely lawful and can be attained, but I think it is unwise or immoral and I will not accomplish it'").

\textsuperscript{203} RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (2000).

\textsuperscript{204} \textit{Id.} When this topic was introduced into the Restatement project in 1992, Professor Leubsdorf, in his Introductory Note, remarked that the need to ensure competence and fidelity to clients "takes on added significance because of the public interest in protecting individual legal rights." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, Introductory Note (Tentative Draft No. 5, 1992). This remark once again recalls the mid-twentieth century rights revolution that turned the traditional lawyer-client relationship on its head. See supra notes 111-52 and accompanying text (discussing how changes in American law and society influenced client-lawyer relationship).

\textsuperscript{205} RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) cmt. c (2000).
Traditionally, some lawyers considered that a client put affairs in the lawyer’s hands, who then managed them as the lawyer thought would best advance the client’s interests. So conducting the relationship can subordinate the client to the lawyer. The lawyer might not fully understand the client’s best interests or might consciously or unconsciously pursue the lawyer’s own interests.

The Restatement adopts a “middle view” that protects the client’s prerogative to define the goals of the representation, yet it recognizes that the lawyer must retain discretion in technically implementing those goals after consultation with the client. It accepts the lawyer’s discretion to take lawful action “reasonably calculated to advance a client’s objectives as defined by the client,” but it warns that the client may temper that discretion by agreement or instruction. When the lawyer’s view of the proper course of action conflicts with the client’s view, the Restatement emphasizes repeatedly that “a lawyer may not continue a representation while refusing to follow a client’s continuing instruction.” It

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206 Id. ch. 2, Topic 3, Introductory Note.
207 Id. §§ 20–24, Introductory Note. Indeed, the first version of the rationale for the lawyer’s duty to inform and consult with clients warned that, without consultation with the client, “the lawyer-client relationship may become one of domination of clients by lawyers.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 31 cmt. b (Tentative Draft No. 5, 1992). This “domination” language was diplomatically eliminated in the next draft. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32 cmt. b (Proposed Final Draft No. 1, 1996).
209 Id. § 21(3).
210 Id. § 21(1), (2), cmt. b.
211 Id. § 21 cmt. d; see also id. § 23 cmt. c (stating that “[t]his Section does not authorize a lawyer to refuse to assist a client in performing an act that might obligate the client to a third person but that would not ordinarily be considered unlawful”). In particular, the Restatement clarifies that a contract requiring the lawyer to approve any settlement is invalid. Id. § 22 cmt. c. Such a contract is functionally identical to § 524(c)(3)(B) of the Bankruptcy Code.
emphatically rejects the notion that a lawyer has the right to "remain in a representation and insist, contrary to a client's instruction, that the client comply with the lawyer's view of the client's intended and lawful course of action." The Restatement reinforces the thirty-year-old prohibition on lawyers' wrestling control from their clients and substituting their judgment for the client's "imprudent" legal proposals. From the late twentieth century forward, American legal ethics have consistently rebuffed any attempt to subjugate clients' decisions to the judgment of their lawyers.

II. IMPROPER PATERNALISM OR PROTECTION OF THE "DISABLED"?

This Part returns to where we began and argues that section 524(c)(3)(B) of the Bankruptcy Code flies in the face of the three decades of American professional regulations just described. Lawyers, including those on Capitol Hill, need to be reminded that modern developments in legal professional ethics have pushed the pendulum of control decidedly toward the client. By requiring the debtor to obtain her lawyer's approval that a lawful and morally sound reaffirmation agreement will not impose an "undue hardship" on the debtor, section 524(c)(3)(B) forces the debtor's attorney into a conflict of judgment with the client that undermines the client's autonomy and dignity. Part II.A applies the Model Code, Model Rules, and the Restatement to the scenario of a debtor who wishes to enter into a reaffirmation agreement. Part II.B considers exceptions to the rules, which sometimes allow limited lawyer paternalism where the client is disabled or incompetent. It shows that these exceptional rules cannot support allocating a veto power to the debtor's attorney over the debtor's desire to reaffirm.

