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# The University of Kansas Law Review

## The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking

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### I. INTRODUCTION

In *Commonwealth v. Woodward*,<sup>1</sup> the highly publicized murder trial of an au pair accused of killing an infant in her care, the defense team faced a strategic decision commonly encountered at trial: whether to request or to object to lesser included jury instructions. Put simply, the Woodward defense team had to decide whether to ask for an instruction that would permit the jury to return a manslaughter verdict, or to object to such an instruction, leaving the jury only the choice either to acquit the defendant or to convict her of second degree murder as charged in the indictment.<sup>2</sup> Undoubtedly concerned that the jury might return a

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\*\* Assistant Professor and Director, Program in Criminal Justice and Corrections, Department of Sociology, Mississippi State University. We would like to thank Koni Johnson, Heiko Burrow and Lori Ketner for their assistance in the preparation of this Article. We also would like to thank Professor Leo Whinery and the Empirical Research in Law Committee of the University of Oklahoma College of Law for the funding that made this study possible. Finally, we would like to thank the many public defenders and administrators who participated in the study.

1. No. CRIM. 97-0433, 1997 WL 694119 (Mass. Super. Ct. Nov. 10, 1997), *aff'd*, 694 N.E.2d 1277 (Mass. 1998).

2. *See id.* at \*6. Under Massachusetts law, a defendant's desire to adopt an all-or-nothing strategy, however, does not bind the trial judge to accept that strategic choice. *See id.* A trial judge does not err if he or she fails to instruct the jury on a lesser included instruction and allows a defendant to pursue an all-or-nothing trial strategy. *See Commonwealth v. Roberts*, 555 N.E.2d 588, 592 (Mass. 1990). On the other hand, a trial judge is entitled to instruct on a lesser included

manslaughter verdict, either as a compromise or because it comported with the evidence, but apparently confident that the jury would acquit rather than return a murder verdict, the defense team chose to object to the submission of the manslaughter instruction.<sup>3</sup> This strategic decision—based on the defense team's prediction of what the jury was likely to do when faced with an all-or-nothing choice—was personally and publicly approved by Ms. Woodward.<sup>4</sup> Unfortunately for Ms. Woodward, the jury returned a guilty verdict.<sup>5</sup> Fortunately for her, however, the trial judge invoked the court's statutory authority and reduced the verdict to the lesser included charge of manslaughter.<sup>6</sup> Declaring that a court "is not a casino," the judge voided a result he deemed "a miscarriage of justice."<sup>7</sup>

Lost amid the clamor of reaction to the *Woodward* verdict and the trial court's controversial decision is the fact that countless criminal defendants and defense lawyers struggle daily making a host of strategic choices both before and during trial based largely on defense counsel's assessment of the risk involved and of the potential costs and benefits of taking particular action.<sup>8</sup> Unquestionably, some criminal defendants benefit and others suffer when risky strategic decisions are made. Few defendants, however, are rescued as dramatically as Ms. Woodward when their decisions—or gambles—turn out badly. Rather, defendants usually must

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instruction over the defendant's objection if the evidence warrants the submission of a lesser included instruction, *see, e.g.*, *Commonwealth v. Matos*, 634 N.E.2d 138, 142 (Mass. App. Ct. 1994), and may even be required to do so, *see Commonwealth v. Thayer*, 634 N.E.2d 576, 578 (Mass. 1994).

In some jurisdictions, the trial judge is obligated to respect the defendant's choice to adopt an all-or-nothing strategy. *See, e.g.*, *People v. Garcia*, 686 N.E.2d 700, 703 (Ill. App. Ct. 1997), *appeal allowed*, 690 N.E.2d 1384 (Ill. 1998); *State v. Boeglin*, 731 P.2d 943, 945-46 (N.M. 1987). As in Massachusetts, however, many other jurisdictions give the trial judge the authority to override the defendant's strategic choice and to submit lesser included instructions to the jury, despite the defendant's objection, if the judge deems that the evidence supports such a verdict. *See, e.g.*, *People v. Barton*, 906 P.2d 531, 536 (Cal. 1995).

3. *See Woodward*, 1997 WL 694119, at \*6.

4. *See id.* at \*7. Prior to instructing the jury, Judge Hiller Zobel addressed Ms. Woodward personally to ensure that she understood the consequences if her strategy backfired. *See Bill Hutchinson & Andrea Estes, Nanny Gambles Jury Will Set Her Free*, Boston HERALD, Oct. 28, 1997, at 1, available in 1997 WL 5414995.

5. *See Woodward*, 1997 WL 694119, at \*8.

6. *See id.*

7. *Id.* at \*7. Judge Zobel's decision to reduce the verdict was upheld on appeal. *See Woodward*, 694 N.E.2d 1277, 1298 (Mass. 1998).

8. Indeed, most criminal defendants accept plea bargains and do not even choose to go to trial largely because of counsel's prediction of the defendant's limited chances at trial or the likelihood of a harsher sentence after such a trial. *See Rodney J. Uphoff, The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 81-86 (1995) [hereinafter Uphoff, *The Criminal Defense Lawyer*].

bear the consequences of strategic decisions that backfire even though they have had little or no say in the decisions.<sup>9</sup>

The Woodward defense team clearly involved the defendant in the decision to object to the lesser included jury instruction.<sup>10</sup> But what if the defense team had made the decision regarding the lesser included instruction without consulting Ms. Woodward? Or what if Ms. Woodward had wanted to minimize the risk of a possible life sentence and had insisted on having the lesser included instruction submitted to the jury? Would the defense team have deferred to her choice and abandoned the all-or-nothing strategy even though they believed her choice to be strategically unsound?<sup>11</sup>

The *Woodward* case, and even more vividly, the Theodore Kaczynski case,<sup>12</sup> highlights the difficulties lawyers encounter in resolving questions of the proper division of decisionmaking power or responsibility between

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9. The Fifth Circuit has observed: "Criminal defendants daily entrust their liberty to the skill of their lawyers. The consequences of the lawyer's decisions fall squarely upon the defendant. There is nothing untoward in this circumstance. To the contrary, the lawyer as the defendant's representative is at the core of our adversary process." *Jones v. Estelle*, 722 F.2d 159, 165 (5th Cir. 1983); see also *Wainwright v. Sykes*, 433 U.S. 72, 93-94 (1977) (Burger, C.J., concurring) (discussing reasons defendants are bound by counsel's strategic decisions even though made without consultation).

For a sampling of the many cases in which clients are bound by strategic choices made without their input or contrary to the client's wishes, see *infra* notes 115-16 and accompanying text. Unquestionably, defendants who personally make an informed choice to gamble on a lesser included instruction as Ms. Woodward did will be bound by that choice. See, e.g., *People v. Bunyard*, 756 P.2d 795, 825-26 (Cal. 1988) (holding that defendant cannot complain of trial judge's failure to give lesser included instruction because defendant and counsel made a deliberate choice to utilize an all-or-nothing strategy); *State v. Boeglin*, 731 P.2d 943, 947 (N.M. 1987) ("[T]he defendant in a first degree murder prosecution may take his chances with the jury by waiving instructions on lesser included offenses and cannot be heard to complain on appeal if he has gambled and lost."); *People v. Petrovich*, 664 N.E.2d 503, 503-04 (N.Y. 1996) (holding that when client and counsel disagree about the decision whether to request lesser included instruction, the choice ultimately is for the client who will be bound by that decision even if it turns out badly).

10. See *Woodward*, 1997 WL 694119, at \*7.

11. No Massachusetts appellate court explicitly has addressed the question of whether the decision regarding the submission of lesser included instructions is ultimately the choice of defense counsel or the defendant. It is unclear, therefore, what the Woodward defense team would have done had Ms. Woodward demanded the submission of a lesser included instruction.

12. *United States v. Kaczynski*, CR-S-96-259GEB GGH, 1997 WL 716487 (E.D. Cal. Nov. 7, 1997). Kaczynski's criminal case drew national attention not only because, as the "Unabomber," he had been the focus of one of the most intense manhunts in American history, but also because his running battle with his court-appointed lawyers over defense strategy delayed the trial and ultimately led to a negotiated plea. See Daniel Klaidman & Patrick King, *Suicide Mission: Trial of Accused Unabomber Ted Kaczynski*, NEWSWEEK, Jan. 19, 1998, at 22, available in 1998 WL 9578052. Kaczynski's highly publicized struggle with his lawyers over strategy generated considerable debate about the defendant's right to control trial decisions, especially when the defendant's mental state is suspect. See *infra* note 13.

counsel and client. Moreover, as the diverse reaction to these cases evinces, the legal profession is sharply divided as to how decisionmaking power should be allocated.<sup>13</sup> Legal scholars vigorously disagree about the appropriate role for the lawyer in wielding decisionmaking power in the attorney-client relationship, a disagreement that has spawned a host of articles and books.<sup>14</sup> Similarly, reported decisions reflect significant judicial disagreement about the extent to which clients should be involved in making decisions about their cases.<sup>15</sup>

Given the mixed guidance provided by legal commentators, case law, and professional standards regarding the proper division of decisionmaking responsibility, lawyers are relatively free to decide for themselves whether they will share decisionmaking power with their clients.<sup>16</sup> The question becomes, then, to what extent do practicing lawyers actually involve their clients in decisionmaking as the lawyers did

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13. See, e.g., Editorial, *What Competence Must Mean*, WASH. POST, Jan. 21, 1998, at A20, available in 1998 WL 2463024 (discussing legal experts' disagreement over how much control Kaczynski should have over his own defense); Michael Mello, *Unabom Defense Should Assist and Not Resist*, NAT'L L.J., Jan. 26, 1998, at A21 (arguing that Kaczynski's lawyers were wrong in denying him the right to choose his own defense); Victoria Slind-Flor, *Unabomber Case Begins: The Focus is Mental State, Diaries of Accused, But Some Talk of a Plea*, NAT'L L.J., Nov. 24, 1997, at A1 (discussing conflicting views of role of attorney when a client like Kaczynski wants to control the defense).

14. See generally, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* (1974); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454; John K. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. REV. 781 (1987); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987).

15. Compare *Wainwright v. Sykes*, 433 U.S. 72, 93-94 (1977) (Burger, C.J., concurring) (stating the traditional view of the lawyer's role is that trial decisions are necessarily entrusted to defense counsel, who has "immediate and ultimate responsibility" to make "myriad tactical decisions" even without consulting the defendant), with *Jones v. Barnes*, 463 U.S. 745, 758-59 (1983) (Brennan, J., dissenting) (advocating the more client-centered approach). This Article, however, will not join in the ongoing debate of how decisionmaking power ought to be allocated within the attorney-client relationship. Rather, this Article primarily focuses on the extent to which criminal defendants actually are involved in decisionmaking when practicing lawyers and their clients face important strategic and tactical decisions.

16. Numerous commentators have pointed out the lack of clear guidance provided by case law and professional norms on the proper allocation of decisionmaking power between lawyer and client. See, e.g., Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 33-46 (1986); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 503-11 (1994); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 49-72 (1979).

in the *Woodward* case?<sup>17</sup> Do lawyers secure their clients' consent before making strategic and tactical decisions, and if not, why not? If the defendant is unwilling to consent, are lawyers willing to respect the strategic choices of a client even though they disagree with the client's choice? In light of the importance of such questions, it is surprising that there is a paucity of empirical evidence indicating whether clients are making strategic and tactical decisions in their cases.<sup>18</sup> We decided, therefore, to design a research project aimed at collecting data on lawyer-client decisionmaking. This Article reports the findings of our study.

The Article begins by briefly discussing the conflicting views of the proper allocation of decisionmaking responsibility within the lawyer-client relationship. Part II describes the two major approaches or models of lawyering: the traditional, lawyer-centered model and the participatory, client-centered approach. Part III then looks at the limited extent to which the legal profession's ethical rules provide guidance regarding the proper allocation of decisionmaking authority between lawyer and client. Turning next to the specific relationship between lawyer and criminal defendant, Part IV examines how the Constitution and professional norms encourage, but do not mandate, lawyer dominance over most decisionmaking issues.<sup>19</sup> In view of the broad discretion granted criminal defense lawyers to determine to what degree they actually involve their clients in strategic and tactical decisions, many commentators assume that most lawyers are unwilling to share decisionmaking power, but rather

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17. Citing a small survey of divorce lawyers presented in HUBERT J. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES* 163-64 (1963), William Simon claims that what he terms the autonomy and paternalist views of lawyering are both "well represented among practitioners." William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 n.1 (1991) [hereinafter *Mrs. Jones's Case*]. Given the dearth of empirical evidence on lawyer-client decisionmaking, see *infra* notes 131-32 and accompanying text, it is difficult to say just how divided practitioners really are.

