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Mentor, Mercenary or Melding: An Empirical Inquiry into the Role of the Lawyer

*Margaret Ann Wilkinson, Peter Mercer & Terra Strong**

I. INTRODUCTION

The role of the lawyer in contemporary society is a widely discussed topic. Not only have scholars presented a great deal of writing on the various roles of lawyers, but official codes of conduct address the issue as well. Some literature suggests that the lawyer's role is that of a counselor, one who provides general legal counseling to a client. In contrast, others have argued that lawyers should simply follow a client's instructions and act exclusively as the client's agent.

These two contrasting roles of the lawyer reflect the predominant ideologies regarding the proper role of the lawyer: the "counselor" approach and the "hired gun" approach. The literature portrays the two approaches as being mutually exclusive approaches to the entire practice of law. In reality, however, it appears that these approaches exist along one continuum from counselor to hired gun, a continuum through which lawyers may shift during the course of representing a client.

This Article examines the two models for the role of lawyers as espoused in legal literature. It then looks at the guidance given lawyers in Ontario, Canada, in choosing between the two roles in the *Professional Conduct Handbook of The Law Society of Upper Canada*

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("Professional Conduct Handbook" or "Handbook").¹ The Article then compares those models and the Law Society's directives concerning them, to the actual roles practiced by lawyers as members of the Ontario Bar. The purpose of this Article² is to determine the way in which the roles adopted by practicing lawyers compare to the roles of a lawyer as articulated in legal literature and the professional ethical codes.³

First, this Article describes the two contrasting roles that a lawyer may adopt in dealing with a client—that of the "hired gun" versus that of the "counselor."⁴ Recognizing that the two contrasting roles can be reconcilable,⁵ this Article then sets out the possible approaches a lawyer can take with respect to these two roles when representing a client.⁶ Next, this Article discusses these roles of professional conduct within the context of data obtained through extensive empirical research.⁷ In particular, this Article focuses on the experiences and perceptions of many diverse lawyers⁸ with regard to the roles they fulfill within an attorney-client relationship.⁹ Then, this Article analyzes the results of this empirical research and considers, specifically, the results with respect to the effectiveness of ethical codes and the aptness of the legal literature.¹⁰ Finally, this Article concludes that neither scholarly discourse nor legal regulation is

1. LAW SOCIETY OF UPPER CANADA, PROFESSIONAL CONDUCT HANDBOOK (1996) [hereinafter PROFESSIONAL CONDUCT HANDBOOK].

2. This Article is one part of a larger multi-year interdisciplinary research initiative entitled *Professionalism or Profit: The Changing Nature of Legal Ethics*. The research was sponsored under a strategic grant from the Social Sciences and Humanities Research Council of Canada. The Law Society of Upper Canada and the Canadian Bar Association endorsed the project, which has received organizational and financial support from the Westminster Institute for Ethics and Human Values. The other two members of the original interdisciplinary team were C. Barry Hoffmaster, Professor of Philosophy, University of Western Ontario, and Don Buckingham, Assistant Professor of Law in the working Group on Agricultural Law and the Environment, University of Saskatchewan.

3. See *infra* Part II.B. This Article focuses on the ethical code established by the Law Society of Upper Canada. Nevertheless, many of the Law Society's rules closely resemble ethical rules established by the American Bar Association. See *infra* text accompanying notes 64-78 (discussing the American Bar Association's ethical code of conduct).

4. See *infra* Part II.A.1 (discussing the lawyer as counselor) and Part II.A.2 (discussing the lawyer as hired gun).

5. See *infra* Part III.A.

6. See *infra* Part III.B.

7. See *infra* Part IV.

8. See *infra* Part IV for a discussion of the role of the lawyer as expressed by practicing attorneys.

9. See *infra* Part IV.

10. See *infra* Part V.

directly effective in influencing the manner in which legal practitioners approach their roles.¹¹ Additionally, this Article suggests those areas in which further research is required.¹²

II. THE POSSIBLE ROLES OF THE LAWYER

A. *The Role of the Lawyer in Legal Literature*

The role of the lawyer is a much discussed topic in legal literature today.¹³ A large volume of literature exists encouraging the Bar to adopt a counselor approach—an approach which might be thought reminiscent of days gone by when law was practiced by prominent men who took an active role in the lives of their clients and their community.¹⁴ A second body of literature employs a vastly different approach to the manner in which law should be practiced. This approach is often referred to as the hired gun approach.¹⁵ According to this view, lawyers should allow clients to direct their own affairs. In this capacity, the lawyer is merely an agent of the client and acts exclusively under the client's direction. In the realm of legal literature, these two concepts are mutually exclusive: lawyers are to act either as counselors in their practice or as hired guns.¹⁶

11. See *infra* Part VI.

12. See *infra* Part VI.

13. See generally *infra* notes 17-22 and accompanying text.

14. See, e.g., Jim Philips, *Beyond the Law: Lawyers and Business in Canada 1830 to 1930*, in 4 *ESSAYS IN THE HISTORY OF CANADIAN LAW* (Carol Wilton ed., 1990).

15. See generally Joseph Allegritti, *Have Briefcase Will Travel: An Essay on the Lawyer as Hired Gun*, 24 *CREIGHTON L. REV.* 747 (1990-91) (espousing the notion that prospective attorneys are trained to be the hired gun of their client); Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 *J. LEGAL EDUC.* 11 (1991).

16. Indeed, Duncan Kennedy, in an "Ideas" program on CBC radio, hypothesized about the reasons lawyers choose each role:

[Lawyers] tend to have an attitude of relative deference to the client, depending on how rich and powerful the client is. So that the less hierarchically powerful and the less authoritative the client is, the less you'll do for them. The more authoritative and hierarchically powerful the client is, the more willing you are to become their tool. So the result of that is that large corporations and other large social powers that aren't in the corporate form which could be government entities sometimes, get basically an essentially passive overpaid intense support service from the bar, in which independent professional judgement plays a tragically small role. And that small clients, the people at the lower end of the social order, when they have access to legal services at all, tend to be much more manipulated, culled out, directed, oriented and controlled by their lawyers, by contrast to the higher status people. And the result of that is that the legal profession both in its more or less utterly submissive posture *vis a vis* the large social powers of a society and its more controlling, manipulative attitude towards the small client and the small

1. The Lawyer as Counselor

An enormous body of literature embraces the view that lawyers owe a general duty of counseling to their clients.¹⁷ Atticus Finch¹⁸ and Abraham Lincoln¹⁹ serve as vivid fictional and historical examples of the archetypal rural lawyer who performs a counseling function.²⁰ This role has been described as part of the lawyer-statesman ideal²¹ and the notion of the lawyer as moral activist.²² Fundamentally, the lawyer has a duty, as a counselor, to become actively involved in the client's affairs and to advise the client in the most general sense.

This duty to provide general counseling is best illustrated through a simple example. In the situation where a client enters the lawyer's office "wanting to go to court," lawyers operating from a counseling perspective would perceive it as their duty to examine the situation beyond the initial parameters as defined by the client to ensure that the client's decision was well thought out.²³ The counselor-lawyer recognizes that the client may not have the legal background to define and address the problem at hand and that interests exist beyond the client's immediate desires. Thus, the counselor-lawyer must weigh competing and concurrent third-party interests, as well as the client's interests, in order to formulate advice. As a result, the counselor-lawyer becomes obligated to advise the client about these other interests, even if the client is not initially concerned about such issues.

people in the society reinforces social hierarchy in the whole society through its forms of practice.

Duncan Kennedy, *Ideas: The Legal Mind* (Canadian Broadcasting Corporation radio broadcast, Oct. 29, 1990).

17. See generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (articulating the content and legal appeal of the lawyer-statesman ideal); SOL M. LINOWITZ, *THE BETRAYED PROFESSION* (1994) (discussing the need to rediscover the humanitarian aspect and non-pecuniary satisfaction in the practice of law); The Honourable Mr. Justice Charles D. Gonthier, *What is Professionalism?*, 26 *GAZETTE* 10 (1992); The Honourable Mr. Justice Frank Iacobucci, *The Practice of Law: Business and Professionalism*, 49 *THE ADVOC.* 859 (1991) (highlighting the need to emphasize the role model of the "moral" lawyer).

18. See LINOWITZ, *supra* note 17, at 11-14 (discussing HARPER LEE, *TO KILL A MOCKINGBIRD* (Warner Books 1982) (1960)).

19. See Iacobucci, *supra* note 17, at 863.

20. See also Richard L. Abel, *United States: The Contradictions of Professionalism*, in *LAWYERS IN SOCIETY, THE COMMON LAW WORLD* 186 (Richard L. Abel & Philip S.C. Lewis eds., 1984) (providing an account of the demise of the American attorney as a profession).

21. See KRONMAN, *supra* note 17, at 11-14.

22. See *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* (David Luban ed., 1983).

23. See KRONMAN, *supra* note 17, at 129.

Notably, it has even been argued that a duty is imposed on all lawyers to act as counselors within the scope of their professionalism.²⁴ The knowledge required of a professional, however, is neither quickly nor easily gained. In Ontario, Canada, for example, students must study for three years at law school in addition to a minimum of two years of prior university education,²⁵ study in the Bar Admission Course administered by the Law Society of Upper Canada, and train for one year in Articles²⁶ before becoming eligible for admission to the Bar.²⁷ Thus, the legal knowledge and skill in the law held by members of the profession extends far beyond that which is held by most non-members. This knowledge and skill justify the granting of special privileges, such as self-regulation, and place the corresponding responsibility of the duty of service on the profession.²⁸

The Honourable Mr. Justice Gonthier emphasized the lawyer's responsibility to serve the client when he stated that "in a professional setting, service and a sense of duty must be the motivating forces, and

24. A frequently cited definition of professionalism is provided by Roscoe Pound, the late Dean of Harvard Law School. It identifies the basic elements of a professional calling as organization, learning, and earning a living:

Historically there are three ideas involved in a profession: organization, learning, *i.e.*, pursuit of a learned art, and a spirit of public service. These are essential. A further idea, that of gaining a livelihood is involved in all callings. It is the main if not the only purpose of purely money making callings. In a profession it is incidental.

The Honourable Mr. Justice Frank Iacobucci, *Striking A Balance: Trying to Find the Happy and Good Life Within and Beyond the Legal Profession*, 26 GAZETTE 205, 206 (1992) (citing ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* (1953)).

25. In fact, it is more common for students to study for four or five years, rather than two, at a university prior to attending law school.

26. The articling student trains closely with an articling principal, who must be a member of the Law Society of Upper Canada, gaining practical experience in the law and in the ethics of the profession prior to writing the bar examinations. For a good examination of the process, see ALLAN C. HUTCHINSON & PAM MARSHALL, *THE LAW SCHOOL BOOK: SUCCEEDING AT LAW SCHOOL* 149-53 (1996). Rule 24 of the PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, governs articles in Ontario. See also LAW WITHOUT FRONTIERS, A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW 166-67 (Edwin Godfrey ed., 1995) [hereinafter LAW WITHOUT FRONTIERS].

27. Each jurisdiction has regulations concerning the admission of lawyers to its Bar. For example, in order to practice in the United States, Canadian lawyers may be required to take further studies at an American law school prior to writing the state bar examination. In Canada, foreign educated lawyers, including Americans, are required to have their credentials verified by the Joint Committee on Accreditation, a national body located in Ottawa, and are frequently required to study at a Canadian law school prior to writing the bar examination of any of the provincial bars. See LAW WITHOUT FRONTIERS, *supra* note 26, at 153-54, 168-70; see also HUTCHINSON & MARSHALL, *supra* note 26, at 148.

28. See Peter Wright, *What is a "Profession?"*, 29 CAN. B. REV. 748, 757 (1951).

must take precedence over financial considerations and the self-interest of the profession."²⁹ Taking an active counseling role is, therefore, inherent in the lawyer's performance of this type of service. The specialized knowledge gained during the study of law presumably provides the lawyer with insight which is not professed by non-lawyers. Accordingly, as proposed by counselor-lawyer supporters, superior knowledge of the law provides lawyers with unique insight that must be used to aid the uninformed client.³⁰

Importantly, the ability to give advice and judgment results from extensive knowledge. Some have even argued that advice and judgment are the cornerstones of counseling.³¹ As such, the lawyer must thoroughly weigh all interests and encourage the client to be thoughtful in making the ultimate decision.