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212 Id. § 23 cmt. c.
213 See, e.g., Fred C. Zacharias, Limits on Client Autonomy in Legal Ethics Regulation, 81 B.U. L. Rev. 199, 199 (2001) (remarking that "[l]egal ethics proceeds from the assumption that client autonomy is a good thing and paternalism towards clients is bad").
215 See infra notes 218-29 and accompanying text.
216 See infra notes 230-42 and accompanying text.
217 See id.
A. APPROPRIATING THE CLIENT’S CHOICE TO REAFFIRM

In the absence of section 524(c)(3)(B), the decisionmaking rules in the Model Code, Model Rules, and Restatement provide clear guidance to a bankruptcy lawyer representing a consumer debtor who wishes to reaffirm a debt. Model Code DR 7-101(A)(1), EC 7-7 and 7-8, Model Rule 1.2(a), and Restatement sections 16, 21, and 23 all clearly identify the client as the ultimate arbiter of judgment disputes between client and lawyer on substantive matters. The debtor’s lawyer has no right to veto her client’s lawful, moral decision to contract to reaffirm a debt. Whether the lawyer is forbidden from “intentionally fail[ing] to seek the lawful objectives of [the] client through reasonably available means permitted by law,” or directed to “abide by [the] client’s decisions concerning the objectives of representation,” the result is the same. The lawyer must “proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client.”

If the lawyer believes that reaffirmation is imprudent, she has two—and only two—options: (1) she can abide by her client’s decision and do her best to negotiate a reaffirmation agreement that mitigates the negative impact on the debtor, or (2) she must withdraw quietly from the representation. The lawyer cannot

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218 See infra notes 219-21 and accompanying text.
221 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (2000). Indeed, reaffirmation agreements are analogous to settlement agreements, and the Model Code, Model Rules, and Restatement are even more explicit about the client’s right to control whether and on what terms to enter into a settlement agreement. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-7 (Preliminary Draft, 1969); MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (1983); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22(1) (2000).
222 Indeed, under the Model Code, the lawyer arguably may not withdraw in this situation. The Model Code allows for withdrawal as a result of such a disagreement in judgment between lawyer and client only in a “non-adjudicatory matter,” in other words, a “matter not pending before a tribunal.” MODEL CODE OF PROF’L RESPONSIBILITY EC 7-8, DR 2-110(C)(1) (Preliminary Draft, 1969). The lawyer’s right to withdraw when the client insists on a course of action the lawyer believes is simply unwise or imprudent arose in Model Rule 1.16(b)(3) as a result of an amendment offered by the Los Angeles County Bar Association. Proceedings of the 1983 Midyear Meeting of the House of Delegates, 108 A.B.A. REP. 289, 322 (1983). The ABA Commission on Evaluation of Professional Standards, which had developed the Model Rules, objected to this amendment, arguing that “a lawyer should not be permitted to withdraw simply because the lawyer considers the client’s conduct unwise if withdrawal will
"remain in [the] representation and insist, contrary to the client’s instruction, that the client comply with the lawyer’s view of the client’s intended and lawful course of action." The client, after all, will have to live with the benefits and burdens of reaffirmation, and at least as far as her lawyer is concerned, the client has the right in modern America to choose the level of risk and responsibility with which she is comfortable.

By all means, the lawyer should counsel the debtor against taking action that the lawyer deems imprudent or unwise, and she should identify the legal and nonlegal adverse effects that might flow from the decision. The lawyer need not passively resign herself to following the client’s lead and facilitating a decision that will, in the lawyer’s view, redound to the detriment of the client’s interests. But if the lawyer is unsuccessful in using counsel and suasion to convince the client to abandon her objective of reaffirming a debt, the modern American lawyer must acknowledge that the ultimate decision on central issues like whether or not to enter into an agreement must lie with the client.

Section 524(c)(3)(B) of the Bankruptcy Code brushes aside decades of professional responsibility rules and revives the Roman patronus model of lawyer domination. Stripped of her autonomy and her integrity, the debtor is compelled to battle with her own attorney on close judgment calls, as few “right” answers can emerge have a material adverse effect on the client.” Id. at 323.

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224 An attorney might suggest that a debtor simply say “no” to an offer to reaffirm personal debt in order to avoid empty threats of repossession of valueless property, or to gain access to unsecured credit immediately after bankruptcy. Both are scenarios familiar to most consumer bankruptcy attorneys, but not to their clients.