18. A number of scholars have noted the surprisingly small number of studies yielding data on client involvement in decisionmaking. See, e.g., Dinerstein, *supra* note 14, at 577 n.342; Miller, *supra* note 16, at 509-10. Surely the most important work in this area is Douglas Rosenthal's study of personal injury lawyers in New York and their interactions with their clients. See generally ROSENTHAL, *supra* note 14. There is, however, virtually no empirical evidence from which one can draw any meaningful generalizations about the extent to which clients are actively involved in strategic and tactical decisions in criminal cases. See *infra* notes 131-32 and accompanying text.

19. Certain decisions, however, are consistently recognized as ultimately reserved for the client, including whether to plead guilty, whether to accept a plea agreement, whether to waive a jury trial, whether to testify, and whether to appeal. See *Jones*, 463 U.S. at 751 (citing *Wainwright*, 433 U.S. at 93 n.1); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983); STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 (3d ed. 1993).

“aim for total control of the representation.”<sup>20</sup> But is this really so? Do most lawyers, in fact, dominate strategic and tactical decisionmaking in criminal cases?

To answer this question, we conducted an exploratory study of five public defender offices involving almost seven hundred public defenders.<sup>21</sup> Section V presents the methodology we employed in that study and then analyzes the data collected. We found that a majority of the lawyers studied adopt a more lawyer-centered approach to decisionmaking. Nevertheless, we also found a significant number of public defenders who exhibit a more client-centered orientation, which allows their clients to make numerous strategic and tactical decisions. Finally, the Article concludes by exploring some of the personal and systemic factors that may affect the allocation of decisionmaking power between defendant and public defender. Part VI probes some of the factors that influence the lawyers in our study to take a client-centered approach and identifies additional avenues of research.

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20. Berger, *supra* note 16, at 34; see also Miller, *supra* note 16, at 509-10. A paternalistic lawyer may want total control over decisionmaking and still be motivated to represent his or her clients zealously. Some lawyers with a paternalist view provide excellent representation. Unfortunately, some lawyers use their decisionmaking power to serve their own interests, not those of their clients. There are a number of unflattering articles depicting criminal defense lawyers—especially public defenders and appointed lawyers—as manipulative double agents primarily focused on arm-twisting defendants into pleading guilty, not on providing zealous representation. See generally Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, L. & SOC'Y REV., June 1967, at 15; Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52 (1967).

Unquestionably, there are unethical defense lawyers who choose not to share decisionmaking power, except in a manipulative, disingenuous manner. So also, there are well-meaning but horribly overworked and under-resourced defense lawyers, who lack either the time or the inclination to involve their clients in decisionmaking. See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1179-1210 (1975); Berger, *supra* note 16, at 60-64; Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 85-96 (1993). Nonetheless, our observations and anecdotal evidence suggest that many criminal defense lawyers strive to render competent representation whatever their decisionmaking orientation. For a more detailed defense of this position, see Rodney J. Uphoff, *The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?*, 28 CRIM. L. BULL. 419 (1992) [hereinafter Uphoff, *Zealous Advocate*].

21. We recognize that this is an exploratory study because more data and more testing is needed to determine the validity of our initial findings. Nonetheless, we are confident that our study is sufficiently large and varied that our findings reliably reflect the general attitudes and behavior of public defenders regarding attorney-client decisionmaking.

## II. DIFFERING APPROACHES: LAWYER-CENTERED VERSUS CLIENT-CENTERED DECISIONMAKING

According to the traditional view of the lawyer-client relationship, the client chooses the goals or the objectives of the representation while the lawyer selects the means to achieve the client's stated ends.<sup>22</sup> Once the client has retained counsel and identified the problem, the client's role is largely passive. The lawyer, as a trusted and skilled professional, is to utilize her training and specialized knowledge to manage the legal problem or case in accordance with her best judgment. Thus, the lawyer makes all tactical and strategic decisions, including the decision whether to request a lesser included instruction, because the lawyer as a detached expert is in a better position to do so than is the untrained, emotionally involved client, and because the nature of the trial process simply does not permit consultation, much less informed, client decisionmaking.<sup>23</sup> By choosing to retain the lawyer, or by accepting appointed counsel, the client has expressly consented to allowing counsel to use her best judgment in handling the client's legal matter.<sup>24</sup> This approach to decisionmaking, therefore, is lawyer-centered because it maximizes lawyer autonomy by providing counsel the discretion to make the

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22. See, e.g., *Jones*, 463 U.S. at 750-54; *Wainwright v. Sykes*, 433 U.S. 72, 93-94 (1977) (Burger, C.J., concurring). The traditional view, as articulated by Justice Burger in decisions such as *Wainwright* and *Jones*, assumes clients should be passive and delegate almost all decisionmaking power and responsibility to the lawyer, the expert, skilled professional. See Dinerstein, *supra* note 14, at 506. Although commentators use slightly different terms to describe the lawyer's role in the traditional approach to the lawyer-client relationship, generally the lawyer/manager is depicted as the master and the subservient, needful client is portrayed as the servant. See, e.g., Berger, *supra* note 16, at 33-37. For a more detailed look at the traditional approach, see DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 16-18 (1991); ROSENTHAL, *supra* note 14.

23. See *Wainwright*, 433 U.S. at 93-94 (Burger, C.J., concurring) (placing ultimate responsibility for strategic and tactical decisions with the lawyer, without need for consultation, in part, because of the nature of the trial process). Anecdotal evidence suggests that a significant number of lawyers share the view of former ABA president Chesterfield Smith that the lawyer as professional must take charge of the case and make all strategic decisions: "Clients before long get great confidence in me and they don't want me to tell them all of the alternatives. They want me to tell them what to do. I do it and charge them." Panel Discussion, *A Gathering of Legal Scholars to Discuss "Professional Responsibility and the Model Rules of Professional Conduct,"* 35 U. MIAMI L. REV. 639, 643 (1981). For a sampling of others espousing the traditional lawyer-dominated approach, see, for example, F. LEE BAILEY & HENRY B. ROTHBLATT, *FUNDAMENTALS OF TRIAL ADVOCACY* § 58 (1974); Abe Fortas, *Thurman Arnold and the Theatre of Law*, 79 YALE L.J. 988, 996 (1970); Samuel C. Stretton, *Trial Tactics and Strategy—Who Controls It, the Attorney or the Client?*, THE CHAMPION, May 1992, at 25, 25-26.

24. See, e.g., *People v. Hamilton*, 774 P.2d 730, 741 (Cal. 1989) (in bank) ("By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to counsel's complete control of defense strategies and tactics."); see also BINDER ET AL., *supra* note 22, at 268; Spiegel, *supra* note 16, at 77.



strategic decisions she deems necessary to attain the results she believes are in the client's best interests.

The participatory or client-centered model,<sup>25</sup> on the other hand, posits a very different lawyer-client relationship. In this approach to lawyering, counsel's role is to help the client identify his legal problems, to develop solutions consistent with the client's goals, and to present the pros and cons of each solution so that the client ultimately can select a course of action that is consistent with the client's best interest.<sup>26</sup> The client-centered lawyer is committed to a counseling process that requires the client to take an active role both in establishing his priorities and identifying his best interest as well as in making all fundamental decisions that are likely to have a substantial legal or nonlegal impact on the client or his case.<sup>27</sup> The client-centered model serves to maximize client autonomy by fostering client responsibility for decisionmaking. It

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25. Although there are many variations of the client-centered model, those who espouse such an approach are critical of the traditional lawyer-dominated view of the attorney-client relationship and argue instead for a more balanced relationship in which lawyers interact with their clients in a manner that fosters informed client decisionmaking. See, e.g., ROSENTHAL, *supra* note 14; Ellmann, *supra* note 14; Miller, *supra* note 16; Morris, *supra* note 14; Spiegel, *supra* note 16; Strauss, *supra* note 14. Undoubtedly, the model's most influential proponents are David Binder and Susan Price, whose first book, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977), was the most widely used text on legal interviewing and counseling in legal education. Joined by their colleague Paul Bergman, Binder and Price authored a revised text, *LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH*, *supra* note 22, which continues to enjoy widespread use. Nonetheless, many of those favoring a client-centered approach take issue with aspects of the Binder, Bergman, and Price model. See, e.g., Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990); Ellmann, *supra* note 14; Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71 (1996). For an excellent overview of the arguments for and against the client-centered approach to legal counseling and decisionmaking together with an assessment of the strengths and limitations of the Binder and Price model, see generally Dinerstein, *supra* note 14.

26. See BINDER ET AL., *supra* note 22, at 290-308, 316-46.

27. See *id.* at 268. According to Binder, Bergman, and Price, the client should make any decision when the lawyer, using "such skill, prudence, and diligence as other members of the profession commonly possess and exercise," would or should know that such a decision is likely to have a substantial legal or nonlegal impact on the client. *Id.*

The lawyer remains an active participant in the decisionmaking process advocated by Binder, Bergman, and Price, but counsel is cautioned to withhold her advice or opinion regarding the client's best course of action so as not to unduly influence or override her client's choices. See *id.* at 19-22. A number of client-centered theorists have criticized this aspect of the initial Binder and Price approach by arguing that denying advice to clients is manipulative and paternalistic, see Ellmann, *supra* note 14, at 744-45, or that more flexibility regarding the circumstances when advice should be proffered is warranted, see Dinerstein, *supra* note 14, at 509-10, 567-70. Under the traditional view of lawyering, of course, counsel is free to use "reasonable persuasion to guide the client to a sound decision." STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.1 commentary at 198 (3d ed. 1993).

assumes not only that most clients are competent decisionmakers, but that most are in a better position to make case decisions because so many decisions ultimately turn on the values and priorities that the client alone best appreciates.<sup>28</sup> The lawyer's role in this model, then, is to provide clients meaningful information so as to empower them to make informed choices about their cases.<sup>29</sup>

A lawyer taking a client-centered approach still is called upon to utilize her professional judgment to make many tactical and strategic decisions.<sup>30</sup> Commentators who espouse the client-centered model recognize that lawyers must be provided the professional discretion to make decisions—such as how to cross-examine a witness, what to include in a closing argument, or whether to object to an improper question—without the client's consent or even input.<sup>31</sup> Time, common sense, and respect for professional autonomy simply preclude the client from making all strategic decisions. Nonetheless, the client-centered lawyer ultimately

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28. See BINDER ET AL., *supra* note 22, at 5-10, 17-18; Miller, *supra* note 16, at 503-04. For an article challenging this conception of the lawyer's role and arguing that good practice often demands that lawyers make judgments about their clients' best interests and influence their clients to adopt those judgments, see *Mrs. Jones's Case*, *supra* note 17.

29. The informed consent model advocated by some commentators, see, e.g., Spiegel, *supra* note 16, envisions shared decisionmaking between lawyer and client. For a discussion of the different goal sought by those espousing the Binder, Bergman, and Price approach, see Dinerstein, *supra* note 14, at 507, 525-34.

30. See BINDER ET AL., *supra* note 22, at 270. Indeed, Binder, Bergman, and Price argue that the lawyer as a professional must be given considerable freedom to perform her craft without client interference:

[A] client's decision to hire you is tacit willingness for you to make lawyering skills decisions free from consultation. Thus, such matters as how you cross examine, write briefs, or phrase contingency clauses are generally for you alone to decide, even though they may have a substantial impact. They involve primarily the exercise of the skills and crafts that are the special domain of lawyers.

*Id.* Although this test or standard recognizes that client decisionmaking extends to strategic and tactical issues, this "substantial impact" standard has been rightfully criticized as vague and as offering little real guidance to lawyers trying to determine which decisions really belong to the client. See, e.g., Hurder, *supra* note 25, at 77-80; Miller, *supra* note 16, at 511-14. Indeed, the standard proposed by Binder, Bergman, and Price relegates virtually all strategic and tactical decisionmaking to the lawyer, albeit with the need to consult with the client in many such decisions. See Miller, *supra* note 16, at 511-12. Requiring only consultation, however, substantially reduces the force or sweep of client-centered decisionmaking.