Of course, the knowledge prerequisite of professionalism presumes that the lawyer has insight and skill that the client does not have.³² This presumption does not, however, rule out the possibility that the client can be right on some issues. Certain clients may be very clear about what outcome they desire with regard to certain legal matters, such as obtaining a will, incorporating a business, or completing a real estate transaction. Sophisticated clients may even have a better understanding than the lawyer of the impact their desired outcomes will have on others and on society as a whole. Other clients, however, may need the lawyer's advice about the impact of certain outcomes and help in evaluating various options. All clients, though, will need to be given a sense of the process or means necessary to achieve their ends. Thus, the lawyer who adopts a counseling role does not always operate in the same manner, but must respond to the needs and circumstances of individual clients.³³

29. Gonthier, *supra* note 17, at 11. In addition, the Honourable Mr. Justice Iacobucci explains that "[t]he distinguishing feature of the practice of law is the fact that [a lawyer's] knowledge [of the law] carries with it both great power to influence private lives and public affairs and, correspondingly, great responsibility to our clients and community." Iacobucci, *supra* note 17, at 860.

30. Mr. Justice Iacobucci acknowledges that "[t]he real work of lawyers is dealing with people through the offering of advice and ultimately judgment." Iacobucci, *supra* note 17, at 860.

31. See DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991).

32. This explains Linowitz's statement, "[p]rofessionalism presumes that in professional relations the customer is *not* always right." LINOWITZ, *supra* note 17, at 88.

33. See *infra* note 81 and accompanying text.

2. The Lawyer as Hired Gun

Legal literature also supports a second approach to the role of the lawyer. This school of thought is often referred to as the hired gun³⁴ or conduit approach.³⁵ This approach presumes that the lawyer's exclusive role is to act as an agent for the client. If a client asks for legal advice, the lawyer is clearly obligated to give such advice to the best of her knowledge and ability. After accepting the person as a client, however, the lawyer merely becomes an actor of that client.³⁶ If the client prefers to litigate, the lawyer is obliged to litigate the matter to the best of her ability within the confines of the law. Unlike the counselor-lawyer approach,³⁷ no duty is imposed on the hired gun lawyer to ensure that the client's decision to litigate is a thoughtful one.³⁸

Professor Richard Abel's *American Lawyers*³⁹ proposes an interesting argument for promoting this hired gun approach. Professor Abel applies Marxist and Weberian theories⁴⁰ to the legal profession and concludes that self-regulation of the profession is driven by self-

34. See Allegretti, *supra* note 15, at 749-54 (describing the hired gun approach as one in which the attorney is retained ultimately to attain whatever the client wants; the attorney must put aside any personal value system in order to become unconditionally loyal to the client and must go as far as the law allows in order to win); Schneyer, *supra* note 15, at 22-25 (supporting the hired gun lawyer as appropriate and beneficial in certain areas of the law).

35. See Robert A. Kagen & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 411-15 (1985).

36. *Id.*

37. See *supra* notes 17-33 and accompanying text for a discussion of the lawyer as counselor.

38. The following excerpt summarizes this viewpoint:

Among the metaphors that shape how lawyers view themselves, and are viewed by others, none exercises a more powerful hold than the metaphor of the hired gun. . . . [Lawyers] learn quickly they must be ready to argue any side of any issue. Their personal values and beliefs are to play no role in how they do their job. They owe their clients uncompromising loyalty. If they have moral qualms about a client, or about the means needed to achieve a client's goal, then they should refuse to take the case. *But once they take a case they are in, all the way in, and the client has the right to expect them to do everything possible to win the case, subject only to the constraints of the law and the codes of the legal profession.*

Allegretti, *supra* note 15, at 749 (emphasis added).

39. RICHARD L. ABEL, *AMERICAN LAWYERS* (1989).

40. Marxist theory focuses upon socioeconomic class relations and views class conflict, between bourgeois capitalists and the proletariat, as the principal engine of social change. *Id.* at 30. The theoretical tradition associated with Max Weber addresses competition among occupational categories for market shares and social status. *Id.* at 15, 30. In *American Lawyers*, Professor Abel uses social theory analysis to describe and explain the development of the American legal profession.

interest. In turn, he concludes that it is the lawyers' self-interest which causes them to act as counselors rather than hired guns.⁴¹ He believes the counselor approach allows lawyers to protect their privileged position in society.⁴²

Abel also suggests that counselor-lawyers do not litigate fringe cases because their training, background, and self-interest dictate advising the client not to pursue such cases.⁴³ In order for minority or non-lawyer interests to be heard, therefore, it is necessary for lawyers to act solely on the client's instructions.⁴⁴ Accordingly, social reform through the courts is best achieved through the hired gun model.⁴⁵ This model assumes that particular non-legal considerations, unknown to the lawyer, may be paramount in some circumstances. Therefore, it is inappropriate for a lawyer to adopt a counseling role, as the only responsibility of a hired gun is to pursue the goals that have been defined by the client alone.

Legal literature points to a number of factors as precipitating the hired gun approach.⁴⁶ First, legal education was historically a process of mentoring rather than formal institutional education.⁴⁷ Today, however, legal education is removed from the realities of legal practice. Students are taught in the university setting according to a

41. *See id.* at 246-47.

42. Others have acknowledged that "hired-gun norms, however unattractive in the abstract, become appropriate insofar as they serve as a measured response to real temptations and pressures in law practice. . . ." Schneyer, *supra* note 15, at 23.

43. *See* ABEL, *supra* note 39, at 239-48.

44. *Id.* at 247.

45. *Id.* at 239-48. Abel suggests that:

Lawyers *are* hired guns: they know they are, their clients demand that they be, and the public sees them that way. . . . Lawyers must stop denying the identification and embrace it. Instead of seeking to justify their actions by reference to process values that allegedly produce truth and justice, lawyers must concede—indeed, affirm—that they actively promote the objectives of their clients and justify their own behavior in terms of the substantive justice of their clients' goals.

Id. at 247. *See also* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 687 (1981) (noting that "[a]lthough the lawyer claims to be amoral in agreeing to represent a client, and thus refuses to accept ethical responsibility, lawyer, client and society all persist in viewing the lawyer as implicated in the client's ends and accountable for the means used to pursue them"); Thomas L. Schaffer, *The Legal Ethics of Fear: On the 1904 Report of the Committee on Legal Ethics of the Georgia Bar Association*, 41 MERCER L. REV. 565 (1990) (criticizing ethical recommendation of lawyers as "humble advisors" and "gentlemen").

46. These assertions are difficult to test within the framework of the evidence gathered in this project and will not be pursued in this paper.

47. *See* C. IAN KYER & JEROME E. BICKENBACH, *THE FIERCEST DEBATE: CECIL A. WRIGHT, THE BENCHERS, AND LEGAL EDUCATION IN ONTARIO 1923-1957* (Univ. of Toronto Press 1987).

curriculum focused primarily, if not exclusively, on appellate questions of law. Thus, they are studying case law solely for its contribution to a specific area of law. The cases are not, for the most part, being widely studied for their ethical content or counsel's management of the case. This detached method of study, it is argued, does not equip the student with counseling skills.⁴⁸

Second, the dramatic changes made in the law firm environment also helped precipitate the hired gun approach. Thirty years ago, a law firm with 100 lawyers was virtually unimaginable in Canada. As recently as 1965, there were only eight firms in Toronto which employed more than twenty lawyers.⁴⁹ In 1993, however, there were eleven firms that employed more than 100 lawyers⁵⁰ and four firms that employed more than 200 lawyers.⁵¹ In contrast to the small number of mega-firms, there are forty-four firms in Toronto that employ more than twenty lawyers.⁵² Notably, more than half of the practitioners in Toronto currently practice in the large or mega-firm setting.⁵³

This fundamental structural change from small law firms to the mega-firms inevitably influences the nature of the practice of law. For instance, partners and associates of mega-firms may not recognize one another on the street. Depersonalization of the law firm results, and quantitative measures of performance, such as billable hours, are emphasized. It is speculated that such measures deter lawyers from acting as general counselors.⁵⁴ Moreover, clients of these large firms

48. For more information on this topic, see KRONMAN, *supra* note 17, at 264-70; LINOWITZ, *supra* note 17, at 119-25; Allegretti, *supra* note 15, at 754-60.

49. THE CANADIAN LAW LIST 1965 (William B. Cartwright ed., 1965). See also CHRISTOPHER MOORE, THE LAW SOCIETY OF UPPER CANADA AND ONTARIO'S LAWYERS 1797-1997 (1997). Moore states that "[i]n the 1970s, a firm could be one of the largest in Canada . . . with fewer than forty lawyers." *Id.* at 310.

50. The original study was conducted in 1993. At that time this data was collected from the *Rolls of the Law Society of Upper Canada* (Law Society of Upper Canada, Ontario, Nov. 1993). See Peter Mercer et al., *The Practice of Ethical Precepts: Dissecting Decision-Making by Lawyers*, 9 CAN. J. LAW & JUR. 141 (1996).

"Rolls" simply refers to a membership list. The Law Society of Upper Canada is the self-governing professional body for lawyers in the province of Ontario. It is sub-national in that it only covers one province, not the entire country.

51. *Rolls of the Law Society of Upper Canada*, *supra* note 50. See also MOORE, *supra* note 49, at 311 (confirming data).

52. *Id.*

53. *Id.*

54. See Richard Brunaugh, *Thoughts on Money, Winning, and Happiness in the Practice of Law*, 9 CAN. J. LAW & JUR. 101 (1996) (stating the proposition that the lawyer whose professional goals are either "making money" or "simply winning" will be unable to achieve the type of satisfaction which comes to the lawyer who truly acts as an advocate); Barry Hoffmaster, *Hanging Out a Shingle: The Public and Private Services*

are often very sophisticated and have their own in-house counsel. In such cases, the in-house counsel often take the role of the counselor and retain, on many occasions, private counsel to perform a specific task.⁵⁵ As a result, the private counsel will undertake the task of acting as the hired gun.

In addition, multi-national corporations and the global economy are relatively new phenomena. This has created a new type of client for lawyers. The legal issues facing a multi-national company and its lawyers are very different than those facing the individual client. Therefore, the sheer size of the client and the complexity of its legal problems prohibit lawyers from acting in a counseling role.

Finally, specialization in the legal profession has prompted participation in the hired gun approach. As jurisprudence and legislation increase, lawyers become more specialized; specialists have in-depth knowledge of a limited and specific area of law.⁵⁶ As a result, they are not equipped to give general advice to a client on all legal matters.⁵⁷ This legal development, therefore, may lead to short-term hired gun relationships rather than life-long counseling relationships.

B. The Role of the Lawyer in Ethical Codes

Clearly, legal literature supports the notion that there exists a fundamental contradiction between the counselor and hired gun approaches to the practice of law.⁵⁸ The majority of the literature,

of Professionals, 9 CAN. J. LAW & JUR. 127 (1996) (blaming the recent increase in competition and commercialism for the apparent loss of ethical morality within the legal community). These ideas will be further explored in a later paper prepared with data from this research study.

55. See LINOWITZ, *supra* note 17, at 83.

56. As Linowitz suggests, "[o]bviously, no lawyer today can know everything his client needs to know in dealing with the hugely expanded library of government rules and regulations Specialization is unavoidable, and with specialization comes depersonalization." *Id.* at 67.

57. For example, intellectual property lawyers, who often practice in boutique firms, may not always feel comfortable advising a client on more general business needs. The third commentary to Rule 2 of the *Professional Conduct Handbook*, which requires the lawyer to be competent to perform the legal services undertaken, states:

It follows that the lawyer should not undertake a matter without honestly feeling competent to handle it, or able to become competent without undue delay, risk or expense to the client. This is an ethical consideration, and is to be distinguished from the standard of care which a court would invoke for purposes of determining negligence.

PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, at r.2.

58. See *supra* notes 37-38 and accompanying text for the differences between the counseling role and the hired gun role.

then, represents the roles from which a lawyer must choose—the lawyer as counselor and the lawyer as hired gun—and allow that choice to govern the conduct of her entire practice. Figure 1 illustrates the two model roles of lawyers as depicted in literature (see Fig. 1, appendix).