225 My use of the word “modern” should not be overemphasized, as courts have recognized this essential tenet of client-lawyer relations for decades. For example, Singleton v. Foreman, 435 F.2d 962 (5th Cir. 1970), includes one of my favorite examples of a court rebuking a lawyer for outrageous overreaching. The lawyer representing the wife in this domestic dispute excoriated his client for desiring a settlement, hurling insults at her and insisting that she did not “have any more to say in this case than a chair in the Courtroom.” Id. at 967. The court reminded this lawyer that a retainer contract does not render the client “an indentured servant, a puppet on counsel’s string, nor a chair in the courtroom.” Id. at 970. It laid out exactly the rule advanced in this Article, that “[c]ounsel should advise, analyze, argue, and recommend, but his role is not that of an imperator whose edicts must prevail over the client’s desire.” Id. at 970. My great thanks to Lucy McGough for bringing this extreme case to my attention.

226 See supra notes 33-42 and accompanying text (discussing Roman patronus model).
from the vague "undue hardship" standard. Even if lawyer and client ultimately agree, the very process of forcing a competent adult debtor to implore her lawyer for approval of a clearly lawful agreement upsets the delicate relationship between client and lawyer. And if the lawyer disagrees, this demeaning scenario concludes with the lawyer's paternalistic explanation that the lawyer's limited information suggests that the debtor simply cannot handle such responsibility and the lawyer cannot allow her to take on such an "undue hardship." This is blatantly inconsistent with rules requiring lawyers to seek their clients' lawful objectives, and it adds fuel to the fire of criticism of arrogant and patronizing professionals.

Even if paternalism like this cannot be eliminated from the judicial system, it must be stamped out of the relationship between clients and their lawyers. One can accept defeat from an impartial judge who exists to make judgment calls, but one should not have to accept defeat from a paid lawyer who exists to advise and advocate. If consumer protection is our goal, there are acceptable ways of achieving this end. For example, Congress could prohibit reaffirmation agreements altogether, as some have suggested, or it could subject them to final approval by the bankruptcy court. Forcing the debtor's attorney to certify her approval—or withhold her approval—of the client's agreement is not an acceptable option.


228 The reaffirmation provisions in the original 1978 Bankruptcy Code created just such a regime, and § 524(c)(3)(B) arose as a result of creditor dissatisfaction with this system. See infra notes 243-68 and accompanying text (discussing reaffirmation agreements under original 1978 Bankruptcy Code).

229 Aside from the paternalism problem, the lawyer's certification of her view of the advisability of the debtor's reaffirmation is itself objectionable. It is never appropriate for lawyers to offer their personal views on their client's matter. All modern professional responsibility standards have prohibited lawyers from offering their personal opinions of their
Upending a century of progress in regulating the client-lawyer relationship is not the proper way to protect debtors from abuse. This pernicious cure is worse than the disease.

B. BANKRUPT DOES NOT MEAN DISABLED OR INCOMPETENT

Modern legal ethics recognize only a few exceptional instances of limited lawyer encroachment on client decisionmaking power. These exceptions do not sanction lawyers' vetoing the decisions of their adult, mentally competent consumer debtor clients. Even in the case of a debtor whose consistent inability to manage her finances led to her bankruptcy, it is not for her lawyer to co-opt her case after determining that her general capacity for decisionmaking is "impaired." This is not the sort of "disability" that calls for suspension of the fundamental right to self-determination. If the court must apply a paternalistic law to the client's affairs, that is the court's prerogative; but the client must at least retain control of her lawyer's presentation of her case to the court. Private lawyers simply cannot be allowed to strip their adult, legally competent clients of dignity in this way.

While all of the modern statements of professional responsibility acknowledge that lawyers must sometimes act for clients who are...
legally incompetent to make decisions, they all restrict lawyer invasion of the client’s autonomy to a minimum. The Model Code acknowledges that lawyers may be compelled to make decisions on behalf of a client when “[a]ny mental or physical condition . . . renders him incapable of making a considered judgment on his own behalf.”[^232]

Only those “incapable of making considered judgments,” however, fall within the Model Code’s definition of “incompetent.”[^233]

A client does not fall within this definition simply because the client’s considered judgment does not square with the lawyer’s view of the proper approach.[^234] Therefore, adult consumer debtors who have not been declared legally incompetent do not fit within the limited bounds of this standard.