31. Client-centered theorists differ in the degree to which they advocate client involvement in decisions that a traditionalist clearly would label as tactical and exclusively the lawyer's to make. Compare BINDER ET AL., *supra* note 22, at 270-71 (arguing that lawyering skills decisions are the special domain of lawyers but many such decisions warrant client consultation), with Spiegel, *supra* note 16, at 123-26 (arguing that the client decides whether to call witness or cross-examine a particular witness though the lawyer decides how to perform particular task such as the order of proof and the details of eliciting testimony).

gives her client the opportunity to make all significant case decisions.<sup>32</sup> Thus, in the example of the defendant who, contrary to counsel's advice, prefers the submission of a lesser included instruction rather than forcing the jury into an all-or-nothing choice, the client-centered lawyer generally would defer to the client's decision.<sup>33</sup> The lawyer would do so, however, only after ensuring that the client had carefully weighed and understood the consequences of his choice and after attempting to persuade the client to change his decision.<sup>34</sup>

This is not to say that all lawyers fall neatly into one camp or the other or that all decisions can be easily pigeonholed into those that are solely for the client and those that are exclusively the concern of counsel.<sup>35</sup> Indeed, legal commentators, our own observations, and the findings of our study indicate that lawyers who favor a client-centered approach do not consistently consult with clients with respect to all significant case decisions or uniformly provide all clients equal access to decisionmaking power.<sup>36</sup> Similarly, not all lawyers with a lawyer-centered approach dictate all tactical and strategic decisions to the client or always refuse to bow to the wishes of a client who the lawyer feels is insisting upon an unsound strategic choice. Nevertheless, if, as our study suggests, lawyers have a client-centered or lawyer-centered orientation, then that orientation

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32. See BINDER ET AL., *supra* note 22, at 268.

33. See Spiegel, *supra* note 16, at 123-26. Although Binder, Bergman, and Price undoubtedly would expect a lawyer to consult with the client regarding the decision to request a lesser included instruction, they do not indicate that the lawyer should defer to the client's wishes on such a matter. See BINDER ET AL., *supra* note 22, at 270-72. For many advocates of a client-centered approach, however, respect for the client's choice in such a matter is an essential aspect of this approach to lawyering. See, e.g., Spiegel, *supra* note 16, at 123-26. Nonetheless, client-centered theorists, for the most part, have not addressed how clashes between lawyers and clients over strategic or factual decisions should be resolved. For a more detailed critique of the extent to which most client-centered literature fails to provide guidance on the allocation of specific decisionmaking power, see Miller, *supra* note 16, at 504-14.

34. Good lawyering often requires persuading a client that making a particular decision or taking certain action is, in fact, likely to be in the client's best interest when the client thinks otherwise. The lawyer seeking to promote client decisionmaking, however, will strive to give advice and to use "reasonable persuasion" without doing so in a manipulative fashion that compromises client autonomy. STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.1 commentary at 198 (3d ed. 1993) (describing the use of "reasonable persuasion"). For a look at the difficulty of the counseling task facing the criminal defense lawyer, see, for example, Alschuler, *supra* note 20, at 1310; Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 1-31 (1993); Uphoff, *The Criminal Defense Lawyer*, *supra* note 8, at 83, 131-32.

35. See Hurder, *supra* note 25, at 76-80 (arguing that dividing decisions into those in the client's domain and those in the lawyer's domain neither reflects actual practice nor is desirable, but that the preferred approach involves open negotiation and joint decisionmaking).

36. See Dinerstein, *supra* note 14, at 567-70; see also *infra* Parts V.B. to VI. and accompanying tables.

reflects their view of the appropriate role of counsel in controlling case decisions, a view that in turn is heavily influenced by the degree to which the lawyer respects the value of client autonomy.<sup>37</sup>

### III. THE ETHICAL RULES AND THE ALLOCATION OF DECISIONMAKING POWER

The law student or lawyer seeking to determine to what extent a client should be involved in particular strategic or tactical decisions will find only limited guidance in the ethical rules of the legal profession. Although commentators have drawn support from both the Model Code of Professional Responsibility<sup>38</sup> (Model Code) and the Model Rules of Professional Conduct<sup>39</sup> (Model Rules) to support a client-centered approach,<sup>40</sup> each also provides significant authority for the more traditional model of the lawyer-client relationship.<sup>41</sup> In the end, neither the Model Code nor the Model Rules offers a definitive answer to the proper allocation of decisionmaking power within that relationship or to the specific question of who ultimately controls the decision to request a lesser included jury instruction.

#### A. *The Model Code of Professional Responsibility*

Model Code Ethical Consideration (EC) 7-7 seemingly grants clients broad decisionmaking power. It states:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is

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37. In his compelling account of his own experiences as a public defender, Charles Ogletree describes the values of empathy and heroism and the extent to which the clash of those values affects the way public defenders view their professional role. See Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993). In Ogletree's view,

[t]he empathetic lawyer quite naturally embraces the client-centered approach to representation, which "emphasiz[es] the importance of clients' expertise, thoughts and feelings in resolving problems." She is likely to bring the client into decisionmaking and to respect the client's decisions, even on strategic matters that have been traditionally allocated to the lawyer. By contrast, the "heroic" public defender tends to accord a much less central role to the client. Narrowly focused on the goal of winning the case, she is likely to limit client autonomy and input to the minimum required by ethical rules, for fear that the client will make the "wrong" decisions.

*Id.* at 1281 (quoting BINDER ET AL., *supra* note 22, at 18 (citation omitted)).

38. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

39. MODEL RULES OF PROFESSIONAL CONDUCT (1989).

40. See, e.g., Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1056-57 (1984).

41. See Dinerstein, *supra* note 14, at 534-38; Miller, *supra* note 16, at 506-11.

exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.<sup>42</sup>

If this language is construed expansively, almost any strategic or tactical decision in a case could affect the merits of the case and, therefore, all such decisions should belong to the client. Yet, the examples set out in EC 7-7—accepting a settlement offer, waiving an affirmative defense, pleading guilty, or taking an appeal<sup>43</sup>—are the types of significant decisions generally considered to be reserved for the client, thus suggesting that the language is not meant to be read too broadly.<sup>44</sup>

Indeed, the Model Code contains other language demonstrating the inconsistency of its guidance on the proper allocation of decisionmaking responsibility. Model Code EC 7-26 states that a lawyer should “present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.”<sup>45</sup> Read plainly, EC 7-26 seemingly gives the client the right to insist upon calling certain defense witnesses. No court, however, has looked to this provision as authority for the proposition that a lawyer must defer to the client’s decision to call a witness even though counsel believes that the witness will hurt the defense case or provide cumulative or irrelevant testimony. In addition, the fact that EC 7-26 does not even apply when the lawyer wants to present admissible evidence by calling a witness contrary to her client’s wishes constitutes further evidence that the provision was never intended to resolve the question of who has the final say in calling witnesses.

Model Code EC 7-8 certainly lends support to the notion that the client is the prime decisionmaker in the lawyer-client relationship by declaring that “[i]n the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.”<sup>46</sup> Read in its entirety, EC 7-8 describes a decisionmaking process in which the lawyer has a duty to bring to the client’s attention a full range of information and to offer advice that includes moral and non-legal considerations so that the client fully appreciates the signifi-

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42. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980).

43. *See id.*

44. *See* Dinerstein, *supra* note 14, at 534-35; Spiegel, *supra* note 16, at 65-67. Both Dinerstein and Spiegel question a broad reading of EC 7-7. *See* Dinerstein, *supra* note 14, at 534-35 (stating that the decisions EC 7-7 reserves for the client do not include decisions a client-centered lawyer might consider the client’s); Spiegel, *supra* note 16, at 65-67 (suggesting that the Model Code did not intend that clients control every step taken in litigation).

45. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-26 (1980).

46. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980).

cance and consequences of his decision. Assume, for example, a client does not want to call his elderly father as a witness—even though his testimony is critical to the defense—because of the client’s concern for his father’s physical and emotional well-being. EC 7-8 seemingly dictates that, despite the lawyer’s legitimate fear that the failure to call the father will result in a guilty verdict, the decision regarding this “non-legal” factor ultimately rests with the client. EC 7-8, however, describes a process geared to the objectives or ends of the representation, not one necessarily designed to cover all of the tactical or strategic decisions involved in the litigation of a case. It is not clear, then, that EC 7-8 grants the client the final say when the lawyer and client disagree about a legal factor, such as the utility of the father’s testimony, that may affect the client’s case.

The Model Code’s very next provision, EC 7-9, undercuts the argument that EC 7-7 and EC 7-8 give clients ultimate decisionmaking authority for all significant strategic and tactical decisions. EC 7-9 states: “In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client.”<sup>47</sup> Although this provision does not spell out in any detail which decisions are within the lawyer’s domain, EC 7-9 surely indicates that lawyers retain significant decisionmaking authority beyond merely technical matters.<sup>48</sup>

Finally, the only disciplinary rule (DR) that even speaks to the subject of the allocation of decisionmaking further muddies the Model Code’s already murky waters. Model Code DR 7-101(B)(1) provides that a lawyer may “[w]here permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.”<sup>49</sup> This vague grant of discretionary power is difficult to reconcile with a broad reading of EC 7-7 and EC 7-8. Similarly, it is difficult to reconcile the discretion provided by DR 7-101(B)(1) with DR 7-101(A)(1)’s command that a lawyer “shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law.”<sup>50</sup> In the end, the vague and conflicting provisions of the Model Code simply fail to offer practitioners meaningful assistance regarding the proper division of decisionmaking responsibility between lawyer and client.

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47. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-9 (1980) (citation omitted).

48. See Spiegel, *supra* note 16, at 66.

49. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(B)(1) (1980).

50. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1980); see Dinerstein, *supra* note 14, at 535 n.153; see also Maute, *supra* note 40, at 1056-57.

### B. *The Model Rules of Professional Conduct*

Unfortunately, the Model Rules are not a marked improvement. Model Rule 1.2 sets up a dichotomy between objectives and means and states that, except in limited situations, “[a] lawyer shall abide by a client’s decisions concerning the objectives of representation.”<sup>51</sup> On the other hand, the comment to Model Rule 1.2 provides that though the lawyer must consult with the client as to means, it is the lawyer’s responsibility to select the means used to achieve the client’s ends.<sup>52</sup> On its face, Model Rule 1.2 appears to present an easy-to-apply, albeit lawyer-centered, test. Strategic and tactical decisions are only means and, as such, are squarely within the lawyer’s province. Nonetheless, the comment to Rule 1.2 recognizes “[a] clear distinction between objectives and means sometimes cannot be drawn.”<sup>53</sup> Moreover, the lawyer’s selection of means or strategic choices may so profoundly affect the client’s substantive rights and the opportunity to realize the client’s objectives that it is inconsistent with general agency principles to permit the lawyer/agent such sweeping control.<sup>54</sup> Most legal scholars, therefore, have sharply criticized the ends/means test as vague and unhelpful in determining whether a client ultimately has the right to make particular strategic decisions.<sup>55</sup>

Other language in the official comments to Model Rules 1.2 and 1.3 only adds to the confusion. The comment to Model Rule 1.2, in fact, begins by observing that “[b]oth lawyer and client have authority and responsibility in the objectives and means of representation,” then admits that often “the client-lawyer relationship partakes of a joint undertaking,” and finally warns that the law defining the scope of a lawyer’s “authority in litigation varies among jurisdictions.”<sup>56</sup> That same comment also

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51. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1989).

52. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1989).

53. *Id.*

54. See RESTATEMENT (SECOND) OF AGENCY § 14 (1958) (giving a principal the right to control the conduct of an agent); see also *id.* § 369 (forbidding an agent to act contrary to a principal’s wishes); *id.* § 385 (giving agent “a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform”). As the comment to subsection (1) of section 385 indicates, although “an attorney is in complete charge of the minutiae of court proceedings” and may be permitted to withdraw if not allowed to act as counsel thinks best, the attorney still is under a duty not to act contrary to the directions of the principal. *Id.* § 385(1) cmt. a. As that same comment makes clear, however, the agent is under no duty to perform illegal or unethical acts. See *id.*

55. See, e.g., BINDER ET AL., *supra* note 22, at 267-70; Dinerstein, *supra* note 14, at 535-38; Maute, *supra* note 40, at 1080-1105; Miller, *supra* note 16, at 506-09; Lee A. Pizzimenti, *The Lawyer’s Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441, 473-76 (1990); Strauss, *supra* note 14, at 318-26.

56. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1989).

includes the disclaimer that “a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so.”<sup>57</sup> This ability to override a client’s objectives cannot be easily squared with the command of Rule 1.2 itself. It also is difficult to reconcile Rule 1.2’s directive about abiding by the client’s decision regarding objectives with the comment to Model Rule 1.3, which proclaims that “a lawyer is not bound to press for every advantage that might be realized for a client.”<sup>58</sup>

The official comments to the Model Rules not only undercut the client’s authority regarding objectives, but also offer inconsistent guidance on the lawyer’s control of the means used in a client’s case. The comment to Model Rule 1.3 notes that a lawyer “has professional discretion in determining the means by which a matter should be pursued.”<sup>59</sup> The comment to Model Rule 1.2, however, cautions that “[i]n questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.”<sup>60</sup> Such language hardly suggests that a lawyer’s professional discretion regarding means is unrestricted. Rather, for the lawyer in our earlier example wrestling with the decision whether to call the client’s elderly father against the client’s wishes, the comment to Rule 1.2 arguably directs counsel to defer to her client’s choice because that choice reflects the client’s concern for his father’s well-being. On the other hand, the vagueness of the ends/means test and the inconsistencies in the Model Rules and its official comments leave the lawyer basically free to decide this question as she sees fit.<sup>61</sup>

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57. *Id.*

58. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1989).

59. *Id.*

60. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1989).

61. See Dinerstein, *supra* note 14, at 537-38. A criminal defense lawyer’s freedom is, of course, limited if the courts in her state have taken a specific position on the question of whose decision controls regarding witnesses. Absent such a controlling decision in her jurisdiction, counsel can find authority supporting either position she takes. Compare *State v. Lee*, 689 P.2d 153, 157-60 (Ariz. 1984) (in banc) (holding that by succumbing to client’s demand to call two witnesses, counsel rendered ineffective assistance because strategic decision regarding selection of witnesses belongs to counsel), *State v. Davis*, 506 A.2d 86, 92 (Conn. 1986) (holding that counsel’s refusal to accede to defendant’s desire to call a witness does not violate defendant’s right to be heard or right to compulsory process), *Reddin v. State*, 476 S.E.2d 882, 885-86 (Ga. Ct. App. 1996) (stating that ultimate decision on witnesses to call rests with counsel), *State v. Pratts*, 366 A.2d 1327, 1333 (N.J. 1975) (stating that the lawyer has the authority to manage the case and select the witnesses to be called), *aff’d*, 365 A.2d 928 (1976) (per curiam), STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 commentary at 201 (3d ed. 1993) (stating that decision to call witnesses is for the lawyer), and *Stretton*, *supra* note 23, at 26 (stating it is lawyer’s decision regarding witnesses to be called), with *Burton v. State*, 651 So. 2d 641, 656 (Ala. Crim. App. 1994) (stating that the ultimate decision on



#### IV. THE DIVISION OF DECISIONMAKING RESPONSIBILITY IN CRIMINAL CASES

##### *A. Constitutional Mandates and the Supreme Court's View of Decisionmaking Authority in the Lawyer-Defendant Relationship*

Unquestionably, the profession's ethical rules give lawyers substantial discretion to select the lawyering orientation they deem proper. Yet, the criminal defense practitioner also must look to constitutional mandates, especially case law interpreting the Sixth Amendment right to effective assistance of counsel, to determine if the United States Constitution commands any particular allocation of decisionmaking power between counsel and criminal defendant.<sup>62</sup> What one finds is that, except for a few specified decisions ultimately reserved for the defendant,<sup>63</sup> the Constitution actually dictates very little about the allocation of decisionmaking authority between lawyer and defendant.<sup>64</sup>

A criminal defendant remains free, of course, simply to reject counsel's aid. The mere fact that the Sixth and Fourteenth Amendments to the Constitution guarantee the assistance of counsel does not mean that a state may constitutionally force a lawyer upon a criminal defendant. Rather, the United States Supreme Court in *Faretta v. California*<sup>65</sup> recognized that the Sixth Amendment grants to every accused the right to self-representation—the right to conduct one's own defense—because ultimately it is the defendant who will suffer the consequences if the defense is unsuccessful.<sup>66</sup> Responding to the argument that a criminal defendant would be better served by proceeding with counsel's guidance, Justice Stewart trumpeted the value of individual autonomy.<sup>67</sup> Stewart insisted that the defendant should be free to decline to take advantage of

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calling witnesses is for client), *People v. Wilkinson*, 474 S.E.2d 375, 381-82 (N.C. 1996) (stating that the decision regarding witnesses to call is the lawyer's after consultation with client, except that if there is an impasse over the decision, the client has the ultimate say), MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 57-64 (1990) (stating that it is the client's right to decide which witnesses to be called), and Spiegel, *supra* note 16, at 124 (stating that it is the client's decision whether a particular witness is to be called).

62. In a state criminal case, a criminal defense lawyer also must ensure that the state constitution of that jurisdiction has not been interpreted to grant special decisionmaking authority to a criminal defendant.

63. See generally *Jones v. Barnes*, 463 U.S. 745 (1983) (explaining that the defendant only makes certain fundamental decisions including whether to plead guilty, waive a jury trial, testify in his or her own behalf, or take an appeal). The Constitution does not, however, preclude a lawyer from sharing decisionmaking power with a client.

64. See *id.* at 755 (Blackmun, J., concurring).

65. 422 U.S. 806 (1975).

66. See *id.* at 819-21.

67. See *id.* 832-34.

counsel's training and expertise and should be allowed to "conduct his own defense ultimately to his own detriment."<sup>68</sup>

Not only does *Faretta* confirm and extol the importance of the accused's autonomy, it also contains considerable language that encourages a client-centered approach to decisionmaking issues. In the most significant paragraph in the decision regarding the question of the division of decisionmaking power, Stewart observed that the "language and spirit of the Sixth Amendment contemplate that counsel . . . shall be an aid to a willing defendant" and that "an assistant, however expert, is still an assistant."<sup>69</sup> Nevertheless, Stewart went on to acknowledge that "law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative."<sup>70</sup> Thus, as long as the defendant agreed to accept defense counsel, Stewart was willing to allow the lawyer/assistant to bind the client/master at least "in many areas" of trial strategy.<sup>71</sup> Although Stewart did not define with any precision how decisionmaking power in the lawyer-client relationship is to be divided, his opinion lends support to proponents of both traditional and client-centered lawyering.<sup>72</sup>

Subsequent cases demonstrate, however, that the Constitution gives defense lawyers wide discretion over decisionmaking issues and requires only that a represented defendant have final decisionmaking power in a limited number of fundamental decisions. In *Jones v. Barnes*,<sup>73</sup> the Court observed that the accused has the ultimate decisionmaking authority over the following case matters: whether to plead guilty, waive a jury trial,

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68. *Id.* at 834.

69. *Id.* at 820.

70. *Id.* at 820-21 (citations omitted).

71. *Id.* at 820. Consent to accept appointed counsel at the beginning of a relationship, when the client's only other choice is self-representation, cannot really be characterized as free and voluntary. Nor is it likely to be an informed choice. For a discussion of the difficulties of forcing clients to make a decision about the allocation of decisionmaking responsibilities at the onset of the attorney-client relationship, see Spiegel, *supra* note 16, at 77-85. Rarely does the indigent defendant have any say about the choice of his attorney or her lawyering style. Even the paying defendant, unless unusually sophisticated, generally lacks the knowledge or time to bargain for decisionmaking power at the beginning of the relationship. See Berger, *supra* note 16, at 49-50.

72. For an argument that *Faretta* requires the legal profession to accept greater control by defendants over tactical decisionmaking and suggests a framework for joint presentation of the defense, see Richard H. Chused, *Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 CAL. L. REV. 636 (1977). Most courts, however, read *Faretta* to indicate that "a criminal defendant, having agreed to be represented by counsel, is bound by counsel's decisions on matters entrusted to counsel." *State v. Lee*, 689 P.2d 153, 159 (Ariz. 1984) (in banc).

73. 463 U.S. 745 (1983).

testify on one's behalf, or take an appeal.<sup>74</sup> Thus, counsel who usurps one of these decisions risks offending the Constitution. Furthermore, an appointed lawyer whose professional judgment is that her client's appeal has no merit cannot withdraw from that appeal, but must advocate the client's cause vigorously.<sup>75</sup> Beyond these few fundamental decisions, however, counsel's role is to manage the case and to make all tactical decisions. As the case manager, defense counsel is not constitutionally required to press every nonfrivolous argument desired by the defendant. Rather, Chief Justice Burger, writing for the majority in *Jones*, confirmed that counsel has the ability, and ultimately the power, to present the client's case in accord with counsel's best professional judgment, regardless of the client's wishes.<sup>76</sup>

In his dissent in *Jones*, Justice Brennan voiced his disagreement with Burger's view of the proper function or role of defense counsel.<sup>77</sup> According to Brennan, the Sixth Amendment's right to counsel includes a personal right to make the decision of "which nonfrivolous issues should be presented on appeal," even against the advice of counsel if the defendant so chooses.<sup>78</sup> Clients have the capacity—and lawyers have the time to assist them—to make informed tactical judgments about their appeals. Even if a defense lawyer may be better able to make wiser tactical choices, Brennan contended that the Sixth Amendment obligates the defense counsel to protect a client's dignity and autonomy.<sup>79</sup> Thus, counsel should be assisting the defendant to make choices, not imposing choices on the defendant, because "[t]he role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process."<sup>80</sup>

Brennan's view of lawyering as articulated in *Jones* is decidedly more client-centered than that espoused by the majority. His forceful defense

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74. *See id.* at 751.

75. *See Anders v. California*, 386 U.S. 738, 742-44 (1967).

76. *See Jones*, 463 U.S. at 753 n.6. In support of his position, Burger looked to the final draft of MODEL RULES OF PROFESSIONAL CONDUCT Proposed Rule 1.2(a) (Final Draft 1982), which specified that "the lawyer shall abide by the client's decision, . . . as to a plea to be entered, whether to waive jury trial and whether the client will testify." *Id.* Burger then declared that "[w]ith the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." *Id.*

77. *See id.* at 755-64 (Brennan, J., dissenting). Brennan's dissent was joined by Justice Marshall. *See id.* at 755. In his concurring opinion, Justice Blackmun also expressed his agreement with Brennan's ethical view, observing that "it seems to me that the lawyer, after giving his client his best opinion as to the course most likely to succeed, should acquiesce in the client's choice of which nonfrivolous claims to pursue." *Id.* at 754 (Blackmun, J., concurring).

78. *Id.* at 758 (Brennan, J., dissenting).

79. *See id.* at 759 (discussing *Faretta v. California*, 422 U.S. 806 (1975); *Anders v. California*, 386 U.S. 738 (1967)).

80. *Id.* at 763.

of the accused's right to make strategic choices, even if detrimental, extends beyond just fundamental decisions of the defense.<sup>81</sup> Nonetheless, Brennan acknowledged that the allocation of authority between lawyer and client at trial is subject to significant time constraints.<sup>82</sup> It is proper, therefore, to confer decisionmaking authority on the lawyer "with regard to the hundreds of decisions that must be made quickly in the course of a trial."<sup>83</sup>

Although Brennan's views on the allocation of decisionmaking responsibility between lawyer and client have received considerable attention by commentators,<sup>84</sup> his client-centered approach to lawyering has never been adopted by a majority of the Court. Indeed, during the next term, the Court in *Strickland v. Washington*<sup>85</sup> established a two-pronged test for evaluating claims of ineffective assistance of counsel that incorporated a strong presumption that defense counsel rendered adequate assistance and "made all significant decisions in the exercise of reasonable professional judgment."<sup>86</sup> The Court recognized that counsel, "as assistant to the defendant," had certain basic duties, including the "overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments."<sup>87</sup> The Court, however, specifically declined to adopt a set of standards or to provide rules of conduct outlining defense counsel's duties and responsibilities when representing a criminal defendant.<sup>88</sup> The Court worried that such rules would interfere with counsel's professional independence and the "wide latitude counsel must have in making tactical decisions."<sup>89</sup>

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81. In Brennan's view, choosing a lawyer should not mean that the defendant relinquishes control over every aspect of the case except for its most basic structure. *See id.* at 759. Rather, it means that

[a] defendant's interest in his case clearly extends to other matters. Absent exceptional circumstances, he is bound by the tactics used by his counsel at trial and on appeal. He may want to press the argument that he is innocent, even if other stratagems are more likely to result in the dismissal of charges or in a reduction of punishment. He may want to insist on certain arguments for political reasons. He may want to protect third parties. This is just as true on appeal as at trial, and the proper role of counsel is to *assist* him in these efforts, insofar as that is possible consistent with the lawyer's conscience, the law, and his duties to the court.