In a profession regulated by the government, members must examine whether the law imposes any restrictions on the making of choices in professional areas. The Ontario Legislature granted Ontario's professional governing body, the Law Society of Upper Canada, the authority to regulate members of the legal profession in Ontario.⁵⁹ It has chosen to do so, in part, through its *Professional Conduct Handbook*.⁶⁰ The Rules of Professional Conduct set forth in the *Professional Conduct Handbook*, and the commentary to those Rules,⁶¹ are meant to act as a direct influence on the actual roles played by lawyers in the Province of Ontario.⁶² Their purpose is to operationalize the profession's grant given by the provincial government to self-regulate.⁶³ Therefore, it is important to examine the role or roles mandated by those rules and the case law which interprets the Law Society's legislation in order to see whether lawyers are free to make the kind of dichotomous choice in adopting a professional role which is portrayed in literature.

1. The Lawyer as Counselor

At least three of the Rules in the *Professional Conduct Handbook* imply that the lawyer must sometimes adopt a counseling role.⁶⁴ Rule One, for example, states that "[t]he lawyer must discharge with integrity all duties owed to clients, the court, the public and other members of the profession."⁶⁵ The recognition that duties are owed to

59. *Law Society Act*, R.S.O. 1990, c.L.8, s.63.

60. PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1. For a discussion of the way the *Handbook* operates to regulate members, see Gavin MacKenzie, *The Valentine's Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession*, 33 ALTA. L. REV. 859 (1995).

61. These Commentaries are found in the PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1.

62. See PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1.

63. See *id.*

64. See *infra* notes 65, 68-72 and accompanying text for a discussion of the rules supporting the lawyer acting as a counselor.

65. PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, at r. 1. See also MODEL RULES OF PROFESSIONAL CONDUCT Rules 8.1-8.5 (1983) (maintaining the integrity of the legal profession); MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983) (mandating that lawyers consider "moral, economic, social and political factors" in addition to technical legal considerations). The American Bar Association has always emphasized the

persons other than the client supports the theory of the lawyer's need to adopt a counseling role. The implication is that the lawyer must be mindful of these other interests when advising clients. As advocates of the counseling philosophy recognize, a client's actions are not made, or felt, in isolation. Instead, any given action by a client has an impact upon opposing parties, families and associates of the parties, and, in many cases, society at large.⁶⁶ The potential negative impact on others' interests due to the choices made by the client in many situations highlights the need for legal advice that will encourage clients to choose the best possible course of action. On this view, the chosen course of action must be determined in light of *all* the competing interests involved. Thus, it may be argued that to discharge these duties to the client, the court, and the public, a lawyer must adopt the role of a counselor.⁶⁷

Rule Three of the *Professional Conduct Handbook* actually mandates certain situations in which a lawyer must act as counselor to the client. The Rule states that "[t]he lawyer must be both honest and candid when advising clients."⁶⁸ Commentaries One, Two, and Nine of this Rule demonstrate situations in which a lawyer is required to discharge counseling duties. The first Commentary explains that the lawyer must go beyond an analysis of the relevant facts and law in advising clients and give the client the benefit of her own experience and expertise while clearly disclosing her own opinion on the case.⁶⁹

importance of integrity in the profession. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1 and EC 1-5 (1980) (establishing that lawyers should maintain high standards of professional conduct and should encourage other lawyers to do likewise).

66. See William E. Conklin, *A Contract*, in CANADIAN PERSPECTIVES ON LEGAL THEORY 207, 212 (R.F. Devlin ed., Emond Montgomery Publications Ltd. 1991).

67. This perspective may be distinguished from the point that an individual espousing a hired gun role must recognize the impact of limitations on that role and its primary duty to represent the client's views, which may, in turn, be imposed upon by the court, by law, or by morality.

68. PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, at r. 3. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983) (mandating that the lawyer render "candid" advice).

69. Commentary 1 states in pertinent part:

The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, *and the lawyer's own experience and expertise. The advice must be open and undisguised*, and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, at r. 3 cmt. 1 (emphasis added). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. 1 (1983). Comment 1 states:

In addition, a lawyer's expertise and experience may extend to areas other than law. In fact, Commentary Nine assumes that a lawyer may possess non-legal expertise.⁷⁰ Finally, Commentary Two to this third rule states that the lawyer has a duty to clear up the client's misunderstandings or misconceptions.⁷¹ Read together, these Commentaries require the lawyer to act as a counselor in situations where legal or non-legal experience and expertise suggest that the client is not pursuing the most beneficial course of action.

Finally, Rule 11 of the *Professional Conduct Handbook* implies a lawyer's adoption of a counseling role by stating that "[t]he lawyer should encourage public respect for, and try to improve, the administration of justice."⁷² In this respect, it has been written that "[c]odes of ethics have traditionally reminded lawyers that their profession is more than just a business, and that they are quasi-public officials ('officers of the court' and 'ministers of justice') who are expected to share with judges a community-minded devotion to the

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Id.

70. Commentary 9 explains that

[i]n addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, policy or social implications involved in the question, or the course the client should choose. *In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client.* The lawyer who does express views on such matters should, where and to the extent necessary, point out any lack of experience or other qualification in the particular field, and should clearly distinguish legal advice from such other advice.

PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, at r. 3 cmt. 9 (emphasis added). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. 3 (1983) (stating that a lawyer's advice may extend beyond "legal considerations").

71. Commentary 2 to Rule 3 of the *Professional Conduct Handbook* states: "Whenever it becomes apparent that the client has misunderstood or misconceived the position or what is really involved, the lawyer should explain as well as advise, so that the client is apprised of the true position and fairly advised with respect to the real issues or questions involved." PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, at r. 3 cmt. 2. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. 3 (1983) (stating that a lawyer's advice may extend beyond "legal considerations").

72. PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, at r. 11. See also MODEL RULES OF PROFESSIONAL CONDUCT Preamble para. 5 (1983) (recognizing the importance of the lawyer's commitment to the public interest).

law."⁷³ A community-minded devotion to the law requires the lawyer to adopt a counselor approach because non-thoughtful decisions made by the client are potentially detrimental to the client, third parties and, possibly, society at large. The pursuit of justice, therefore, demands that decisions be made thoughtfully, and that all related and third-party interests are carefully weighed and considered.

While the *Professional Conduct Handbook* does not necessarily impose counseling duties on members of the Bar, it nonetheless implies the expectation and recognition that a lawyer will act as a counselor in certain situations.⁷⁴ The lawyer should always ensure that the client has considered all of the possible courses of action and understands the risks involved when making a decision.⁷⁵ The amount of counseling required by the rules of ethical conduct differs depending on the knowledge the client already possesses and the complexity of the legal issue.

2. The Lawyer as Hired Gun

In regulating the lawyer's conduct as an advocate, the *Professional Conduct Handbook* articulates a position which is quintessentially that of the hired gun.⁷⁶ Rule Ten provides that "[w]hen acting as an advocate the lawyer, while treating the tribunal with courtesy and respect, must represent the client resolutely and honourably within the limits of the law."⁷⁷ Therefore, in litigation, it is the lawyer's job to represent the client. In order to make the goals and opinions of the client clear to the court, the lawyer should convey the actual wishes of the client.

In addition, the lawyer has a duty to follow the client's instructions, whether it is based on agency, contract, or a fiduciary relationship between lawyer and client. This duty is widely acknowledged by the

73. KRONMAN, *supra* note 17, at 374; W. W. Pue, *Becoming "Ethical": Lawyer's Professional Ethics in the Early Twentieth Century Canada*, 20 MAN. L.J. 227, 227-28 (1991).

74. See *supra* notes 64-73 and accompanying text for a discussion of the lawyer's role as a counselor. While the American Bar Association's Model Rules are not binding on the profession, many states have adopted the Rules' mandate of the lawyer's role as counselor. See STEPHEN GILLERS & ROY D. SIMON, JR., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 3 (1996).

75. See *supra* notes 64-73 and accompanying text for a discussion of the lawyer's role as a counselor.

76. See *infra* notes 77-80 and accompanying text for a discussion of the hired gun approach.

77. PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, at r. 10. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983) (establishing that a lawyer must provide competent representation).

courts.⁷⁸ Moreover, this obligation is consistent with the hired gun role described in legal literature. For instance, in *Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd.*,⁷⁹ this duty was reaffirmed as an established practice.⁸⁰

III. RECONCILING THE TWO ROLES

A. *The Continuum*

Legal literature presents the counselor approach as separate and distinct from the hired gun approach. Accordingly, the literature suggests that the counselor and the hired gun approaches cannot be reconciled. Rather, the literary analyses view the approaches as a dichotomy from which a lawyer must choose her role. Many authors reinforce the impression of this mutually exclusive dichotomy by thoroughly discussing the advantages and disadvantages of the hired gun versus the counselor approach.⁸¹

78. See *Canada Trustco Mortgage Co. v. Bartlet & Richardes and Gates* (1991) 3 O.R. (3d) 642 (Ont. Ct. (Gen. Div.)) (stating solicitor only had a duty to follow the written instructions of plaintiff and was not required to advise plaintiff on matters outside the scope of plaintiff's written instructions); *Polischuk v. Hagarty* (1983) 42 O.R. (2d) 417, 149 D.L.R. (3d) 65 (Ont. H.C.) (holding solicitor liable for failing to carry out the specific terms of plaintiff's contract despite acting as an ordinary competent solicitor); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) (noting that the lawyer should follow the client's "instructions").

79. *Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd.* (1991), 5 O.R. (3d) 65 (Ont. Ct. (Gen. Div.)). The issue before the court was the duty of counsel where the client gave instructions to not approve a draft adjournment order, but for which there existed no proper grounds for withholding such approval. *Id.* at 66. Faced with this, the court recognized that counsel owed both a duty to the client and to the court, but found no authority directly on point in this matter. *Id.* While the court stressed the need for the solicitor's duty to be bound by law, the court refused to order costs against the solicitors, stating: "I am satisfied they did their best to have their client act reasonably and that, after careful consideration, they came to the conclusion that they were bound to follow his instructions." *Id.* at 71.

80. As the court stated: "[i]t is well to start with the general well settled proposition that a solicitor is the agent of his/her client and must, like any other agent, follow the principal's instructions. This is, however, subject to the exception that those instructions must be lawful." *Id.* at 69.

81. See KRONMAN, *supra* note 17, at 146-54 (discussing the distinct differences between advocating and counseling, despite the fact that they are often intertwined in practice); LINOWITZ, *supra* note 17, at 84-87 (discussing the differences between in-house counsel, who acts as a counselor, and outside counsel, who acts as a hired gun); Kagen & Rosen, *supra* note 35, at 404 (discussing the four images that the public associates with the role of the corporate lawyer); Schneyer, *supra* note 15, at 22 (describing an ethically appropriate defense to the lawyer's role as a hired gun). Some authors explore the advantages of the lawyer as counselor by analyzing the nature of the counseling process. See BINDER, *supra* note 31, at 259-86. Other authors explain that despite the disadvantages of the two roles, the distinct roles of in-house counsel (counselor) and

It is recognized, however, that within the counselor approach itself, there is a continuum of possible action. For example, a continuum of viable options exists between the appropriate counseling for an unsophisticated client with a complex legal issue on the one hand, and a sophisticated client with a simple legal issue on the other hand. The closer to the latter end of the continuum the problem is, the less counseling is needed in a given situation. Yet, the essence of the counseling approach, wherever a particular interaction falls on the continuum, is that, unless there are provisions in the law of a particular jurisdiction which force lawyers not to withdraw from cases, lawyers should never act as hired guns against their professional judgment.⁸²

Opposing the perspective set forth in legal literature, Ontario law views the different roles of the lawyer as part of a continuum with a range of possibilities, including both the hired gun and the counselor approaches.⁸³ This view suggests that these two roles are reconcilable. The law in Ontario affirms the hired gun role for the lawyer but, at the same time, recognizes that the lawyer must also be a counselor.⁸⁴ Whereas a pure hired gun approach presumes that the lawyer places the client's goals first,⁸⁵ Ontario courts have consistently held that lawyers owe a duty to advise, fully inform, and, in essence, counsel a client.⁸⁶

outside counsel (hired gun) are needed in our society due to changes in our social structure. LINOWITZ, *supra* note 17, at 82-83.

82. BINDER, *supra* note 31, at 286-87.

83. See *infra* notes 84-96 and accompanying text discussing how Ontario law utilizes both the hired gun and counselor approaches.