The Model Rules require lawyers to accord even incompetent clients the maximum possible autonomy. For clients whose ability to make “adequately considered” decisions is impaired, Model Rule 1.14 directs lawyers, “as far as reasonably possible, [to] maintain a normal client-lawyer relationship with the client.”[^235]

The first comment to this Rule clarifies that the cornerstone of such a “normal client-lawyer relationship” is respecting the client’s prerogative to make ultimate decisions in the matter with the advice and assistance—not paternalistic control—of her lawyer.^[236]

[^232]: *Model Code of Prof’l Responsibility* EC 7-12 (1969) (emphasis added). Note, in addition, that the lawyer is “compelled” to step in only when the client has no legal guardian or other representative. *Id.* In construing Montana’s version of this provision, even when the Supreme Court of Montana conflated the roles of guardian and attorney and required that the appointed attorney for a child argue for the child’s best interests rather than the child’s wishes, the court carefully limited its decision to the “very narrow question of court-appointed representation of a child in a custody dispute arising out of a divorce.” In re Marriage of Rolfe, 699 P.2d 79, 85 (Mont. 1985). Moreover, the court did not assign final decision-making authority to the attorney, because the court was to make the ultimate determination and was to be “clearly informed” of both the child’s wishes and the basis for the attorney’s rejection of those wishes. *Id.* at 87.


[^235]: *Id.* cmt. 1. The Supreme Court of Wyoming discussed this rule in the context of a child-client, remarking that “counsel for a child is not free to independently determine and advocate the child’s ‘best interests’ if contrary to the preferences of the child.” Clark v. Alexander, 953 P.2d 145, 182 (Wyo. 1998). This case is infamous for its conclusion to merge the admittedly conflicting roles of attorney for the child and guardian ad litem. See Jennifer Paige Hanft, *Attorney For Child Versus Guardian Ad Litem: Wyoming Creates a Hybrid, But Is It a Formula For Malpractice?*, 34 LAND & WATER L. REV. 381, 385-86 (1999) (discussing
when the lawyer "reasonably believes that the client cannot adequately act in the client's own interest" do the Model Rules allow the lawyer to seek the appointment of a guardian or take "other protective action" on behalf of the incompetent client.\(^{237}\) Once again, only if a client lacks the basic mental capacity to make "adequately considered" judgments can her lawyer presume to make decisions on her behalf.\(^{238}\) Suggesting that the ordinary consumer bankruptcy client is unable to make "adequately considered" judgments is a wildly overbroad indictment of the average member of our society.

The Restatement limits even more severely the lawyer's ability to use "diminished capacity" as carte blanche to substitute her judgment for that of her client. Like the Model Rules, the Restatement directs the lawyer to maintain a normal client-lawyer relationship with a client suffering from "diminished capacity" of one kind or another.\(^{239}\) For lawyers overly eager to identify diminished capacity, the Restatement cautions that "[l]awyers . . . should be careful not to construe as proof of disability a client's insistence on a view of the client's welfare that a lawyer considers unwise or otherwise at variance with the lawyer's own views."\(^{240}\) Imprudent financial management is not a symptom of disability.
Even if a client in fact suffers from diminished capacity, the Restatement exhorts lawyers to "adhere, to the extent reasonably possible, to [their] usual function as advocate and agent of the client, not judge or guardian." Where the lawyer must make decisions in the client's "best interests," those interests are identified according to how the client would define them, not how the lawyer views them based on presumptions about the client and her circumstances.

The ordinary consumer debtor enjoys the same right to personal autonomy and integrity as any other client under modern standards of legal ethics. Counterintuitive as the decision to reaffirm dischargeable debt may be, as the Restatement warns, a seemingly unwise decision certainly does not warrant branding the debtor incapable of making reasoned decisions with the advice of counsel. Reaffirmation might properly be subjected to heightened scrutiny from a court, but it cannot reasonably be used as a badge of mental infirmity that strips clients of the autonomy that lies at the foundation of the modern client-lawyer relationship.