*Id.* at 759 (citation omitted).

82. *See id.* at 760.

83. *Id.*

84. *See, e.g., Berger, supra* note 16, at 31-32, 39-40.

85. 466 U.S. 668 (1984).

86. *Id.* at 690.

87. *Id.* at 688.

88. *See id.* at 688-89.

89. *Id.* at 689.

Surprisingly, the Court in *Strickland* suggested that “[c]ounsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant.”<sup>90</sup> It is difficult to take this comment seriously in light of the Court’s earlier pronouncement that counsel’s duty is limited to consulting with, and to informing clients about, important decisions, and the Court’s repeated references to the importance of deferring to counsel’s reasonable judgments.<sup>91</sup> In fact, the opinion states that counsel’s “[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.”<sup>92</sup> *Strickland* grants defense lawyers almost unlimited freedom of action in managing a case and further dictates that counsel’s strategic choices will be deemed professionally adequate as long as they can reasonably be considered sound trial strategy. Although *Strickland* does not mandate a lawyer-centered approach to decisionmaking, it certainly facilitates such an approach. In sum, however, neither the Constitution nor the Supreme Court provides many definitive answers to the allocation of decisionmaking questions that lawyers, clients, and courts regularly confront.

### B. *Professional Standards and Decisionmaking Responsibility*

The most useful statement of the prevailing norms of criminal defense lawyers can be found in the American Bar Association Standards for Criminal Justice<sup>93</sup> (ABA Standards). Though other nationally recognized standards provide guidance to lawyers striving to fulfill their obligations to render zealous, effective representation,<sup>94</sup> the ABA Standards represents the most widely cited set of guidelines detailing what a criminal defense lawyer should do to provide quality representation to a person accused of a crime.<sup>95</sup> ABA Standard 4-5.2, entitled “Control and Direction of the Case,” spells out a division of decisionmaking responsi-

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90. *Id.* at 691.

91. *See id.* at 688.

92. *Id.* at 690.

93. STANDARDS FOR CRIMINAL JUSTICE (3d ed. 1993). The first edition of the Defense Function Standards was published by the American Bar Association in 1971. The present (third) edition of the ABA Defense Function Standards was approved by the ABA House of Delegates on February 3, 1992. *See* STANDARDS FOR CRIMINAL JUSTICE at xii (3d ed. 1993). The ABA Standards has been cited with approval in countless decisions and has been generally acknowledged to represent the “prevailing norms of practice.” *Strickland*, 466 U.S. at 688.

94. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Proposed Final Draft No. 1, 1996); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Proposed Final Draft No. 2, 1998). For another set of well-crafted standards expressly designed to aid criminal defense lawyers, see PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (National Legal Aid and Defender Ass’n 1995).

95. *See Strickland*, 466 U.S. at 688 (acknowledging the importance of the ABA Standards).

bility that substantially tracks Model Rule 1.2(a) and the majority opinion in *Jones v. Barnes*.<sup>96</sup> Standard 4-5.2 provides:

- (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:
  - (i) what pleas to enter;
  - (ii) whether to accept a plea agreement;
  - (iii) whether to waive jury trial;
  - (iv) whether to testify in his or her own behalf; and
  - (v) whether to appeal.
- (b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.
- (c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.<sup>97</sup>

As its commentary indicates, Standard 4-5.2 slightly expands the fundamental decisions reserved to the defendant by *Jones* and by Model Rule 1.2(a) to include specifically the decision to accept or to reject a proffered plea agreement.<sup>98</sup> The settlement decision, however, is so closely intertwined with the decision regarding the plea to enter that no one seriously argues that such a decision is the lawyer's.<sup>99</sup>

ABA Standard 4-5.2 directs the lawyer to give the defendant the benefit of counsel's careful advice and full experience before the defendant makes any of these fundamental decisions.<sup>100</sup> Ultimately, however, it is the client who has the final say in these decisions because these decisions are "so crucial to the accused's fate."<sup>101</sup> Ignoring the fact that many strategic and tactical decisions are likely to affect the outcome of the trial and, therefore, are equally crucial to the defendant's fate, ABA Standard 4-5.2 opts to promote lawyer autonomy by giving ultimate

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96. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 (3d ed. 1993).

97. *Id.*

98. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 commentary at 201 (3d ed. 1993).

99. See Keith N. Bystrom, *Communicating Plea Offers to the Client*, in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS 84, 89 (Rodney J. Uphoff ed., 1995).

100. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 (3d ed. 1993).

101. STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 commentary at 201 (3d ed. 1993).

responsibility for all strategic and tactical case decisions to defense counsel.<sup>102</sup>

The full extent of the lawyer's decisionmaking power under ABA Standard 4-5.2 is evidenced by the fact that defense counsel's duty to consult about trial strategy and tactics is conditioned upon the lawyer's judgment that such consultation is "feasible and appropriate."<sup>103</sup> Thus, even in an important decision such as whether to call a particular defense witness, the lawyer is given the professional discretion to make that choice without consultation with the defendant if the lawyer feels consultation is inappropriate or unfeasible. Admittedly, lawyers are encouraged "ordinarily" to consult with the client before making some strategic decisions, "especially those involving which witnesses to call."<sup>104</sup> Only in limited instances, however, is a client given any check on the lawyer's power to make strategic or tactical judgments.<sup>105</sup>

The commentary to ABA Standard 4-5.2 recognizes that it is important for criminal defense lawyers to consult with the accused about the specific decision concerning the submission of lesser included instructions to the jury.<sup>106</sup> Nevertheless, the current edition of the ABA Standards places final responsibility for this critical decision in counsel's hands, not the client's.<sup>107</sup> The previous edition, however, allocated the decision to

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102. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 commentary at 201-02 (3d ed. 1993).

103. STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 commentary at 201 (3d ed. 1993). In the history of the third edition of Standard 4-5.2, it is noted that "[t]he language 'where feasible and appropriate' was added in section (b) to reflect the fact that sometimes consultation is virtually impossible, e.g., in the middle of cross-examination." STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 history at 200 (3d ed. 1993). Whatever the drafters' intent, the "feasible and appropriate" language and similar language in the commentary to other ABA provisions encourages consultation, but arguably provides too much cover for those lawyers who choose not to consult with their clients. See, e.g., STANDARDS FOR CRIMINAL JUSTICE Standard 4-3.8 commentary at 178 (3d ed. 1993) (stating that a lawyer is not expected to describe trial or negotiation strategy to the client, but "ordinarily should consult the client on tactics that might injure or coerce others").

104. STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 commentary at 202 (3d ed. 1993).

105. The lawyer in the example we have been discussing arguably would not be empowered under the ABA Standards to call the client's elderly father over the client's objection. The commentary to Standard 4-3.1 states:

In questions of means, the lawyer should assume responsibility for technical and legal, strategic and tactical issues, such as what witnesses to call . . . . But defense counsel should consult with his or her client on these questions where such consultation is feasible, and counsel should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

STANDARDS FOR CRIMINAL JUSTICE Standard 4-3.1 commentary at 148 (3d ed. 1993).

106. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 commentary at 202 (3d ed. 1993).

107. See *id.*

the client.<sup>108</sup> The drafters of the current edition offer no explanation for shifting control of this significant issue back to the lawyer.

The commentary to Standard 4-5.2 proclaims the advantages of this lawyer-centered model.<sup>109</sup> Given the complexity of many of the defendant's rights, it is, in many instances, futile to expect lawyers to provide a meaningful explanation to most clients of how to exercise those rights.<sup>110</sup> In addition, many decisions have to be made during trial without adequate time for consultation.<sup>111</sup> Finally, even when decisions can be anticipated so that consultation is appropriate, the decisions ultimately should rest with counsel "[b]ecause these decisions require the skill, training, and experience of the advocate."<sup>112</sup> Put simply, because the lawyer knows best, the lawyer should have the power to make all strategic and tactical decisions.

### *C. State and Lower Federal Courts and the Allocation of Decisionmaking Issues*

State and lower federal courts generally have treated issues involving the allocation of decisionmaking responsibility between lawyer and client in the same manner as the Supreme Court in *Jones*. That is, in reviewing a claim of ineffective assistance of counsel, courts have had to decide whether defense counsel's failure to involve a defendant in making, or failure to defer to the client's wishes regarding, a particular strategic decision constitutes deficient or inadequate representation. In the vast majority of cases, that determination is simple. In view of the limited rights deemed fundamental and reserved for the client by the Constitution,<sup>113</sup> courts routinely hold that defense counsel's representation was constitutionally adequate because counsel exercised reasonable professional judgment when she made the particular strategic or tactical decision at

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108. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 commentary at 68 (2d ed. 1980). The commentary to Standard 4-5.2 acknowledges:

It is also important in a jury trial for the defense lawyer to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury. Indeed, because this decision is so important as well as so similar to the defendant's decision about the charges to which to plead, the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses. For instance, in a murder prosecution, the defendant, rather than the defense attorney, should determine whether the court should be asked to submit to the jury the lesser included offense of manslaughter.

*Id.*

109. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 commentary at 202 (3d ed. 1993).

110. See *id.*

111. See *id.*

112. *Id.*

113. See *supra* text accompanying notes 62-92.



issue.<sup>114</sup> Moreover, the defendant is deemed to be bound by counsel's strategic and tactical judgment calls even though he may not have been consulted<sup>115</sup> or may have disagreed with counsel's strategy.<sup>116</sup> Accordingly, appellate opinions generally promote the traditional lawyer-centered approach to decisionmaking.

Although state court opinions echo *Strickland v. Washington* in giving lawyers almost unchallengeable authority to make strategic and tactical decisions, these opinions, like *Strickland*, do not dictate a specific decisionmaking orientation.<sup>117</sup> State judges, like their federal counterparts, have been quite willing to find that a lawyer has rendered constitutionally adequate and effective representation even though counsel permitted her client to make a strategic decision typically made by counsel.<sup>118</sup> A defendant whose lawyer follows his instructions regarding a strategic trial decision rarely will be able to complain successfully on appeal that the lawyer acted unprofessionally in abiding by the client's wishes.<sup>119</sup> Indeed, in a growing number of death penalty cases, courts

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114. See, e.g., *Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1433-36 (3d Cir. 1996); *People v. Ramey*, 604 N.E.2d 275, 281 (Ill. 1992); *State v. Johnson*, 714 S.W.2d 752, 766 (Mo. Ct. App. 1986).

115. See, e.g., *Lovett v. Foltz*, 687 F. Supp. 1126, 1135 (E.D. Mich. 1988) (holding that lawyer's strategic decision not to call a particular defendant, though made without consulting the defendant, was not ineffective assistance of counsel); *Van Alstine v. State*, 426 S.E.2d 360, 363 (Ga. 1993) (finding that although important for lawyer to consult with defendant about requesting lesser included instructions, failure to do so did not constitute ineffective assistance of counsel because lawyer made strategic choice that was consistent with defendant's feelings about the case); *Johnson*, 714 S.W.2d at 766 (concluding that counsel properly made strategic decision to allow admission of inadmissible evidence without consulting with defendant because decisions other than fundamental decisions made during trial are necessarily for lawyer alone without advice from defendant).

116. See, e.g., *Weatherwax*, 77 F.3d at 1433-36 (holding that counsel's failure to raise issue of possible juror misconduct despite defendant's wishes was a strategic choice and thus, not ineffective assistance of counsel); *Ramey*, 604 N.E.2d at 281 (finding counsel not ineffective despite presenting self-defense theory contrary to defendant's wishes).

117. See, e.g., *Briones v. State*, 848 P.2d 966, 977 (Haw. 1993) ("An informed, tactical decision will rarely be second-guessed by judicial hindsight.").

118. See, e.g., *People v. Galan*, 261 Cal. Rptr. 834, 835-37 (Cal. Ct. App. 1989) (holding counsel not ineffective for calling witness who gave damaging testimony because counsel did so at client's insistence); *State v. McDowell*, 407 S.E.2d 200, 209-10 (N.C. 1991) (holding defense counsel not ineffective for deferring to client's wishes whether to pass or strike certain jurors).