84. See *infra* notes 85-96 and accompanying text.

85. See *supra* notes 76-80 discussing the hired gun approach.

86. As a footnote to Rule 2 of the *Professional Conduct Handbook* the following notation is made:

As a matter of law the English and Canadian courts have consistently held that actions by clients against their lawyers for breach of duty stem from the contracts of employment made or implicit on retainer, or from the fiduciary relationship that exists between lawyer and client, and not on any general "tort" basis. A contractual or fiduciary relationship must be established. See, e.g. *Groom v. Crocker* (1938), [1938] 2 All E.R. 394 (C.A.), *Rowswell v. Pettit* (1968), 68 D.L.R. (2d) 202 (Ont. H.C.) at 209-12 (aff'd with variations as to damages by S.C.C. *sub nom. Wilson v. Rowswell* (1970), [1970] S.C.R. 865).

PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, at r.2.

For example, in *Major v. Buchanan*,⁸⁷ the court held that a solicitor has a duty to warn a client of the risks involved in a course of action.⁸⁸ Failure to do so will result in liability and damages if it is proven that the client would not have pursued a particular course of action had the warning been given.⁸⁹ *Polischuk v. Hagarty*⁹⁰ also discusses the duty a solicitor has to her client. In *Polischuk*, Justice Henry clearly explained the role of the lawyer as a progression from a counselor to a hired gun.⁹¹

87. *Major v. Buchanan* (1975), 9 O.R. (2d) 491, 61 D.L.R. (3d) 46 (Ont. H.C.). Plaintiff, seller of a dwelling house, hired defendant, solicitor, to assist him with the sale. *Id.* at 492. The court held that the defendant failed to appropriately satisfy the requirements of the transaction and, as a result, breached his duty to act professionally and in a conscientious and dedicated manner. *Id.*

88. *Id.* at 514. The plaintiff was the vendor of a house and defendants were the plaintiff's lawyers in the transaction. *Id.* at 492. The purchasers of the property, a development company, paid the defendant a deposit on the property and secured the remainder of the purchase price with a mortgage the purchasers claimed to have obtained from a finance company. *Id.* at 497. It was only after the purchasers demolished part of the plaintiff's house that it was discovered that a great many liens had been registered against the purchaser's property and that no mortgage had in fact been secured by the purchasers. *Id.* at 502-03. The plaintiff brought an action against the defendant lawyers for damages for breach of contract based on the alleged negligent conduct of the lawyers for failing to warn the plaintiff of this possibility. *Id.* at 506. The court held that a solicitor has a duty to warn a client of the risks involved in a course of action such as a sale of land of this nature. *Id.* at 514.

89. *Id.* Moreover, limitations on the duty to follow instructions have been imposed by the Law Society and the courts, which place limits upon a lawyer's ability to perform as a hired gun. Indeed, the courts have declared that the lawyer's duty to the court is paramount. See *Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd. and Theodore* (1991), 5 O.R. (3d) 65 (Ont. Ct. (Gen. Div.)) (stating that a solicitor who is no longer acting for his client still has obligations to the court and other solicitors); *R v. Sweezy* (1987), 66 Nfld. & P.E.I.R. 29 (Nfld. C.A.) (finding a lawyer, who advised a witness to be evasive and forgetful, guilty of wilfully obstructing justice); *Re: Comeau* (1986) 77 N.S.R. (2d) 57 (T.D.) (stating that if counsel relied on a trial decision that he knew was changed by an appellate decision, counsel has a duty to reveal that appellate decision to the court).

90. *Polischuk v. Hagarty* (1983) 42 O.R. (2d) 417 (1983) 149 D.L.R. (3d) 65 (Ont. H.C.). In this case the plaintiff vendors claimed damages for breach of contract against the defendant solicitor for failing to obtain and register a discharge of a mortgage on land placed for sale by the plaintiff vendors, thereby breaching the terms of his retainer. *Id.* at 417.

91. In describing the appropriate relationship between the solicitor and his client, the court held that

[h]is duty to his clients was. . . to advise them as to the course that they should instruct him to pursue. It is at this point that the exercise of his professional skill and judgment comes into play—he must then inform them of the implication of the proposed course, apprise them of the risk inherent in it, and once having advised them in accordance with the standard of a reasonable, competent solicitor, and being satisfied that they appreciated the risk, take and act upon their instructions.

Id. at 426.

Similarly, the *Professional Conduct Handbook* provides a basis for the notion that lawyers operate on a continuum, moving from counselor to hired gun.⁹² When the duty to counsel clients⁹³ is read in conjunction with other rules of the *Handbook*, the relationship between the two roles becomes obvious. Under Rule Three of the *Professional Conduct Handbook*, the lawyer has a duty to advise the client.⁹⁴ Commentary Three of that same Rule, however, indicates that the lawyer must also follow the client's instructions.⁹⁵ Therefore, the lawyer clearly has a duty to both counsel the client *and* to accept the client's instructions. While both of these roles cannot be performed simultaneously, they can be performed throughout the course of a single lawyer-client relationship. The lawyer can, for example, be a counselor until the client makes a final decision and ultimately gives uncompromising instructions to the lawyer.⁹⁶

The model of the lawyer's role drawn from the law of Ontario is therefore different from that developed in legal literature (see Fig. 2, appendix). Rather than giving lawyers a dichotomous choice of roles, Ontario law appears to create an obligation for lawyers to take on two roles—one as a counselor and one as a hired gun—at different points in the lawyer-client relationship.

B. Operation of the Roles

Two different models for the possible roles taken by lawyers are thus advanced. The first model is a choice between two mutually-exclusive approaches. This is the model developed in legal literature.⁹⁷

92. See, e.g., PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, at r. 3 cmts. 1, 3, 5 and 9, and r. 10 cmt. 2.

93. See *supra* notes 64-75 and accompanying text for a discussion of the lawyer as counselor.

94. See *supra* notes 76-80 for a discussion of the lawyer's duty to follow her client's instructions.

95. Commentary Three to Rule Three states that

[t]he lawyer should clearly indicate the facts, circumstances and assumptions upon which the opinion is based, for example in a case where the circumstances do not justify an exhaustive investigation with consequent expense to the client. However, *unless the client instructs otherwise*, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications.

PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, at r. 3 cmt. 3 (emphasis added).

96. But see *infra* text accompanying note 152 (noting that neither the *Professional Conduct Handbook* nor the case law clearly suggest when a lawyer should make the transition from counselor to hired gun, or how much counseling is appropriate).

97. See *supra* text accompanying notes 13-16 (discussing notions of professionalism upon which the model is based).

The second model is a necessary continuum. This is the model advanced by the *Professional Conduct Handbook* and subsequent case law.⁹⁸

According to the model which derives from the *Professional Conduct Handbook*, an individual should locate herself on the continuum from counselor to hired gun according to her own analysis of the appropriate role a lawyer should fulfill at a given point in a particular case. A lawyer should first perform a counseling function and subsequently move to the hired gun role as the issues become more defined, as more decisions are made, and as instructions are received. Specifically, a lawyer would adopt the counselor role and function within it until specific instructions are received from the client. If the client's instructions are in accord with the lawyer's counsel or advice, no problem arises for this lawyer. If, on the other hand, the lawyer disagrees with the instructions received, the lawyer may attempt further counseling to persuade the client to alter her instructions. If the client continues to persist, however, the lawyer operating on this basis may face a personal and professional dilemma and must decide whether to abandon the counseling role, acquiesce to the client's instructions and assume the hired gun role, or to withdraw from the case. For other lawyers, this crisis may never arise because they adopted the hired gun role from the outset (contrary to the model the law in Ontario presents) and operate according to the belief that their personal opinion is irrelevant to the client's decision.

In reality, whichever role is initially adopted by the lawyer, hired gun or counselor, concern about her appropriate role will not arise in cases in which the lawyer and the client are of the same mind from the outset. This may be illustrated as shown in Figure 3 (see Fig. 3, appendix). The question of the lawyer's role vis-à-vis the client will not arise because the roles will be *ad idem* throughout their relationship. Thus, there will not be a problem for lawyers operating under either view of the proper role of the lawyer when the lawyer's views and the client's coincide. There will also be no conflict when the lawyer adopts a hired gun role from the start because the lawyer will never see it as her duty to assert her views in the face of the client's.

The lawyer who faces a dilemma is the one who adopts a counseling role at any stage, and whose counseling is ignored by the client. In such cases, the lawyer must choose either to stay with the counseling

98. See *supra* text accompanying notes 87-97; see *infra* text accompanying notes 99-104 (illustrating the models).

model and, therefore, be forced to leave the case, or to adopt the hired gun approach.⁹⁹ This dilemma is illustrated in Figure 4 (see Fig. 4, appendix).

It must be noted that in both the case where the lawyer adopts the hired gun approach from the outset and in the case where it is adopted after counseling has produced disagreement between the lawyer and client, ultimate acquiescence to the client's views, where the lawyer privately disagrees, has the potential to cause the lawyer to internalize the conflict between her own views and the client's views. On the other hand, continuation of any such internal conflict or stress would be avoided where the counseling lawyer, whose client refuses her advice, withdraws from the case.¹⁰⁰ This picture is considerably more complex than that presented in either the literature model or the continuum model of the lawyer's roles derived from Ontario law. The full complexity of this model is illustrated in Figure 5 (see Fig. 5, appendix).

IV. TESTING THE MODELS

A. *The Research Question*

Given the inherent complexity of the issues confronting lawyers concerning the roles they can adopt with respect to clients, it becomes important to assess how lawyers react when confronted with the issue of which role to adopt. Certainly, it is the purpose of the legal principles in this area to guide lawyers' actions.¹⁰¹ To presuppose that the principles actually *do* guide lawyers' actions without actually testing that notion as an empirical hypothesis, however, would be to miss one of the most important aspects of this entire research program—to ask whether, in fact, the Rules guide lawyers' conduct.¹⁰² This analysis uses data gathered from interviews

99. Figure 4 (appendix) illustrates the issues that a lawyer must address when the lawyer and client are in disagreement.

100. Figure 5 (appendix) illustrates the role of a lawyer under various circumstances and at various stages of the attorney-client relationship.

101. See Susan P. Koniak, *Law and Ethics in a World of Rights and Unsuitable Wrongs*, 9 CAN. J. LAW & JUR. 11, 25 (1996) (discussing which legal principles guide attorneys when deciding which role to adopt—hired gun or counselor).

102. The research will also explore other themes, including the themes identified by the participants in the series of workshops co-sponsored by the project and the Westminster Institute for Ethics and Human Values. See Mercer, *supra* note 50, at 144-45 (explaining that a study must use models to determine whether the *Handbook* guides an attorney's actions).

conducted with Ontario lawyers to provide valuable insight into the realities of today's practice. A comparison of the empirical data gathered from these interviews with the models of the lawyers' roles described in the literature and the ethical codes tests the validity of these models in describing the actions taken by lawyers actually faced with these decisions.

There is a logical factor to be considered in assessing the data provided by these lawyers. If some of the lawyers interviewed mention adopting the hired gun approach from the outset of these dealings with clients, this would cast doubt on the universal adoption by the Ontario Bar of the continuum model mandated in their law, which begins with a counseling role. A complete acceptance of the hired gun role will logically not create external conflict with a client. Therefore, it is to be expected that acceptance of this role for the lawyer will not be a subject of discussion in interviews about difficult decisions, although in cases where the lawyer actually disagrees with the client and yet holds to the hired gun model throughout, the interviews might provide evidence of internal tension and ethical pondering. Figure 6 sets out these expectations (see Fig. 6, appendix).

If lawyers embrace an initial counseling role in a continuum from counselor to hired gun, consistent with the model created in the *Professional Conduct Handbook*, we would expect much more evidence of problems in resolving conflict over clients refusing to follow counsel.¹⁰³ Such conflicts for lawyers adopting the counseling model, if they are indeed found in the interviews, can then be further analyzed to see whether they are resolved by finally adopting the hired gun role, as the Rules model would imply,¹⁰⁴ or by dropping the case as the legal literature's dichotomous model hypothesizes.¹⁰⁵ Figure 7 illustrates the approach of testing the literature and Ontario law models against the data (see Fig. 7, appendix). Thus, following the paths which lawyers pursue to resolve their role conflict problems allows us to draw some conclusions about the probable strengths of each model in light of the practitioners' actions.

103. See Figure 6 (appendix) for an illustration of the hypotheses against which the data in his analysis were tested.

104. See *supra* text accompanying notes 81-96 for a discussion of the notion that lawyers operate on a continuum moving from counselor to hired gun.