Even if one could legitimately presume that the decision to reaffirm a debt could only emerge from a mind incapable of making adequately reasoned decisions, this would not support placing ultimate approval power over reaffirmation agreements in the hands of the debtor's lawyer. Even incompetent clients are entitled to a normal client-lawyer relationship. That relationship rests on the premise that the lawyer must either persuade the client to change course, or withdraw from the representation if she simply cannot in good conscience advocate the client's lawful decisions. Short-circuiting the process by acting as judge or guardian over the client's proposed lawful agreement is incompatible with the modern American lawyer's role.

III. WHAT WAS CONGRESS THINKING?

One would assume that Congress had good reason to enact a rule that so blatantly flouts modern standards governing the client-
lawyer relationship. One would be wrong in so assuming. This Part exposes the process that introduced the requirement of attorney certification of reaffirmation agreements into the Bankruptcy Code. A review of the legislative history of section 524(c)(3)(B) reveals that the attorney certification provision was tacked onto critically important legislation by one representative and a small group of lobbyists at the eleventh hour. No committee reviewed the proposal, and because of severe limits on debate, it was never discussed in Congress. The attorney certification requirement was designed to manipulate the client-lawyer relationship to improve the ability of credit unions, department stores, and credit card companies to collect overdue debts from consumers, not to protect consumer debtors.

The practice of persuading consumers to contractually reaffirm discharged debt barely survived the enactment of the 1978 Bankruptcy Code. The commission, convening to propose revisions to the almost century-old federal bankruptcy law, recommended that reaffirmation be forbidden entirely, and the House of Representatives initially agreed. The Senate, however, ultimately prevailed on the House to compromise. Section 524(c)(4) of the original 1978 Bankruptcy Code permitted reaffirmation agreements, but only if the bankruptcy court approved such agreements as being in the "best interests of the debtor" and not imposing an "undue hardship" on the debtor or any dependent of the debtor. No one so much as mentioned any role in this process for the debtor's


The previous Bankruptcy Act had been adopted in 1898. Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).


See H.R. REP. NO. 95-595, AT 164 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6125 (stating "[t]his provision ... ensures a debtor will not come out of bankruptcy in the same situation he went in").

See 36 CONG. Q. 2495, 2495 (Sept. 16, 1978) (stating differences between House and Senate bills must be worked out in committee); see also 124 CONG. REC. 32,399 (1978) (stating compromises were made in section 524(c), (d)); id. at 33,999 (noting section 524(c), (d) represented compromise).

attorney other than representing the debtor at the discharge hearing and arguing for approval of the agreement.

Five years later, the Supreme Court declared the entire jurisdictional structure of the new bankruptcy courts unconstitutional, requiring Congress to revisit its new Bankruptcy Code. Two years passed without congressional action on this fundamental problem, and the situation went from bad to worse when the Supreme Court issued its opinion in \textit{NLRB v. Bildisco \\& Bildisco}. The opinion approved a simple process for bankrupt companies to slough off unfavorable collective bargaining agreements, which infuriated powerful labor constituencies. The \textit{Bildisco} decision added fuel to what had become a raging fire of bankruptcy reform debate, and it provided the needed impetus for action. A few weeks later, on March 19, 1984, Peter Rodino, the Chairman of the House Judiciary Committee, introduced H.R. 5174, which restructured the system of bankruptcy jurisdiction, imposed new requirements for rejecting collective bargaining agreements, and revised several consumer protection provisions. For the very first time, this bill proposed to require the debtor's attorney—instead of the bankruptcy court—to certify that a proposed reaffirmation agreement would not


\textsuperscript{252} \textit{Id.} at 532-34.

\textsuperscript{253} H.R. 5174, 98th Cong. (1984).
impose an undue hardship on the consumer debtor or a dependent of the debtor.254

The attorney certification requirement appeared quite by surprise as a result of last-minute, backdoor negotiations with consumer finance creditor groups.255 The public record is virtually silent with respect to the attorney certification provision and its rationale. Adopting a constitutional scheme of bankruptcy jurisdiction and protecting organized labor dominated the brief Congressional discussion of the bill.256 Rodino's reform bill was fast-tracked through the House two days after its introduction. Consideration of the bill was severely restricted by a special rule allowing only two hours of debate and only one pre-arranged amendment,257 much to the consternation of many House Republicans.258 In his only public statement on the matter, Rodino commented simply that several consumer bankruptcy amendments, encompassing the attorney certification provision, arose as the result of a "compromise worked out with the consumer credit industry."259 Congress never debated or even discussed the attorney certification provision as it adopted Rodino's bill.260 When Senate leaders introduced substantial