119. See, e.g., *Jeffries v. Blodgett*, 5 F.3d 1180, 1198 (9th Cir. 1993) (finding that counsel's failure to present mitigating evidence was not ineffective assistance because counsel acquiesced to defendant's wishes that evidence not be presented); *Lowenfield v. Phelps*, 817 F.2d 285, 290-93 (5th Cir. 1987) (concluding that neither counsel's failure to present insanity defense nor to introduce evidence of defendant's mental problems at sentencing constituted ineffective assistance because defendant objected to either strategy); *Foster v. Strickland*, 707 F.2d 1339, 1343-44 (11th Cir. 1983) (holding counsel was not ineffective for not pursuing insanity defense because defendant insisted on a contradictory defense); *State v. Rubenstein*, 531 N.E.2d 732, 740 (Ohio Ct. App. 1987) (finding counsel was not ineffective for waiving cross examination of state witnesses, stipulating to psychiatric

have been willing to permit clients to make strategic decisions contrary to those proposed by counsel.<sup>120</sup> The Pennsylvania Supreme Court, for example, looked to the defendant's right to control the objectives of representation to find that the client has the right to direct counsel not to introduce or to argue mitigating evidence in the penalty phase of a capital case.<sup>121</sup> The Alabama Court of Criminal Appeals went even further by holding that the trial court did not interfere with the attorney-client relationship when the court honored the defendant's request to call two witnesses at the penalty phase over his lawyer's objection.<sup>122</sup> Citing Rule 1.2 of the Alabama Rules of Professional Conduct, the court declared that "[a]n attorney can only make recommendations to a client as to how to conduct his defense; the ultimate decision, however, lies with the client."<sup>123</sup>

It is not surprising then that lawyers struggling to determine how best to provide criminal defendants with quality representation feel free to decide for themselves whether to share decisionmaking authority with their clients. Criminal defense lawyers realize that the Constitution does not mandate that they provide quality representation, only that counsel's assistance be reasonable given all of the circumstances of the case.<sup>124</sup> The fact that the Constitution demands so little of defense counsel, however, does not mean that defense lawyers are free to ignore professional standards or to provide deficient representation.<sup>125</sup> Rather, criminal

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report and waiving opening argument pursuant to defendant's instructions); *In re Trombly*, 627 A.2d 855, 856-57 (Vt. 1993) (insisting that defendant who chose, contrary to lawyer's advice, not to ask for lesser-included instruction, could not complain that counsel was ineffective for deferring to the defendant's wishes). *But see* *State v. Lee*, 689 P.2d 153, 158-59 (Ariz. 1984) (in banc) (deciding that defense counsel provided deficient representation when he acquiesced to defendant's demand to call witnesses whose veracity counsel doubted).

120. *See, e.g.*, *Mitchell v. Kemp*, 762 F.2d 886, 889-90 (11th Cir. 1985) (holding counsel not ineffective for failing to investigate and to present mitigating evidence due to defendant's directives); *Alvord v. Wainwright*, 725 F.2d 1282, 1288-89 (11th Cir. 1984) (concluding counsel not ineffective because defendant refused to permit counsel to assert an insanity defense); *State v. Brown*, 451 S.E.2d 181, 186-87 (N.C. 1994) (finding trial court acted properly in ordering counsel to follow defendant's wishes regarding trial strategy); *State v. Buchanan*, 410 S.E.2d 832, 835 (N.C. 1991) (holding that defendant cannot complain because counsel acquiesced to defendant's wishes not to remove certain jurors that counsel deemed unsuitable); *State v. Ali*, 407 S.E.2d 183, 188-90 (N.C. 1991) (refusing to hold lawyer ineffective for permitting client to make decision not to peremptorily challenge a juror that counsel wanted to remove).

121. *See* *Commonwealth v. Sam*, 635 A.2d 603, 611-12 (Pa. 1993).

122. *Burton v. State*, 651 So. 2d 641, 656 (Ala. Crim. App. 1993).

123. *Id.*

124. *See* *Strickland v. Washington*, 466 U.S. 668, 688-91 (1984).

125. A criminal defense lawyer may survive an ineffective assistance of counsel claim, but still be subject to discipline or to a malpractice suit for providing inadequate representation. Rarely, however, is a criminal defense lawyer disciplined or successfully sued in a malpractice action for providing shoddy representation. *See* *Schulhofer & Friedman, supra* note 20, at 88 ("[T]he

defense lawyers are required to be vigorous and zealous advocates pursuing their client's interest to the fullest extent permitted by law.<sup>126</sup>

Although it may be easy to assume that most lawyers aspire to provide quality representation and to perform in accordance with the highest standards of the profession, undoubtedly not all do.<sup>127</sup> Many critics of the criminal justice system question the zeal and the competence of many criminal practitioners, especially those representing indigent defendants.<sup>128</sup> A definitive look at the problems of ineffective assistance of counsel and the need to develop adequate systems for delivering indigent defense services is beyond the scope of this Article.<sup>129</sup> Nevertheless, even if we accept the proposition that incompetence and lack of zeal are widespread systemic problems, commentators still agree that many criminal defense lawyers do, in fact, work tirelessly to provide their clients excellent representation.<sup>130</sup> What is not clear is whether those criminal practitioners who are committed to rendering effective assistance of counsel really act in accordance with the lawyering model presented by ABA Standard 4-

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malpractice suit is virtually a non-existent remedy for the criminal defendant.”).

126. The criminal defense lawyer “is obliged not to omit any essential lawful and ethical step in the defense” and is responsible for “furthering the defendant’s interest to the fullest extent that the law and the applicable standards of professional conduct permit.” STANDARDS FOR CRIMINAL JUSTICE Standard 4-1.2 commentary at 122-23 (1993).

127. There has been a host of articles in the past thirty years decrying the inadequate representation provided by many criminal defense lawyers. See, e.g., Alschuler, *supra* note 20, at 1179-1210; David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 8-11 (1973); Berger, *supra* note 16, at 50-55; Blumberg, *supra* note 20, at 28-31; Michael McConville & Chester L. Mirsky, *Criminal Defense for the Poor in New York City*, 15 REV. L. & SOC. CHANGE 581 (1986-87).

128. Some critics focus on defense counsel’s lack of zeal. See, e.g., Blumberg, *supra* note 20, at 20; David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in the Public Defender Office*, 12 SOC. PROBS. 255, 272-73 (1965). Others contend that the inadequate representation provided by public defenders stems not from a lack of zeal, commitment, or ability, but from a lack of adequate resources and the burden of excessive caseloads. See, e.g., Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 661-63 (1986).

129. For a more extensive exploration of these problems, see generally Berger, *supra* note 16; Schulhofer & Friedman, *supra* note 20; Uphoff, *Zealous Advocate*, *supra* note 20.

130. Just as the literature abounds with stories of deficient representation, there are countless examples of defense lawyers providing zealous representation even at great personal expense. See, e.g., Ogletree, *supra* note 37, at 1260-89 (describing his struggles to represent his clients in the face of his sister’s murder and touting the zeal of his colleagues at the Public Defender Service in Washington, D.C.). For a look at other favorable accounts of the representation provided by particular public defender offices or programs, see NATIONAL CENTER FOR STATE COURTS, INDIGENT DEFENDERS: GET THE JOB DONE AND DONE WELL (1992); THE SPANGENBERG GROUP, CASELOAD/WORKLOAD STUDY FOR THE STATE PUBLIC DEFENDER OF WISCONSIN, FINAL REPORT (1990); U.S. DEP’T OF JUSTICE, AN EXEMPLARY PROJECT: THE D.C. PUBLIC DEFENDER SERVICE (1975); Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81 (1995).

5.2, or whether those lawyers behave in a more client-centered manner. Our study was designed to address that question.

## V. AN EXPLORATORY STUDY OF THE ALLOCATION OF DECISIONMAKING AUTHORITY BETWEEN PUBLIC DEFENDERS AND THEIR CLIENTS

### A. *Methodology and Data Collection*

Systematic data collection regarding client involvement in decisionmaking is virtually non-existent.<sup>131</sup> A review of the extant literature reveals only a few previous field studies that examine issues associated with lawyer-client decisionmaking, and none that employs a survey methodology similar to that which we considered using.<sup>132</sup> Admittedly, confidentiality, lawyers' attitudes, time constraints, and the nature of legal work make it difficult to obtain meaningful empirical evidence.<sup>133</sup> To minimize the effect of these obstacles and to ensure that our study reflected the views of a significant number of criminal practitioners, we opted to use a survey method to gather our data about lawyer-client decisionmaking. We also decided to aim for a sufficient number of participants and types of decisions to allow for meaningful group comparisons and statistical analysis. In our view, this methodology represented the most useful approach for gathering meaningful data about

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131. The authors of three recent studies focusing on client competence and decisionmaking in criminal cases claim that their studies "are the first in the literature to provide data on such questions as the amount of time attorneys spend with their clients, defendants' level of involvement in their cases generally, and defendants' involvement in making key decisions." Norman G. Poythress et al., *Client Abilities to Assist Counsel and Make Decisions in Criminal Cases: Findings from Three Studies*, 18 LAW & HUM. BEHAV. 437, 449 (1994). Although the authors acknowledge that their sample size was small, involving only one six-person public defender office, they found that the majority of defendants in their studies had actively participated in the key decisions clearly allocated to them by law. See *id.* at 450. For a look at the authors' preliminary study, see Steven K. Hoge et al., *Attorney-Client Decision-Making in Criminal Cases: Client Competence and Participation as Perceived by Their Attorneys*, 10 BEHAV. SCI. & L. 385 (1992).

132. Several authors have looked at attorney-client interactions by observing and interviewing lawyers working in particular practice settings. See, e.g., KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 37-67 (1985); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177 (1986); Austin Sarat & William L. F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 L. & SOC'Y REV. 93 (1986). Such works offer useful insights about the attitudes and practices of certain lawyers, but it is difficult to know if these small samples of lawyers are, in fact, representative generally of lawyers practicing in their respective substantive areas.

133. See generally Brenda Danet et al., *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure*, 14 L. & SOC'Y REV. 905 (1980) (describing the difficulties of gathering empirical evidence concerning lawyer-client interactions).

the client's role in decisionmaking. Anecdotal evidence is notoriously suspect, and conducting personal interviews of a sufficient number of lawyers would be prohibitively expensive and time consuming—particularly if one wanted to make meaningful comparisons between lawyers from different offices and locations. A survey, on the other hand, would generate sufficient data to allow us to draw some meaningful and valid generalizations about lawyer-client decisionmaking.<sup>134</sup>

We focused exclusively on public defenders in collecting our initial data. By surveying only a selected number of sizeable public defender offices, we were able to minimize the number of data collection sites and to maximize the number of likely respondents from each location.<sup>135</sup> The cost of such a focus, however, is that the data collected may not be representative of the beliefs and practices of criminal defense lawyers in general. Although most public defenders and private lawyers are held to the same professional standards,<sup>136</sup> the attitudes and practices of privately retained lawyers regarding lawyer-client decisionmaking may be significantly different from those of public defenders.<sup>137</sup> Perhaps

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134. We recognize the danger, however, in concluding too much from one's empirical work. See Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 LAW & POL'Y 149, 157 (1984).

135. Accordingly, it may be that our results reflect the views of public defenders in larger urban offices, but do not accurately represent the beliefs and practices of public defenders in smaller offices or rural areas.

136. See, e.g., *Ferri v. Ackerman*, 444 U.S. 193, 204-05 (1979); *Espinoza v. Rogers*, 470 F.2d 1174, 1175 (10th Cir. 1972); *Spring v. Constantino*, 362 A.2d 871, 878 (Conn. 1975); *Reese v. Danforth*, 406 A.2d 735, 739 (Pa. 1979).