105. See *supra* Part II.A for a discussion of the argument that lawyers must choose between two mutually exclusive approaches in the practice of the law.

B. The Research Method

This study was conducted using data gathered from interviews with lawyers in three Ontario cities.¹⁰⁶ These cities were selected based on their population: one smaller-medium-sized city with a population closer to 10,000 in a range from 10,000 to 99,999;¹⁰⁷ one larger-medium-sized city with a population closer to 99,999;¹⁰⁸ and one large city with a population of between 100,000 and 499,999.¹⁰⁹ A total of sixty-one interviews were conducted in these cities.¹¹⁰ In each city, interviews were conducted in each of three firm sizes: sole practitioners, medium firms of between two and eight practitioners, and large firms of between nine and thirty practitioners.¹¹¹ Within each city and firm-size group, participants were selected at random. The interviews were conducted in a "critical incident format," in which each participant was asked to describe an incident of particularly difficult decision-making relating to practice.¹¹²

Figure 8 indicates the number of interviews conducted in each of the nine cells of the research design being used in this analysis (see Fig. 8, appendix). The numbers in round brackets indicate the number of interviews in each cell originally planned for each cell. Some variation between the number planned and the number executed in each cell

106. For further details of the sampling approach, see Mercer, *supra* note 50, at 151.

107. Strict confidentiality was assured to all those interviewed by the study group. For further details, see Mercer, *id.*, at 144-45. Research data is not publicly available since it was produced and collected under agreements of strict confidentiality. Part of the confidentiality agreement also requires masking the identities of the interview cities. *Id.*

108. *Id.* at 151.

109. *Id.*

110. An analysis of the data gathered from lawyers practicing in a large metropolitan center of over 500,000 will appear in a forthcoming paper.

111. The interviews conducted in the metropolitan center include practitioners practicing in "mega" firms of over thirty practitioners. See Mercer, *supra* note 50, at 150. There were no firms of that size in Ontario cities under 500,000. *Id.* The forthcoming paper will discuss practice in such large firms.

112. For a fuller description of the methodology used in the study, see *id.*, at 145-48. As indicated in that article, the figures in the tables shown were subject to slight variation as the data gathering was completed. *Id.* at 154 n.46. The figures shown in the appendix to this Article reflect the final data gathered.

The interviewer asked the participants questions relating to the specific situation. Beyond the initial skeletal instructions provided by the interviewer, the topic was defined by the participant and questions flowed from his or her choice of topic. Participants were also asked a series of demographic questions which provided data for independent variables. Once the interviews had been transcribed, they were sent back to the participants for review and editing. At this point, the participants were asked for their consent to the interview being used in the study. If that consent was obtained, the edited transcript was included in the database for subsequent analysis.

occasionally occurred when the size of the firm was actually verified during the interview. Figure 8 also indicates in square brackets the number of transcripts for which consent was obtained in each cell, which indicates that the response rate to our study was 87% overall for these cells.

Collectively, the lawyers discussed a wide range of topics in the interviews. Participants discussed such areas as career choice issues, lifestyle choices, case strategy issues, and ethical dilemmas.¹¹³ In the subsequent process of analyzing the qualitative content made available by the participants, the researchers identified those interviews in which the participating lawyers discussed the role of the lawyer as an issue.¹¹⁴ Figure 9 shows the distribution of the seventeen interviews which reflected this concern (see Fig. 9, appendix).¹¹⁵ The lawyer's role was a recurrent and frequently discussed theme. In total, thirty-two percent of the participants chose to discuss an incident of difficult decision-making that they identified as being directly related to their roles as lawyers.¹¹⁶ Moreover, the concern with the lawyer's role came in interviews with practitioners of every size firm. This suggests that the lawyer's role is a pervasive issue within the profession.¹¹⁷

C. The Model of the Role of the Lawyer Expressed by Participants

Every participant in the study described a situation that involved unique factors and considerations. Moreover, each lawyer who chose to discuss an issue pertaining to the lawyer's role raised the question in a different context. As such, their approaches to their roles offer some

113. An example of the sort of problems raised by practitioners in the study was one in which a lawyer discussed how she reacted to a request from a second lawyer to approach an individual who had previously approached that second lawyer for help in an accident situation. The second lawyer was unable to take the case because of a conflict and, for other reasons, did not feel free to refer the client to the first lawyer but rather wanted her to approach this accident victim directly.

114. The researchers intend to explore the other themes identified by the subjects in subsequent articles.

115. The numbers in square brackets in Figure 9 (appendix) reproduce the numbers in square brackets in Figure 8 (appendix). They indicate all the transcripts for which consent was received in each cell.

116. It must be remembered that the participants were not prompted as to which topic of difficult decision-making they chose to relate to the researchers. Therefore, it is revealing that 17 of the 53 participants in cities other than the metropolitan center discussed issues relating to their roles as lawyers.

117. No tests of statistical validity could be done regarding the role of the lawyer because of the small sample size analyzed. Therefore, one may not reliably generalize from the data. On the other hand, these lawyers do provide evidence that the positions they espouse are present in the Ontario legal profession and, therefore, do provide evidence about the fit of the two models proposed.

insights on the validity of the counseling and hired gun models previously discussed. For instance, no subjects adopted the hired gun as the only model to which they subscribe. Such a result was not inconsistent with the authors' hypothesis regarding the data the interviews would provide. This result is shown here in Figure 10 (see Fig. 10, appendix).

1. The Purely Counselor Approach

Of the seventeen lawyers who discussed issues relating to their role as lawyers, five did not wish to convert to the hired gun role from their current counseling role in the context of the problem they were presenting to the interviewer. They articulated their choice as either attempting counseling one more time before withdrawing from the case, or withdrawing from the case immediately (see Fig. 10, appendix).¹¹⁸ None of the clients in these cases attempted to instruct the lawyer to do anything illegal or improper.

One of these five lawyers did not think that the clients were capable of understanding the issue at hand because they were too emotional.¹¹⁹ Therefore, the lawyer believed that she could not represent the clients.¹²⁰ Two of the five lawyers did not agree with the clients' perceptions that they had winning cases and, hence, were not willing to take on,¹²¹ or to stay on,¹²² cases that they believed they would lose. The fourth lawyer felt so strongly about a particular aspect of the presentation of the potential case to the court that she was not prepared to represent the client unless the client followed her advice on that issue.¹²³ The lawyer instead gave the client an ultimatum and the client eventually found another lawyer.¹²⁴ In the fifth case, a potential client

118. Interviews with lawyers B, D, E, J, and K. To aid in protecting the lawyers' anonymity, each of the seventeen transcripts which discuss the lawyer's role has been given a letter to identify it within this Article. Further, according to Loyola Law Journal policy, this Article will refer to all of the participating attorneys by using feminine pronouns to assist in keeping the participating lawyers anonymous.

119. Interview with lawyer B.

120. *Id.*

121. Interview with lawyer J.

122. Interview with lawyer D.

123. Interview with lawyer K.

124. *Id.* In explaining this perspective, one lawyer said:

You have been retained as a professional and you are being paid as a service provider to represent the person who sought your counsel and you do that by analyzing what is best for that client. And sometimes, what is best for that client is different from what they want to do. And then I think it is incumbent upon you to say, "Look, the law is such and such. Plus, I do not think that you have analyzed this potential consequence of you acting in the way you plan to. I am recommending to you that you act differently." And that can be

wished to have a will drawn revealing his belief that his most obvious heir was poisoning him and, therefore, wished to leave that person out of his will. The lawyer believed that the client was delusional on that one point but appeared in all other respects to have testamentary capacity.¹²⁵ Nonetheless, the lawyer did not take the case. Instead the lawyer gave the client the names of other lawyers who might be able to assist him.¹²⁶

These five lawyers adopted the dichotomous approach to the role of the lawyer presented in legal literature. In doing so, they effectively adopted the literature's creed: if one adopts the role of counselor and the client refuses the counseling, drop the case.¹²⁷ The decision process followed by these lawyers is shown in Figure 11 (see Fig. 11, appendix).

2. Role Commutation: Lawyers Who Switched From Counselor to Hired Gun

Five lawyers involved in the study made the transition from counselor to hired gun without creating a conflict with their clients (see Fig. 10, appendix).¹²⁸ In these cases, even though the lawyers were still unsure about whether the client was making the right decision,¹²⁹

sometimes your best advice to a client. It is to do something different from what they want to do for their own good, legally.

Interview with lawyer E.

125. In these last two cases it is interesting to note that the lawyers revealed that it was a conflict between their client's wishes and their own personal perceptions that were preventing them from taking the case. In both cases, they specifically mentioned that they knew there were other lawyers who would take these cases.

126. Interview with lawyer E.

127. See *supra* notes 13-57 and accompanying text.

128. Lawyers A, F, H, M, and O made the transition from counselor to hired gun without conflict. See *infra* notes 129-39 and accompanying text (examining the circumstances surrounding a lawyer's transition from counselor to hired gun).

129. This concept is illustrated in the following excerpt:

Ultimately, professionally it's not our job to make their decision. I mean, they're the client and they have to make the decision, and we can only advise them one way or the other. I'm sure some lawyers may have a beat-over-the-head approach that says 'this is what you're going to do.' But I don't think that's a lawyer's role[;] it's to advise and give your opinion of what the best course of action is, but ultimately it's the client's decision . . . they have to live with it.

Interview with lawyer O.

In any event I was quite torn as to what he might instruct me upon because I certainly felt that the evidence was there that he did not commit [the offense] . . . and just for a second I was torn between whether or not I should continue to represent him. . . . So anyway, he gave me the instructions and I followed those instructions.

Interview with lawyer H.

the lawyers thought they had given enough counseling. As a result, although still uncertain that the client's instructions were in the client's own best interests, these practitioners adopted the role of a hired gun and accepted the client's direction.

Two of these five incidents involved the manner of conducting a criminal trial. The lawyers involved were very clear that the counseling role ended as decisions about how to proceed with the defense were required in the face of the prosecution's approach to the case.¹³⁰ The third situation involved the conduct of civil litigation, and again the trial process precipitated the timing of the change from counselor to hired gun.¹³¹ The next situation involved family law issues.¹³² The participating lawyer clearly articulated the point at which the counseling role must give way to the hired gun role:

We have a Code of Professional Conduct that indicates that we are to behave in a certain manner and that we are to take our client's instructions and act accordingly. I guess the ethical dilemma is, do you move yourself from being counsel for the mother, to being advocate for the child? That is something you have to be very careful of. I think you can look at both of those until such time as the client gives you very clear instructions. Then you have to move away from the joint experience into one where you say well I am advocate of the mother.

....
[One counsels] I suppose until it gets to the point where she can say "Ok, I've heard what the doctor said, I heard what the counselors said, I've heard what the foster parents say, I know what will happen if this happens, but taking all of that into condition [sic] this is what I am going to do." As soon as they say that, then fine, that's where they are, this is the role I have. Then you advocate from there.¹³³

The final situation involved a more complicated scenario. The client had in mind a particular outcome when she arrived at the lawyer's office. In advising the client, the lawyer suggested other options. The lawyer spoke of the advice given in these terms:

It happened to touch on some pretty big societal problems, but I dealt with it as primarily a personal problem for the individual. These are the things that are part of the context within which it had to be dealt with, but if she was wanting to make it a mission of hers, to highlight this area, then that was certainly an option

130. Interview with lawyers H and F.

131. Interview with lawyer O.

132. Interview with lawyer M.

133. *Id.*

that she had There are all kinds of societal problems, but to use you [the interviewer for example] as a tool to change the rules isn't something for me to do, it is something for you to decide that you want to do. And if you do, then that is quite legitimate¹³⁴

Additionally, in response to a question, the lawyer said:

I didn't tell her not to proceed, and I wouldn't have told her not to proceed in any event. I just said 'this is my assessment of your choices, and if you are asking me for a recommendation, this is what I would recommend.' The decision was entirely hers. Now, if she had chosen to proceed then I would have understood that¹³⁵

The client eventually pursued one of the options that had not been a part of her original design in seeking the lawyer's advice. Ultimately, the lawyer said that the client

was very disappointed with the advice, but did agree with it. And it wasn't as if she didn't have other options.

. . . .

. . . And I think that the practical choices were a disappointment for my client at the time, because I think her inclination would have been to pursue the principle of the thing.¹³⁶

Thus, in the end, we have a lawyer who was prepared to take the client's instructions in any event and a client who eventually made her decision based on the lawyer's counseling. The lawyer appears to have approved of the client's choice, yet nonetheless raised this situation when asked by the researchers to describe a *problem*.