254 Id. § 308(b); see also FitzSimon & Winkler, supra note 250, at 6-107 (explaining Rodino had ensured passage of this bill in House by forging compromises with House leadership, including agreement to add to his bill consumer credit provisions of earlier bill, H.R. 1800). Section 109(b) of H.R. 1800 dealt with reaffirmation agreements, but only required court approval of such agreements. H.R. 1800, 98th Cong. (1983). Thus, the attorney certification language was a new and unexplained contribution by Rodino. No committee ever reviewed Rodino's revisions of the consumer bankruptcy amendments from H.R. 1800. The public record reveals only that the revisions occurred in a "private markup" with House majority members and private creditor representatives. 130 CONG. REC. 6193 (1984) (remarks of Rep. Sawyer).


259 130 CONG. REC. 5858 (1984) (remarks of Rep. Rodino). The "consumer credit industry" comprises creditors that lend to consumers, such as banks, credit unions, department stores, and credit card companies.

260 Only two vague comments addressed to reaffirmation arose during the course of the
amendments to H.R. 5174, they left the attorney certification provision untouched and without discussion, explaining only that "the House provisions are basically acceptable to the Senate proponents of these measures." Rodino reported to the House after final adoption of his bill simply that "[i]dentical provisions were passed by both bodies, and the conferees did not alter the consumer credit amendments." Thus, the attorney certification requirement in section 524(c)(3)(B) of the Bankruptcy Code, inserted as an overture to credit unions, department stores, and credit card companies, was never discussed by any committee or either house of Congress.

The consumer credit industry had good reason to lobby for moving approval of reaffirmations from bankruptcy judges to debtors' attorneys. Since the passage of the Bankruptcy Reform Act in 1978, the number of reaffirmations had decreased dramatically for all consumer creditors. Credit unions, for example, enjoyed a reaffirmation rate of nearly seventy percent before adoption of the 1978 law, but that rate had fallen to only ten percent in the following years. This meant significant losses for consumer creditors, who were left unable to recover large amounts of consumer indebtedness. Credit industry lobbyists convinced some members of Congress that these losses resulted from overly stringent judicial control of reaffirmations.

discussion of H.R. 5174 in the House. See 130 CONG. REC. 6203, 6222 (1984) (remarks of Rep. Synar) (remarking on compromise that led to consumer bankruptcy provisions); 130 CONG. REC. 6222 (1984) (remarks of Rep. Long) (remarking on strict provisions designed to ensure that no debtor would take on undue hardship in reaffirming debt). Nothing in particular was said about the attorney certification requirement. Rodino apparently circulated a private "Dear Colleague" letter to members of the House, which might explain in more detail the history of the attorney certification requirement. See 130 CONG. REC. 6197 (1984) (remarks of Rep. Rodino) (noting explanation of major sections of bill by way of detailed letter). I have been unable to locate a copy of this letter after two years of searching. I strongly suspect, however, that the letter was dedicated largely to the critically important and extremely divisive jurisdictional and collective bargaining issues and little, if at all, to reaffirmation of consumer debts.

S. REP. NO. 97-446, at 21.
edly played a role in the decline in reaffirmation, as some courts reportedly refused to approve reaffirmation agreements at all, and in almost all cases courts refused to approve reaffirmation of unsecured debts. Ultimately, some creditors stopped seeking reaffirmations, which they viewed as doomed to judicial disapproval.

Given the press of more critical problems, Congress went along for the ride. It passed the aberrant attorney certification provision into law with no discussion of its meaning and no consideration of its effects on debtors, their relationships with their lawyers, and our system of legal representation. Section 524(c)(3)(B) of the Bankruptcy Code was designed to bypass disinterested and impartial judges and manipulate the professional loyalties of debtors' lawyers to their clients in order to increase collection of consumer debt. In the end, the consumer credit industry had purchased a provision that intentionally placed debtors' attorneys in a no-win situation with respect to clients whom creditors had convinced to reaffirm dischargeable debt.