137. See generally Roy B. Flemming, *Client Games: Defense Attorney Perspectives on Their Relations with Criminal Clients*, 1986 AM. B. FOUND. RES. J. 253 (suggesting that series of interviews with 155 defense lawyers reveals significant differences in lawyer-client relationships and subsequent representation when comparing private clients and those defendants represented by public defenders or court-appointed counsel). Yet, it is difficult to generalize about public defenders because resources and caseloads—and, in turn, the quality of representation and culture of the office—vary so dramatically from office to office. Compare, for example, the favorable descriptions of public defenders provided by Ogletree, *supra* note 37, and by the NATIONAL CENTER FOR STATE COURTS, *supra* note 130, with the unflattering accounts provided by McConville & Mirsky, *supra* note 127, and by Trisha Renaud & Ann Woolner, *Meet'em and Plead'em*, FULTON COUNTY DAILY REP., Oct. 8, 1990, at 1. Not surprisingly, the attitudes and practices of the lawyers working in any office are going to be influenced by the practices, policies, resources, and culture of that office. For an interesting account of the many influences affecting the attitudes and behavior of public defenders in the Cook County, Illinois office, see LISA J. MCINTYRE, *THE PUBLIC DEFENDER* (1987).

Similarly, the attitudes and practices of privately retained defense lawyers vary significantly. Various commentators have described the shoddy and half-hearted representation provided by some private lawyers who do, in fact, function as double agents. See, e.g., Alschuler, *supra* note 20, at 1181-95; Blumberg, *supra* note 20, at 15-31. On the other hand, there are countless private criminal defense lawyers who work vigorously to ensure that their clients get the best representation possible. Time, money, commitment to professional ideals, and prior experiences undoubtedly affect the private lawyer's beliefs and behavior. For a detailed look at the many systemic and personal factors

privately retained criminal defense attorneys generally exercise a more client-centered philosophy than public defenders because private clients have the ability to hire and fire their lawyers.<sup>138</sup> Then again, many defendants can afford only a modest, and often inadequate, retainer.<sup>139</sup> If a serious disagreement with counsel develops, rarely will a defendant have the means to retain new counsel. Thus, few criminal defendants really have the economic leverage to demand much attention from or much control over their lawyers.

Unquestionably, a client-centered approach to lawyering takes more time than a lawyer-centered approach. Public defenders typically maintain very heavy caseloads, struggle with limited resources, and often endure clients who are unhappy because they were unable to choose their lawyers.<sup>140</sup> Conversely, private attorneys with fewer clients and more resources may be more apt to adopt a more client-centered approach because they are able to devote more time to their clients on an individual basis.<sup>141</sup> And yet, many private lawyers are paid an inadequate fee by clients barely able to scrape together a small retainer. These lawyers often spend little time with their clients and frequently render terrible representation.<sup>142</sup> It is highly unlikely that these lawyers will be client-centered because, to make any money in a case, they must pressure the client to take a quick plea and do so in a manner that minimizes counseling and client decisionmaking. Because our limited research budget did not allow for systematic data collection from private lawyers, we simply do not know if privately retained defense lawyers would report similar attitudes and practices regarding client-centered decisionmaking.

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that influence the behavior of privately retained lawyers, appointed counsel, and public defenders, see generally Uphoff, *Zealous Advocate*, *supra* note 20.

138. A criminal defendant does not have the right to the appointed lawyer of his or her choice. See, e.g., *State v. Robinson*, 224 S.E.2d 174, 179 (N.C. 1976). Indeed, indigent defendants are not even guaranteed the right to a "meaningful relationship" with appointed counsel. *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983). A defendant who selects and pays a private lawyer, on the other hand, is much more likely to trust and to cooperate with that lawyer. Nevertheless, Roy Flemming contends that a paradox exists whereby privately retained lawyers can take a more traditional approach to the lawyer-client relationship because they have their clients' confidence, while public defenders must adhere to the participatory model to win their mistrustful clients' confidence. See Flemming, *supra* note 137, at 274-75.

139. See Uphoff, *The Criminal Defense Lawyer*, *supra* note 8 at 78-79. For a compelling look at the interplay between economics and the defendant's rights to zealous representation and to a jury trial, see Alschuler, *supra* note 20, at 1179-1204.

140. See Uphoff, *The Criminal Defense Lawyer*, *supra* note 8, at 80.

141. Indeed, Jonathan Casper attributes the more positive attitude clients have toward private lawyers as compared to public defenders with the increased time spent by private lawyers with their clients. See JONATHAN CASPER, *CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE* 35 (1978).

142. See, e.g., Alschuler, *supra* note 20, at 1179-98; Bazelon, *supra* note 127, at 8-11; Uphoff, *The Criminal Defense Lawyer*, *supra* note 8, at 79-86.

Although we have not addressed this issue in our initial study, future data collection efforts will seek to determine if, indeed, defense counsel's status affects the allocation of decisionmaking between counsel and defendant.

### B. *Survey Instrument*

Considerable time was devoted to crafting an instrument that would reflect meaningful differences in lawyer-client decisionmaking. We began by identifying twelve strategic and tactical decisions that repeatedly confront criminal defense lawyers and their clients.<sup>143</sup> Some of these decisions—whether to accept a plea agreement, whether to waive a jury trial, whether the client will testify—unquestionably are the client's call.<sup>144</sup> We anticipated that the responses to the survey would reflect the clear allocation of these decisions to the client. The other decisions identified in Tables 2, 3, and 5 represent important pretrial and trial-related strategic choices that may significantly affect the outcome of a criminal case. Although these decisions are not constitutionally allocated to either the client or the lawyer, support can be found, to varying degrees, for giving the client or the lawyer the final say for each of these decisions.<sup>145</sup>

We used two different sets of survey questions to determine the degree of support for client-centered lawyering. One set of questions asked whether the public defender agrees (strongly, somewhat) or disagrees (strongly, somewhat) with the proposition that “a lawyer should secure the client's consent” before making a particular decision. We termed this set of questions the “Belief” questions because they reveal the extent to which the lawyer respondents agree or disagree with securing the client's consent before making each of the twelve specific strategic or tactical decisions.

The second set of questions asked “how often do you secure your client's consent” (almost always, most of the time, sometimes, never)

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143. See *infra* Tables 2, 3, and 5.

144. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1989); STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 (3d ed. 1993).

145. Compare *Alvord v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir. 1984) (stating that counsel was ethically bound to follow client's choice of defense), *State v. Boeglin*, 731 P.2d 943, 946-48 (N.M. 1987) (declaring that it is defendant's choice, not counsel's, whether to request lesser included jury instructions), and *State v. Ali*, 407 S.E.2d 183, 189 (N.C. 1991) (insisting that when client and counsel at impasse on decision to exercise peremptory challenge, client's wishes control), with *Van Alstine v. State*, 426 S.E.2d 360, 361-63 (Ga. 1993) (indicating that, although counsel should consult with client in deciding whether to pursue an “all or nothing” defense, the ultimate strategic decision rests with counsel), *People v. Ramey*, 604 N.E.2d 275, 281 (Ill. 1992) (stating that choice of defense is a matter of trial strategy ultimately left for counsel), and *People v. Barrow*, 549 N.E.2d 240, 249 (Ill. 1989) (insisting that it is counsel's decision whether to offer certain evidence or call particular witnesses).

before making a particular decision. We termed this set of questions the "Practice" questions because they attempt to identify the extent to which lawyers actually secure the client's consent before making the same twelve strategic or tactical decisions. Using these two response formats enabled us to compare the attitudes of public defenders toward client-centered lawyering with their reported practices.<sup>146</sup>

In addition to the twelve key decisions noted above, we gathered demographic data on the respondents. The survey asked the respondents' gender, age, the school from which they received their law degree and the year they received it, whether they took a clinical course while in law school, and the nature and the duration of their work experience. The survey also sought information about the people and experiences the respondents perceived to be most influential in developing their own views about lawyer-client decisionmaking.

We pre-tested our survey instrument on twenty practicing attorneys in a public defender office in Oklahoma City, a mid-western capital city with a population of over 500,000. Like the revised survey, the pre-test instrument was a self-administered questionnaire. After completing the pre-test, we discussed the instrument with these twenty public defenders and modified our survey based on their comments and suggestions. Given the lack of previous research of this sort, the pre-test proved to be especially helpful in that it confirmed our anecdotal evidence that criminal defense lawyers sharply disagree about questions of decisionmaking authority. Moreover, the discussions we had with this group of public defenders indicated that we were asking the kinds of questions that would provide useful insights into criminal defense lawyers' attitudes and practices regarding lawyer-client decisionmaking.

In Fall 1995 and Spring 1996, we administered the revised survey to attorneys practicing in public defender offices in Los Angeles County (Los Angeles, California), Cook County (Chicago, Illinois), Washington,

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146. We cannot be sure, of course, if the lawyers in our study accurately reported what they actually do in practice. See Susan Daicoff, (*Oxymoron?*) *Ethical Decisionmaking by Attorneys: An Empirical Study*, 48 U. FLA. L. REV. 197, 220-22 (1996) (discussing several studies finding that attorneys' actual behavior may differ from what they report they do). The public defenders we surveyed, however, did not have any obvious incentive to color their responses about their attitudes or practices regarding client decisionmaking. Because a lawyer-centered approach is more consistent with the prevailing norms of the profession, a public defender is not stigmatizing herself or confessing to engaging in inferior lawyering by reporting that she does not regularly involve her clients in decisionmaking. Similarly, given the widespread acceptance of the client-centered approach, a defender is not admitting to substandard lawyering by acknowledging that she shares or cedes decisionmaking power to her clients. Thus, even if a defender were inclined to shape her responses to present herself in the best professional light possible, neither approach necessarily reflects superior lawyering. Moreover, our experiences with public defenders suggest that they are not inclined to answer questions based on a desire to satisfy the expectations of others.



D.C., Cuyahoga County (Cleveland, Ohio), and Memphis (Tennessee).<sup>147</sup> Rather than conducting a random sampling, we requested that all attorneys from each office participate in the survey. Response rates varied from office to office, ranging from a high of 66.7% of the lawyers in the Memphis office to a low of 48.7% of the lawyers in the Cuyahoga County office. We concluded data collection with 699 surveys completed by public defenders in the offices we targeted. The vast majority of these surveys are from either the Los Angeles County Public Defender Office (N=343) or the Cook County Public Defender Office (N=285). Nevertheless, we were able to make office-specific comparisons of adherence to client-centered lawyering and found significant differences from office to office.

### C. *Survey Results*

Table 1 presents descriptive information about our attorney respondents. Nearly 75% of the respondents are white, with African-Americans representing just over 11% of the sample. About 40% of the respondents are women. Roughly 75% of respondents are between thirty and fifty years of age, and 70% received their J.D. since 1980. About 20% received their J.D. from a "Top 20" law school.<sup>148</sup> The average length of time in a respondent's present public defender job is 9.2 years. The newest defender had been on the job for only 4 months at the time the survey was completed, while the most experienced respondent had been a public defender for 39 years.

#### 1. Response Frequencies

As noted above, we identified twelve strategic decisions that every lawyer who practices criminal law—particularly as a public defender—encounters regularly. Table 2 presents response frequencies to the items that have been labeled Belief items. The survey items are ranked according to the percent of respondents that "strongly agreed" with the survey item. These twelve items provide some evidence of the respondents' degrees of ideological support for client-centered decisionmaking.

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147. All of the respondents were members of public defender offices providing representation in state courts, except the Memphis respondents, who were employed by the Office of the Federal Public Defender for the Middle District of Tennessee.

148. The determination of the "Top 20" law schools was based on the rankings from *Law Schools: The Top 25*, U.S. NEWS AND WORLD REPORT, Mar. 20, 1995. Although the rankings are highly subjective and change yearly, every school on the list generally would be considered a top law school.

**Table 1: Descriptive Information About the Lawyer Respondents (N=699)**  
(Totals exclude missing data)

<b>Race:</b>	
American Indian	3 (0.5%)
African American	75 (11.4%)
Mexican American	39 (5.9%)
Puerto Rican/Other Hispanic	10 (1.5%)
Asian/Asian American	24 (3.7%)
White	482 (73.5%)
Other	23 (3.5%)
<b>Gender:</b>	
Female	269 (39.9%)
Male	405 (60.1%)
<b>Age:</b>	
Under 30 years	74 (11.3%)
30 - 39 years	278 (42.5%)
40 - 49 years	220 (33.7%)
50 - 59 years	74 (11.3%)
Over 60 years	8 (1.2%)
<b>Year Received J.D.:</b>	
Before 1970	39 (6.1%)
1970 - 1979	149 (23.3%)
1980 - 1989	278 (43.5%)
1990 - 1995	173 (27.1%)
<b>Law School Type:</b>	
Top 20 Law School	130 (20.2%)
Other Law School	515 (79.8%)
<b>Length of Time as Public Defender:</b>	
Average Time	9.2 years
Minimum Time	4 months
Maximum Time	39.0 years

The responses set forth in Table 2 reflect differing levels of commitment to the concept of client-centered decisionmaking. First, it is not surprising that there are four decisions that most respondents strongly agreed should involve the client's consent. Those decisions are: (1) making the decision to waive a jury trial; (2) making a decision regarding a plea bargain; (3) making the decision whether the client will testify at trial; and (4) making the decision to waive a preliminary hearing. When one adds in the "somewhat agree" responses, nearly all respondents agreed that a lawyer should secure a client's consent before making any of these four decisions.