As Figure 11 (see Fig. 11, appendix) illustrates, in four of these five cases, the client ultimately gave the lawyers instructions with which the lawyers agreed.¹³⁷ In one situation,¹³⁸ however, the lawyer complied with instructions with which she did not agree. As was evident in the interview, this compliance resulted in personal conflict.¹³⁹

134. Interview with lawyer A.

135. *Id.*

136. *Id.*

137. Figure 11 (appendix) illustrates the results of the participants' choices in deciding whether to take a counselor or hired gun approach.

138. The scenario referred to involved lawyer H.

139. Lawyer H described the situation as follows: "Afterwards, I did not feel very good about what had just occurred [There were] lots of issues that I was grappling with afterwards. . . . So to this day, I still question whether what I did was right or not." Interview with lawyer H.

3. Uneasy Role Commutation: Lawyers Experiencing Conflict

The remaining seven of the seventeen participants examined in this study struggled overtly with the question of when to abandon counseling (see Fig. 10, appendix).¹⁴⁰ These lawyers initially adopted a general counselor approach in advising their clients. Following counseling, these lawyers continued to find themselves in the position of disagreeing with their clients' decisions or feeling that their clients were not prepared to make the decision they had. These lawyers, however, also recognized that they had an ultimate responsibility to follow their clients' instructions.¹⁴¹ Balancing these two responsibilities created the dilemma for these lawyers. As a result, they wrestled with the decision of how much pressure to exert on the client in order to persuade the client that an alternate course of action was more desirable.¹⁴²

a. The Lawyer Objects to a Client's Actions

Four of the remaining seven participants experienced a conflict over the need to switch from counselor to hired gun. In all four cases, however, the client eventually took action which seems to have relieved these lawyers of stress and conflict over the outcomes. In the first situation, a criminal case, the criminal process drove the resolution of the lawyer's dilemma. The case was called for trial, which effectively ended the lawyer's attempts at counseling. Against the lawyer's advice, the client pleaded not guilty.

Two other lawyers also disagreed with their clients but had the decisions wrestled from their hands.¹⁴³ One situation involved family law, and the lawyer, who advised the client to go to court, was fully prepared to make an application.¹⁴⁴ The other situation involved

140. Interviews with lawyers C, G, I, L, N, P, and Q differed from the lawyers among B, D, E, J, and K, previously discussed, who decided to try counseling one more time before withdrawing. See *supra* Part IV.C.1. These seven practitioners did not discuss withdrawing from their cases.

141. The interviews, however, do not reveal the participants' bases for holding this belief.

142. For example, one lawyer commented:

[I] wondered how far I should press him It just seemed so overwhelmingly obvious to me that he was going to be convicted and that would eliminate the one chance that there was for saving something for him, which would have been for him to [take my advice, which he was refusing to do]. That was the dilemma.

Interview with lawyer N.

143. Interview with lawyer C.

144. *Id.*

counseling in a bankruptcy matter.¹⁴⁵ Notably, neither the lawyer in the family law action nor the lawyer in the bankruptcy case actually had to act on instructions from their clients (contrary to the advice given by both lawyers) because the clients, in both cases, took matters into their own hands and resolved the issues without their lawyers.

The fourth situation involved a family law issue of considerable complexity.¹⁴⁶ In this situation, the client insisted upon a course of conduct which the lawyer did not endorse. With pronounced misgivings, the lawyer took some initial steps in accordance with the client's instructions, but continued to advise an alternative approach to the matter. Indeed, the lawyer was very reluctant to accept the client's instructions regarding the ultimate resolution of the case. A real crisis arose for the lawyer when the client took an independent legal step without consulting the lawyer. The lawyer subsequently felt that "it was a conflict insofar as dealing with one's own perceptions on the one hand, and trying to appease or encourage the client on the other."¹⁴⁷ The lawyer had not seriously considered withdrawing from the case because she "was too interested in the case."¹⁴⁸ The client decided to switch counsel, thereby resolving the lawyer's problem. When the interviewer continued the discussion about this problem, the lawyer identified the issue as "whether [I] can represent [the client] effectively."¹⁴⁹ The lawyer stated that there "really was no moral quandary for [me]."¹⁵⁰ On the other hand, the lawyer continued:

It was an ethical quandary in a way, but it didn't really engage me in a moral sense. Ethics have little meaning to me unless they are infused with morality. I mean, you're dealing with a complex individual [the client] who is not being straightforward with you. Then the only thing you can do is protect yourself in the situation; that's the key. You've got to look after yourself first. And keep your wits about you. And if you feel that you can still represent this person as effectively as you can, given what you know, and that you're not going to crush them. There's no question of destroying the client, of squashing clients I wouldn't have considered it ethical to have not tried to counsel her, not been honest about how I felt, because I was straightforward with her as much as I could be. I would have felt *that* [not counseling or being honest] was unethical,

145. Interview with lawyer L.

146. Interview with lawyer Q.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

and I wasn't doing anybody a favor. And ultimately she took the cue from my advice to her, and decided to change lawyers, whatever that cue was My perspective is that I'm not a hired gun, and I'm not going to do whatever a client wants me to do.¹⁵¹

These four practitioners struggled with where to draw the line between their duty to advise and counsel their client, and their duty to blindly take instructions from their client. The most significant problem these lawyers faced was when to stop counseling. See Figure 11 (appendix) to trace their handling of their problems. As previously stated, Ontario law does not provide a clear cut answer on how much counseling is enough.¹⁵²

b. The Lawyer Condonees the Client's Actions

In the remaining three of the seven cases, the legal situations also developed in ways which avoided a crisis for the lawyers. In these cases, however, the clients ultimately chose to make decisions with which their lawyers were in sympathy.

In one case, the crisis for the lawyer was averted because the opposing party in a negligence action made a settlement offer which she could take to the client.¹⁵³ This offer resolved the lawyer's dilemma about whether to pursue the action (even though the evidence was very sketchy) or to press the client to make a settlement offer. Ultimately, the client accepted the settlement offer proposed by the opposing party, an offer which mirrored the lawyer's own view of the hazards of proceeding to trial. Similarly, in the second situation, the lawyer disagreed with the client's instructions to commence a malpractice suit after being counseled on the risks associated with that course of action. Ultimately, the client accepted a settlement offer consistent with the lawyer's own views of the merits of the case.¹⁵⁴

In the third case, the lawyer and the client appeared to disagree over whether the client should act in a way that the lawyer identified as morally correct or to take action in the way the lawyer identified as most legally advantageous.¹⁵⁵ Lawyer P found herself on the horns of a real dilemma:

151. *Id.*

152. See *supra*, Part II.B.1, for a discussion of the Rules set forth in the PROFESSIONAL CONDUCT HANDBOOK which imply that lawyers have a duty to counsel their clients in some situations.

153. Interview with lawyer G.

154. Interview with lawyer I.

155. Interview with lawyer P.

The decision was whether or not I should disregard what I considered to be good legal practice and just say morally what was I supposed to do in this situation, as a person. That was tough. You had to separate the two in this situation. You have to advise your client that legally you should not do this, but morally you have to do it¹⁵⁶

The client tried an interim measure which appeased the lawyer's preference to have the client follow the moral approach. It was obvious from the outcome of that effort, however, that the client would not fully commit to the course of action which the lawyer perceived as moral. Therefore, when the client issued his final instructions in accordance with his most advantageous legal position, the lawyer acquiesced and accepted those instructions as the only possible outcome for this particular set of circumstances.¹⁵⁷ For the latter three lawyers, G, I, and P, the path of decision making from counseling to initial disagreement with their client's instructions and later acceptance of them, to approval of the outcome of the encounter is shown in Figure 11 (appendix).

V. THE PRACTITIONERS' REASONS FOR ADOPTING VARIOUS ROLES

All of the practitioners interviewed who were concerned with the role of the lawyer adopted the counselor role at one point or another in their cases. They cited multiple reasons for doing so.

Some participants stated that counseling duties arose from their superior knowledge, experience, or expertise.¹⁵⁸ This harkens back to notions of the lawyer's role in the profession and the lawyer's special knowledge. Participants who discussed this consideration thought that clients either lacked knowledge of the legal system or possessed a level of knowledge inferior to that of a practicing lawyer. As a result, these participants believed that their superior knowledge required them to perform counseling services.¹⁵⁹

156. *Id.*

157. *See supra* note 137.

158. For example, lawyer L explained:

[A client] will call the office and say, "a family member gave me your name, how much will you charge me to do X?" . . . The client has defined the problem, and often times clients are not equipped to define the problem. *They are not aware of all the rules of the game, they are not aware of the legislation or practical workings of certain things.*

Interview with lawyer L (emphasis added).

159. Interestingly, none of the participants discussed public service, the other element of the "professionalism" definition.

Although the practitioners cited elements of the notion of professionalism as reasons for adopting a counselor role,¹⁶⁰ the actual concept of professionalism itself was not cited. Additionally, participants who cited expertise or superior knowledge as reasons for acting as counselors did not link these elements to the formal notion of professionalism.¹⁶¹ The practitioners, instead, seemed to believe that expertise and experience *per se* imposed counseling duties upon them. These findings suggest that participants were drawing upon their personal experience in formulating their ideas, rather than referring to formal literature. Therefore, although support for one view of the role of the lawyer found in the literature—the counselor role—actually matched the pragmatic experiences of participants, there existed no evidence in the interviews that their views were derived from legal literature.

Similarly, none of the Rules of Professional Conduct discussed above were precisely mentioned during these interviews.¹⁶² Of the seventeen transcripts, only one lawyer mentioned the *Professional Conduct Handbook*.¹⁶³ The ethical concepts and precepts embodied in the interpretation of these Rules outlined above, however, were cited by other lawyers in the study.¹⁶⁴

As discussed above,¹⁶⁵ Rules One and Eleven of the *Professional Conduct Handbook* seem to impose counseling duties on lawyers as a result of the lawyers' duties to the client, the court, and the public.¹⁶⁶ The following excerpts illustrate how participants reflected and articulated this general notion:

There are lawyers who would fight to the very last ditch to minimize the amount of support that a father should pay for a child Whereas my view is that in family law, whatever the issue, custody, access, property division, especially when there are children, that *the total interest is always better served*.¹⁶⁷

The moral thing is, I think, *looking at the other interests that are involved*, and the long-term interests of the clients and their

160. See *supra* Part II.A.1 for a discussion of the counselor role.

161. See *supra* notes 17-33 and accompanying text for a discussion of professionalism.

162. See *supra*, Part II.B.1 and II.B.2, for a discussion of the Rules in the PROFESSIONAL CONDUCT HANDBOOK.

163. Interview with lawyer M. See *supra* notes 132-33 and accompanying text for the lawyer's comments.

164. See *infra* notes 167-81.

165. See *supra* notes 65-67, 72-73 and accompanying text.

166. See *supra* Part II.B.1.

167. Interview with lawyer N (emphasis added).

family, or the situation, and then feeling an obligation to take those into account. Even if the client can't and being able to draw on that sense of morality to Deciding what approach to take with the case, how to conduct the case.¹⁶⁸

The practitioners who made these statements were actively weighing third-party interests when formulating advice. In taking these considerations into account and then advising the client based on these multiple considerations, the participants did, in fact, provide counseling to their clients. It is worth noting that the first lawyer quoted above articulated a belief in the existence of other lawyers who display a purely hired gun approach in their practices.¹⁶⁹

Rule Three, "Advising the Client," appears to impose general counseling duties on practitioners.¹⁷⁰ This Rule is consistent with the views expressed by numerous participants. The following excerpt is illustrative of this view:

Because I think that it is a good illustration of a file that requires my intervention to change the thinking of the clients. Clients often will call and say they are going to do X or Y. They have already decided what action they are going to be taking, and they ask us to help them implement that. Often though X or Y is not the best way to achieve their desired result. I think it is part of our function to make a determination of the best avenues to take to get the result.¹⁷¹

The interviews indicate that the participants drew on personal experience rather than formal sources when conveying the origin of their counseling duties. Because participants were speaking from experience, rather than with reference to the *Professional Conduct Handbook*, the *Professional Conduct Handbook* may not be the source of their views.