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266 S. Rep. No. 97-446, at 21-22. Unsecured debt is not backed by collateral, or property that the creditor can seize and sell if the debtor fails to repay the debt. A classic example of secured debt is a car loan secured by the car itself. If the debtor fails to repay the car loan, the finance company or bank can repossess and sell the car to recoup its losses. Credit card debt is a common example of unsecured debt, as the card-issuing bank has no right to seize and sell any of the cardholder's property if a charge goes unpaid. Credit unions were issuing significant amounts of unsecured loans between 1978 and 1983. S. Rep. No. 97-446, at 21.


268 Note that the highly criticized attorney certification requirements of the pending bankruptcy reform bills are quite different from § 524(c)(3)(B). Despite what some sources have inaccurately reported, see Margaret Graham Tebo, A New Chapter, A.B.A. J., July 2001, at 46 (stating attorneys are responsible for certifying information provided by clients under new means test), the new bills do not require the debtor's attorney to certify that the debtor meets the new "means test" for access to Chapter 7, or that the financial information in the debtor's filing is complete and accurate. Instead, they simply incorporate or restate Bankruptcy Rule 9011, which requires the debtor's attorney to show that she performed a reasonable investigation and, to the best of her knowledge, information, and belief, the debtor's filing was supported by a good faith basis in fact and law. Compare Fed. R. Bankr. P. 9011, with H.R. 333, 107th Cong. § 319 (2001); S. 420, 107th Cong. § 319 (2001). The conference report on these two bills, released July 26, 2002, contains a similar test. See H.R. Rpt. No. 107-617, 12-14 (2002) (setting forth new section 102(a)(4)).
IV. CONCLUSION

While paternalistic court oversight of reaffirmation agreements may have its problems, fixing these problems by forcing the debtor’s lawyer into the role of guardian and gatekeeper for the debtor’s lawful agreement should be self-evidently improper. Yet, despite its shameful legislative history and the serious professional conflict it poses for debtors’ lawyers, section 524(c)(3)(B) has drawn precious little criticism over the eight years of its existence. Lawyers can counsel their clients to avoid decisions that the lawyer views as unwise or imprudent, but lawyers in the twenty-first century must acknowledge that their clients are autonomous individuals with legitimate interests in self-determination. The rights revolutions of the 1950s and 1960s forced American society to reexamine how it viewed its members and their rights to respect, dignity, and independence. After almost a century of development, the American rules of legal ethics have incorporated a modern view of the individual, prohibiting lawyers from interfering with their clients' decisions on legal rights and obligations. It is high time for all who make, administer, and advise on the law to acknowledge that the days of the Roman patronus are long gone. Clients today come to lawyers seeking and deserving advice and advocacy—not guardianship.

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289 I have found few sources that even acknowledge a potential problem with the attorney certification requirement, and generally even these sources simply remark offhandedly that there is a problem. See, e.g., MICHAEL J. HERBERT, UNDERSTANDING BANKRUPTCY § 12.09, at 230 (1995) (noting “at least some conflict of interest” in the lawyer’s duty under § 524(c)(3)(B)); see also Richard E. Coulson & Alvin C. Harrell, Consumer Bankruptcy Developments and the Report of the National Bankruptcy Review Commission, 53 BUS. LAW. 1121, 1129-30 (1998) (questioning “the wisdom of passing on to a debtor’s legal advisor the obligation to ensure that the debtor acts in his or her own best financial interests” and criticizing “arrogant disregard of the correct role of debtors’ lawyers”); Marianne B. Culhane & Michaela M. White, Debt After Discharge: An Empirical Study of Reaffirmation, 73 AM. BANKR. L.J. 709, 716 (1999) (remarking that § 524(c) places debtors’ attorneys in “difficult position”); J. Christopher Marshall & Eric K. Bradford, New Challenges for Attorneys Signing Reaffirmation Agreements: Meeting a Heightened Standard of Judicial Review, AM. BANKR. INST., Nov. 1999, at 24 (noting, but not developing, concept that attorney certification “has always carried the potential for conflict unique to bankruptcy law”). One article, however, has endorsed the notion that consumer debtors should be allowed to make their own choices about continuing financial burdens following a bankruptcy filing. Jean Braucher, Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility, 5 AM. BANKR. INST. L. REV. 165, 190-94 (1997).