Four participants stated that their counseling role arose because they believed that emotions often clouded their clients' judgment. In their

168. Interview with lawyer Q (emphasis added).

169. Note however that, as pointed out above, no one who interviewed for this study represented that perspective. See *supra* note 124.

170. See *supra* notes 68-71 and accompanying text for Rule 3 and its related commentaries.

171. Interview with lawyer L. This excerpt exemplifies the essence of the interpretation of Commentaries 1, 2, and 9 of Rule 3 of the PROFESSIONAL CONDUCT HANDBOOK. See *supra* notes 68-71. Lawyer L drew on her experience and expertise, presumably legal and non-legal, which resulted in the belief that the client was not pursuing the most desirable course of action. As such, the lawyer felt it was her obligation to act as a counselor to improve and better guide the situation at hand. See *supra* notes 134-36 and accompanying text (detailing a situation where lawyer A advised the client of different options even though the client initially desired a particular outcome).

view, a lawyer who is removed from the situation can explore rational alternatives which are not available to the emotionally motivated client.¹⁷² In many ways, this view is simply an extension of the expertise and experience reasoning as seen above.¹⁷³

Nine participants expressed the view that the high cost of litigation required them to act as counselors.¹⁷⁴ In fact, this reason was the most commonly cited factor for adopting the counselor role. This "costs" basis for acting as a general counselor creates an interesting juxtaposition of current economic realities with traditional sources of professional obligation. In stating that the high cost of legal actions, particularly litigation, requires lawyers to adopt a counselor role, these nine participants acknowledged that it is a lawyer's duty to explore alternative, less costly avenues to solving problems. This is a pragmatic rationale for adopting a counselor approach and the interviews suggest that this view is widely-held.¹⁷⁵ It is also

172. For example, lawyer L noted:

In family [law] . . . you have clients who are terribly scared or very angry. Those are big ones in family [law]. *Their instructions to us are often motivated by that emotional state.* If you cannot help your client get a hold of it, your client's instructions are always tainted, they're never clean, and often not thoughtful.

Interview with lawyer L (emphasis added).

173. See *supra* notes 158-61 and accompanying text. It is interesting to note, in connection with the comment made by this lawyer in a family law context, the findings of Roma Harris and Patricia Dewdney in their study of the needs of battered women. See ROMA M. HARRIS & PATRICIA DEWDNEY, BARRIERS TO INFORMATION: HOW FORMAL HELP SYSTEMS FAIL BATTERED WOMEN 88 (1994). They found that 95% of their subjects expected advice with respect to legal options and rights from lawyers and legal aid services; 47.6% wanted help with property settlement issues; and 23.8% expected help with restraining orders and peace bonds. *Id.* Particularly interesting, however, in our context, is the finding that 17.9% of their respondents indicated during their interviews that they viewed "lawyers as a potential source of emotional support for abused women." *Id.* The methodology of the Harris-Dewdney study did not force the subjects to choose between these alternatives at all and therefore the percentages do not add to 100%. A lawyer's experience may help her to remain emotionally uninvolved while providing the necessary counseling and support. Such a role is consistent with, although an expansion of, the counseling function as part of the model of a continuum culminating in the client's instructions.

174. Lawyer K, for example, stated that "there are other people who just believe that . . . if your client tells you to fight, you do that and you just fight on, and let a judge decide everything. But I don't see that as constructive. *It's certainly far too expensive for most people.*" Interview with lawyer K (emphasis added).

175. Interestingly, this "costs" rationale for acting as a general counselor can also be supported by an interpretation of Rule 9, "Fees and Disbursements," of the *Professional Conduct Handbook*. Rule 9 states that "the lawyer shall not: (a) undertake to act for, charge or accept any amount which is not fully disclosed, fair and reasonable" PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, at r.9.

If Rule 3 of the *Handbook* requires the lawyer to "advise the client" in the broadest

interesting to note that although none of the seventeen lawyers whose interviews are included in this analysis adopted the hired gun approach as the only approach to their work, in numerous cases the participants evinced their belief that others in the profession *had* made such a choice.

In four cases, participants stated that their general duty to advise originated from their own personal convictions.¹⁷⁶ Adopting a counselor role because of one's individual beliefs clearly falls outside both the counselor and hired gun models.¹⁷⁷ Indeed, acting from this position actually contradicts both models for two reasons. First, the two models assume that the client's interest is paramount. In other words, the lawyer's personal interests are supposed to be irrelevant in these models. Second, these two models apply to the profession as a whole. As such, they cannot take individual characteristics into account. Expression of individual beliefs actually undermines the explanatory value of these models because the models prescribe behavior across individuals. The notion of professionalism would lack substance in defining elements if the elements could vary from individual to individual.

Four participants even suggested that they adopted the role of counselor in order to protect their personal reputation. When the lawyer simply follows the client's instructions and the client's position is irrational, the lawyer's reputation may be tarnished within the legal community, the bench, and the community at large.¹⁷⁸ As was the case with adopting a role because of one's personal beliefs, adopting a counselor approach to protect one's reputation likewise is not compatible with either of the two models of conduct. The lawyer's reputation is a personal interest which, according to the models, should be irrelevant.

The participants in this study, therefore, described an array of reasons explaining why they adopted the counselor role. Notions embodied in both models were mentioned, although neither the

sense, one must question whether it is "fair and reasonable" to charge the client when counseling services have not been provided. PROFESSIONAL CONDUCT HANDBOOK, *supra* note 1, at 7-8, 29.

176. For example, lawyer P acknowledged "*the fact that I felt personally, I could not live with myself if . . . I had not done something. . . had to advise my client that legally [this is not to your advantage], but morally you have to do it.*" Interview with lawyer P (emphasis added).

177. See *supra* Part II.A and II.A.2 (discussing the counselor and hired gun models).

178. Lawyer D expressed this concern when stating that "[when formulating advice I consider this question:] is the judge going to laugh me out of court for bringing [the client's instructions] in?" Interview with lawyer D.

literature nor the Rules, the sources for the formal models, were themselves cited. As well, the participants went beyond these sources for the models and cited the client's suspect judgment as a reason for adopting the counselor role. This reason is consistent with the models, but not mentioned in the literature or law. On the other hand, "costs," another rationale cited for selecting the counselor role, is also not inconsistent with the models. In direct contrast to the various reasons discussed by participants which were consistent with sources of the models proposed at the outset, some participants cited reasons for their conduct which fall beyond the bounds of either literature or law. In this case, however, the question of escalating costs appears to be more directly linked to factors which are mentioned in the literature and law since costs are a direct result of the legal process itself.

Participants who grounded their role as a counselor in their personal beliefs or personal reputation, however, were acting from premises which are fundamentally different from those contemplated in the theoretical models. That participants act from these personal bases, in fact, challenges the notion of a professional ethic as being distinct from each individual's personal values and beliefs.

No lawyer among the participants advocated a purely hired gun approach to the lawyer's role. Most of the lawyers, however, did accept that role as being appropriate at some stage.¹⁷⁹ For example, two participants acknowledged that they eventually adopted a hired gun approach in order to maintain their own personal well-being and to relieve stress. Leaving decisions in the hands of the client, whether throughout the case, or once the counselor role has been discharged, may allow a lawyer to remain distant and uninvolved with her client's problems. This detachment appears to contribute to personal well-being for some participants. It is interesting to remember, however,

179. This line of reasoning, entirely consistent with that of Professor Richard Abel, discussed *supra* text accompanying notes 39-57, was expressed by lawyer C in this way:

And I've always thought that was the failing of law and lawyers, you know, that they're making the decisions which the lawyers think should be made as opposed to what the people think. And the lawyer is knowledgeable about law, but not about life. And given the facts, some clients if they're in the right form of mind, not too depressed, they can make a decision which would surprise the lawyer, and for a reason that the lawyer hadn't even contemplated, because the lawyer's trained in law, not in a lot of other things that influence people's decision. *And to impose the lawyer's view on it is to impose the advocate's view on things, is to impose the litigator's, is to impose the confrontational attitude of lawyers. That's been proven wrong. It's failed in my view. You're better off to not influence the course of conduct, but to let other people who have skills just as good as yours to make decisions. But don't add your biases. Lawyers have biases.*

Interview with lawyer C (emphasis added).

that others cited personal well-being as a reason for adopting a counselor approach.¹⁸⁰

These differing approaches to deciding on an appropriate role as a lawyer are presumably a function, or a result, of the personality characteristics and traits of individual practitioners. It is ironic that one factor, personal well-being, could be used as the basis of two mutually-exclusive decisions.¹⁸¹ This finding emphasizes the point that when behavior is grounded in individual factors rather than in formal models, behavior becomes unpredictable.

VI. CONCLUSIONS

The empirical evidence gathered in this study indicates that the question of the role of the lawyer is a salient and pervasive issue within the legal profession today. There are two predominant ideologies in the literature regarding the role of the lawyer: the hired gun approach and the counselor approach. The literature portrays them as mutually exclusive approaches to the whole practice of law. The law in Ontario seems to recognize the same two roles for the lawyer, but as part of a continuum from counselor to hired gun through which the lawyer may shift in the course of serving a client.

Examining the data on lawyers' views of these roles supports the notion that the largest group of practitioners operated on a continuum of roles, acting as counselor and then as hired gun rather than choosing one role over the other. There were no lawyers in the study who raised role problems who had begun client relationships as hired guns—all perceived their initial roles as counselors (see Fig. 11, appendix). Of the seventeen lawyers interviewed in this study, five made a transition without client conflict from the counselor role to hired gun despite some continued misgivings about the client's instructions.¹⁸² A larger group (twelve) experienced conflict over the disagreement with their clients which emerged after their counseling.¹⁸³

Ultimately, however, both the groups who had no conflict with their clients and the larger number of those who struggled overtly to further counsel their clients in the face of their client's disagreement with their initial advice, finally accepted their final role as hired gun.

180. See *supra* text accompanying note 176.

181. Compare text accompanying note 176, *supra*, with text accompanying note 180, *supra*.

182. Interviews with lawyers A, F, H, M, and O.

183. Interviews with lawyers B, C, D, E, G, I, J, K, L, N, P and Q.

Fortunately, of these twelve, only one¹⁸⁴ had to live with the stress of acting against her own advice. In four of these cases, the clients took the final actions out of their lawyers' hands, and in seven cases the lawyers and clients ultimately re-aligned their positions so that they were no longer in disagreement.¹⁸⁵ Only five of the original seventeen refused to make the switch and clung to their role as counselors.¹⁸⁶ These findings, however, must be confirmed through further research. Moreover, it appears unlikely that the *Professional Conduct Handbook*, which provides the basis for supposing the continuum model would hold in Ontario, is actually influencing behavior in a reliable manner in the Province. Although the *Handbook* was itself mentioned by one participant, the Rules it contains were not directly referred to by any of the participants in describing this area of decision-making.¹⁸⁷

This study, therefore, is important in three ways. First, the study demonstrates that there is a significant concern about a lawyer's appropriate role in the legal profession today.¹⁸⁸ Second, the evidence from the interviews confirms the underlying elements of two distinct roles which vie for the lawyer's allegiance in the reality of today's practice: the counselor role and the hired gun role.¹⁸⁹ The data suggests that the majority of lawyers recognize that a metamorphosis occurs from counselor to hired gun over the course of a case.¹⁹⁰ This conflicts with the conclusions of much legal literature, which suggest that the two roles are mutually exclusive.¹⁹¹ The small number of cases involved in the study, however, precludes making conclusive findings in this regard.

Third, and perhaps most importantly for the overall objectives of this research program, these lawyers viewed their roles, whether as counselors or as hired guns, as being warranted by factors which lie behind or apart from the sources of the models in legal literature or in ethical codes.¹⁹² For example, expertise is a fundamental element in

184. Interview with lawyer H.

185. The four cases refer to interviews with lawyers C, L, N and Q; the seven cases refer to interviews with lawyers A, F, G, I, M, O and R.

186. Interviews with lawyers B, D, E, K and J.

187. See *supra* text accompanying notes 162-64 (recognizing that none of the lawyers in the study mentioned any ethical code of conduct in making their decision).

188. See *supra* notes 14-22 (discussing various works that detail the two contrasting roles of the lawyer).

189. See *supra* Part IV.

190. See *supra* Part IV.

191. See *supra* Part II.

192. See *supra* text accompanying notes 160-64 (recognizing that none of the

the notion of professionalism. Participants stated, however, that their expertise required them to act in a counseling capacity, rather than acknowledging that their professional obligations compelled their actions *per se*.¹⁹³

Further, although elements of the models were consistent with various practitioners' beliefs, they are not the *sources* of such beliefs.¹⁹⁴ Therefore, if one wished to influence practitioners' approaches to their roles, it would appear that neither scholarly discourse nor legal regulation will be effective. Finally, although the findings of this study are revealing, they must be read in the context of the population being studied. In particular, this study did not include practitioners in metropolitan centers.¹⁹⁵ That data may augment the number of interviews dealing with the lawyer's role to the point where more general conclusions would be possible.

lawyers in the study mentioned either the relevant literature or any ethical code of conduct in making their decisions).

193. See, e.g., *supra* note 171 (describing interview with lawyer L).

194. See *supra* text accompanying notes 160-64 (recognizing that none of the lawyers in the study mentioned either the relevant literature or any ethical code of conduct in making their decision)).

195. See *supra* note 110 and accompanying text for the database selection.

APPENDIX

Figure 1: The Literature Model of Lawyers' Roles

The Lawyer as Counselor	The Lawyer as Hired Gun
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Figure 2: The Model of Lawyers' Roles from Ontario Law

More Counseling	Less Counseling	Hired Gun
- less sophisticated client	- more sophisticated client	- client made decision
- complex legal issue	- simple legal issue	

Figure 3: Agreement Between Lawyer and Client

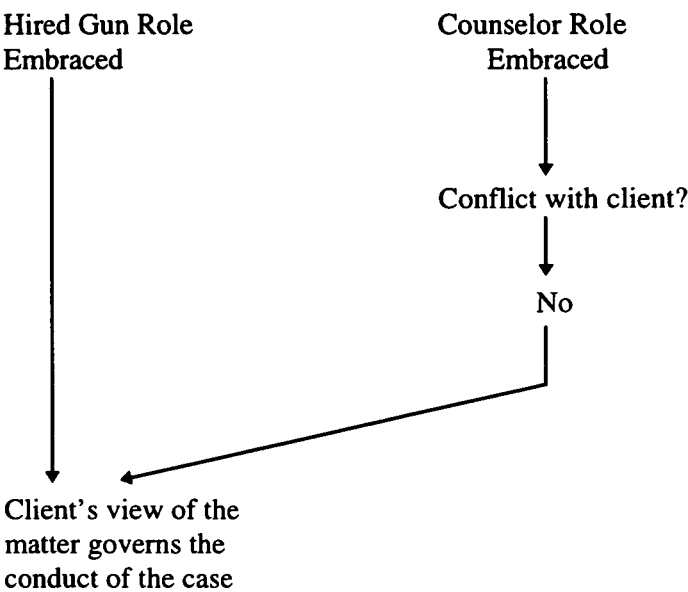


Figure 4: Disagreement Between Lawyer and Client

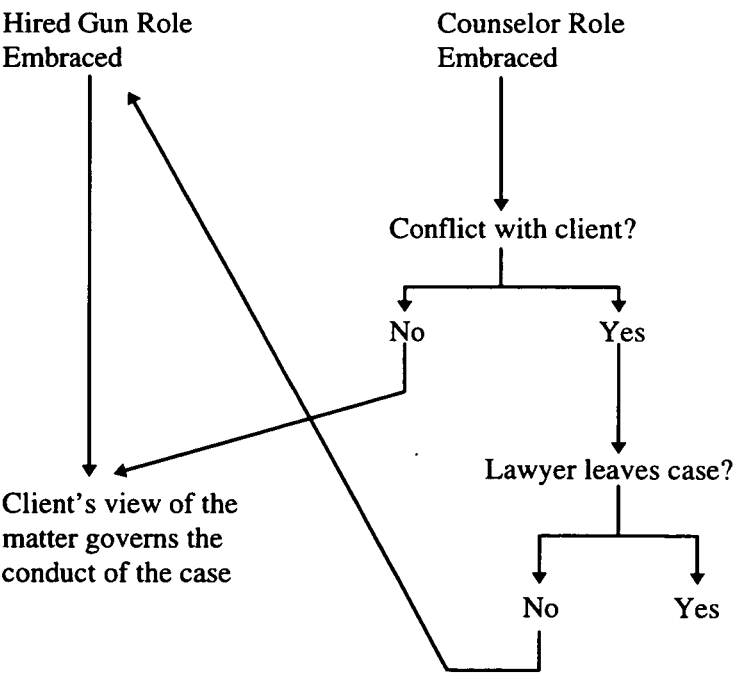


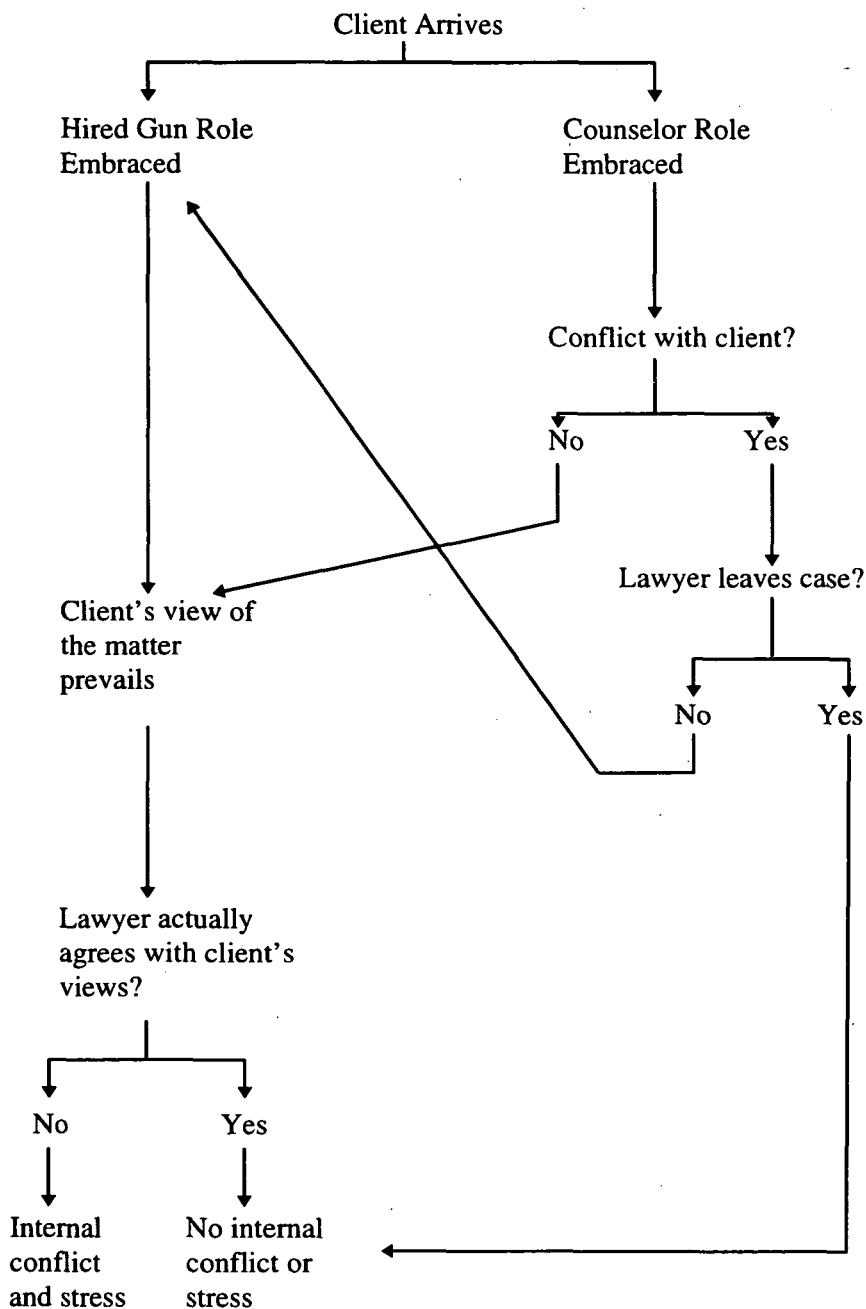
Figure 5: Model of the Role of the Lawyer

Figure 6: Expected Findings for the Interview Evidence

	Client Conflict	No Conflict
Hired Gun	<ul style="list-style-type: none"> - No evidence of external problems - Possible evidence of stress 	<ul style="list-style-type: none"> - No interview evidence
Counselor	<ul style="list-style-type: none"> - Evidence of problem solving 	<ul style="list-style-type: none"> - No interview evidence

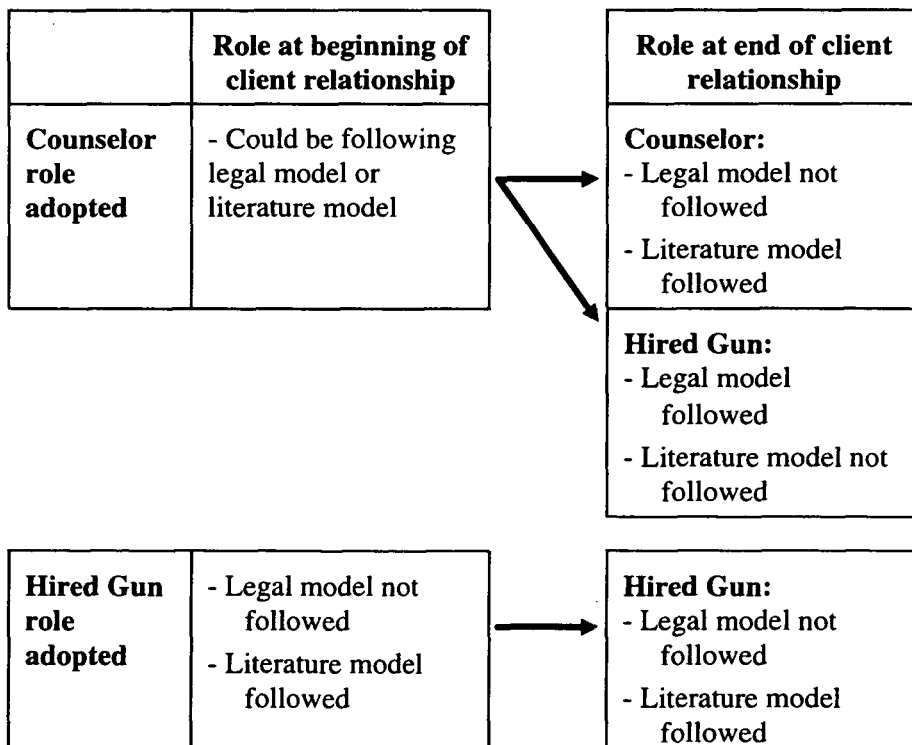
Figure 7: Testing the Models

Figure 8: Sub-Sample Design[†]

City Size ==> Firm Size	Smaller Medium	Larger Medium	Large	Total Interviews
Sole Practitioner	6 (6) [6]	8 (8) [7]	9 (8) [7*]	23 (22) [20*/87%]
Medium	6 (8) [6]	9 (8) [8]	8 (8) [6]	23 (24) [20/87%]
Large	-	2 (2) [2]	13 (13) [11]	15 (15) [13/87%]
Total Interviews	12 (14) [12/100%]	19 (18) [17/89%]	30 (29) [24*/80%]	61 (61) [53*/87%]

Note: * - Indicates that the group contains an interview which could not be transcribed for technical reasons. This interview is treated as a withdrawal of consent for the purposes of this diagram.

[†] Percentages indicate the percentage of completed interviews in each cell for which consent was obtained.

Figure 9: Interviews Discussing the Lawyers' Role

City Size ==> Firm Size	Smaller Medium	Larger Medium	Large	Total
Sole Practitioner	1 [6]	4 [7]	4 [7*]	9 [20*]
Medium	2 [6]	2 [8]	0 [6]	4 [20]
Large	0 [-]	0 [2]	4 [11]	4 [13]
Total	3 [12]	6 [17]	8 [24*]	17 [53*]

Note: * - Indicates that the group contains an interview which could not be transcribed for technical reasons. This interview is treated as a withdrawal of consent for the purposes of this diagram.

Figure 10: Interview Results

Role Adopted	Number of Transcripts	Transcript Identities
Hired Gun Only	0	-
Counselor Only	7	C,G,I,L,N,P,Q
Counselor - Hired Gun	5	A,F,H,M,O
Withdraw	5	B,D,E,J,K,

Figure 11: Results of testing the Model