**Table 2: Response Frequencies to the Twelve Belief Items (N=699)**

<b>Belief Scale Items</b>	<b>Strongly Agree</b>	<b>Agree Somewhat</b>	<b>Disagree Somewhat</b>	<b>Strongly Disagree</b>
<u>A lawyer should secure the client's consent before:</u>				
Making the decision to waive a jury trial	95.8%	1.6%	0.6%	2.0%
Making a decision regarding a plea bargain	93.7%	3.6%	1.0%	1.7%
Deciding whether the client will testify at trial	83.0%	11.4%	3.3%	2.3%
Making the decision to waive preliminary hearing	77.4%	11.2%	5.2%	6.2%
Talking to the D.A. about a possible plea bargain	23.7%	23.0%	22.4%	30.8%
Deciding whether to raise affirmative defense	21.8%	32.6%	25.1%	20.5%
Deciding whether to request a lesser included instruction	20.7%	30.9%	26.2%	22.3%
Making the decision to file a suppression motion	8.5%	18.5%	26.7%	46.3%
Deciding which witnesses to call at trial	8.4%	29.3%	34.4%	27.9%
Exercising peremptory challenges at trial	4.9%	30.6%	30.9%	33.6%
Requesting the appointment of an expert witness	3.9%	15.2%	30.6%	50.3%
Making the decision to interview state's witnesses	2.0%	9.1%	22.9%	66.0%

Second, there are three decisions over which the attorney respondents seem sharply divided. Those decisions are: (1) deciding whether to talk to the prosecutor about a possible plea bargain; (2) deciding whether to raise an affirmative defense; and (3) deciding whether to request a lesser included instruction. When the response categories regarding these three decisions are collapsed into simple "agree" and "disagree" groupings, the respondents were almost evenly split over each item.

Finally, most of the respondents apparently believed that the remaining five decisions are the responsibility of counsel, and fewer than 10% of the respondents "strongly agreed" that the lawyer should secure the client's consent before making these decisions. In fact, a majority of the lawyers responding to the survey disagreed with the need to secure a client's consent before: (1) deciding to file a suppression motion; (2) deciding which defense witnesses to call at trial; or (3) exercising peremptory challenges at trial. An even greater majority of the respondents believed that the client's consent was unnecessary when making the decision to request the appointment of an expert witness or the decision to interview the prosecution's witnesses.

Just as Table 2 provides response frequencies for the Belief items, Table 3 shows response frequencies for what have been labeled the Practice items. Using the same set of questions, the respondents were asked to report *how often* they secured a client's consent before making a given decision. Table 3 lists the survey items in the same order as they appear in Table 2.

The response frequencies to the Practice items set forth in Table 3 roughly divide into three categories that are almost identical in composition to those generated by the Belief items. Again, the vast majority of the public defenders responding to the survey claimed they "almost always" secure their clients' consent before: (1) making the decision to waive a jury trial; (2) making the decision regarding a plea bargain; (3) making the decision whether the client will testify; and (4) making the decision to waive a preliminary hearing. Once again, the respondents were divided sharply over how often they actually secured their clients' consent before talking to a district attorney about plea bargaining, affirmative defenses, or requests for a lesser included instruction. In addition, almost 47% of the respondents contended that they secured their clients' consent before deciding which defense witnesses to call at trial. For each of those four items, then, anywhere from 40-60% of the attorneys claimed to secure the client's consent either "almost always" or "most of the time" before making the particular decision.

Finally, except for the decision regarding calling defense witnesses, the practices of the lawyers as reflected by the responses to the remaining items identified in Table 3 correspond to the beliefs expressed as set forth in Table 2. That is, in making the decision to file a suppression motion, to exercise peremptory challenges, to request the appointment of an expert witness, and to interview the prosecution's witnesses, a majority of the respondents stated that they obtain their clients' consent only "sometimes" or "rarely" before making such decisions.

**Table 3: Response Frequencies to the Twelve Practice Items (N=699)**

Practice Scale Items	Almost Always	Most of the Time	Sometimes	Rarely
<u>How often do you secure your client's consent before:</u>				
Making the decision to waive a jury trial	96.9%	1.2%	0.4%	1.5%
Making a decision regarding a plea bargain	95.2%	2.9%	1.2%	0.7%
Deciding whether the client will testify at trial	93.8%	3.2%	1.5%	1.6%
Making the decision to waive preliminary hearing	83.1%	6.0%	4.0%	6.9%
Talking to the D.A. about a possible plea bargain	24.5%	16.4%	22.9%	36.1%
Deciding whether to raise affirmative defense	34.3%	26.4%	20.4%	19.0%
Deciding whether to request a lesser included instruction	29.6%	21.4%	26.8%	22.1%
Making the decision to file a suppression motion	9.9%	19.4%	26.6%	44.1%
Deciding which witnesses to call at trial	16.0%	30.9%	33.0%	20.1%
Exercising peremptory challenges at trial	12.2%	21.5%	35.3%	31.0%
Requesting the appointment of an expert witness	6.0%	14.4%	29.8%	49.9%
Making the decision to interview state's witnesses	2.5%	6.7%	31.1%	59.8%

## 2. Belief and Practice Scales: Measuring Adherence to Client-Centered Lawyering

We constructed two indices that seem to capture the respondents' degree of commitment to a client-centered philosophy. The "Belief" scale includes the items listed in Table 2 and reflects how strongly the respondents agree that a lawyer should secure a client's consent before making particular decisions. The "Practice" scale includes the items listed in Table 3 and reflects how often the respondents actually secure

a client's consent before making those same decisions. For both the Belief scale and the Practice scale, higher scores mean stronger commitment to the client-centered approach and lower scores mean stronger commitment to the lawyer-centered approach. Both scales are simple additive scales with maximum scores of 48 and minimum scores of 12.

The survey also includes an item that we presumed would be strongly associated with the Belief and Practice scales and that allows us to test—albeit crudely—for some degree of internal reliability of the survey instrument. The attorney respondents were asked how strongly they agree or disagree with the following statement: “A lawyer should allow a competent client of average intelligence to make all important decisions regarding that client's case.” We assumed that lawyers who agree strongly with the statement would register the highest Belief and Practice scale scores, and lawyers who disagree strongly would average the lowest Belief and Practice scale scores. Table 4 presents average Belief and Practice scale scores by response category to the above survey item and indicates that the data supports our predictions.

**Table 4: Response Frequencies for Survey Item “Client”\* and Mean Differences in Belief and Practice Scales by Response Categories for “Client”**

Survey Item “Client” Response Categories and Frequencies	Belief	Average** Score	Average Practice Score
Agree Strongly	85 (12.9%)	33.01%	37.16%
Agree Somewhat	165 (25.1%)	30.88%	33.90%
Disagree Somewhat	166 (25.3%)	29.43%	32.64%
Disagree Strongly	241 (36.7%)	27.16%	30.53%

\* Client: “A lawyer should allow a competent client of average intelligence to make all important decisions regarding that client's case.”

\*\*T-tests of the differences in mean Belief scores and mean Practice scores by response categories to the variable “Client” reveal those differences are all significant at  $p < .001$ .<sup>149</sup>

149. A T-test is used to determine whether a difference between two sample means is so large that it can no longer be attributed to sampling error. When it can no longer be attributed to sampling error, the difference in the two means is statistically significant. That is, the difference between the two means is the result of a real population difference and not just sampling error. Generally, we can assume a difference between two means reflects a real population difference when the probability is very small (for example, only 5 chances out of 100, or when  $p < .05$ ) that the sample difference is a product of sampling error. It is a matter of convention to use the .05 level of significance, but significance levels can be set up for any degree of probability. A more stringent significance level, for example, is the .01 level of significance ( $p < .01$ ), whereby there is only a 1-out-of-100 chance that the obtained sample difference could occur by sampling error. To take an even more extreme

Table 4 reflects a distribution of responses that is slightly skewed toward the disagree categories with 12.9% agreeing strongly, 25.1% agreeing somewhat, 25.3% disagreeing somewhat, and 36.7% disagreeing strongly. Table 4 also reveals that responses to this item are strongly associated with lawyers' average Belief and Practice scale scores in the direction we predicted. That is, the more a respondent agrees with the statement, the higher the respondent's average Belief and Practice scale score. Further, as one moves from the disagree strongly category to the agree strongly category, the mean score of both Belief and Practice scales increases in a statistically significant fashion ( $p < .001$ ). The average Belief scale score increases from 27.16 to 33.01, and the average Practice scale score increases from 30.53 to 37.16, with each incremental increase in the average score being statistically significant compared to the last one. We interpret the results in Table 4 as additional evidence that our Belief and Practice scales generate valid and reliable measures of respondents' degrees of adherence to client-centered decisionmaking.

#### *D. Conclusions*

Given the degree of decisionmaking control vested in defense counsel by the courts, ethical rules, and ABA Standards, we were surprised by the number of public defenders in this study who advocated a client-centered approach. As Table 4 reflects, 38% of respondents agreed, at least to some extent, with the statement that lawyers should allow their clients to make all important decisions. A closer examination of the responses set forth in Tables 2, 3, 5, and 6 reveals, however, that the commitment of our responding lawyers to sharing decisionmaking responsibility with their clients varies significantly from issue to issue.

In light of the clear authority establishing that certain fundamental decisions are reserved for the criminal defendant,<sup>150</sup> the responses to questions regarding decisions whether to have the client testify, whether to waive a jury trial, and whether to accept or to reject a plea bargain are not surprising. As expected, 97.4% of the respondents agreed that the client's consent should be secured before deciding to waive a jury trial,<sup>151</sup> and 98.1% claimed that they actually secured their clients' consent before

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example, setting up a .001 level of significance ( $p < .001$ ) yields a risk that the difference in means could be attributed to sampling error only 1 time out of every 1000. For a further discussion of the T-test, see JACK LEVIN, *ELEMENTARY STATISTICS IN SOCIAL RESEARCH* 127-29 (2d ed. 1977).

150. See *supra* notes 19, 61-122 and accompanying text. In each of the five jurisdictions we surveyed, there is a host of cases reiterating that the defendant must personally decide fundamental matters, such as whether to testify, whether to waive the right to trial by jury, and whether to plead guilty. See, e.g., *In re Horton*, 813 P.2d 1335, 1342 (Cal. 1991).

151. See *supra* Table 2.

doing so.<sup>152</sup> If counsel and the client disagree, however, about waiving the jury, we asked our respondents who should ultimately make the final call. As Table 5 reflects, 96.8% of the respondents concluded that the client should have the final say on this issue.

**Table 5: Response Frequencies for the Twelve  
"Who Makes the Call" Items (N=699)**

Who should make the call if lawyer and client disagree about:	Lawyer Should Make Call	Client Should Make Call
Whether to accept or reject a plea bargain	0.6%	99.4%
Waiving a jury trial	3.2%	96.8%
Whether the client will testify	6.6%	93.4%
Waiving a preliminary hearing	21.8%	78.2%
Initiating a plea bargain discussion	31.4%	68.6%
Whether to request a lesser included instruction	63.0%	37.0%
Raising an affirmative defense	72.7%	27.3%
Filing a suppression motion	82.2%	17.8%
Using peremptory challenges	83.3%	16.7%
Which defense witnesses to call to testify	88.6%	11.4%
Requesting appointment of an expert witness	91.9%	8.1%
Interviewing prosecution witnesses	95.1%	4.9%

Similarly, 97.3% of the public defenders stated that the client's consent should be secured before making a decision regarding a plea bargain,<sup>153</sup> while 98.1% reported that they, in fact, obtain such consent.<sup>154</sup> We anticipated such high percentages because defense counsel clearly is precluded from pleading a client guilty or forcing a client to trial against his will.<sup>155</sup> As expected, then, 99.4% of the respondents indicated that if

152. See *supra* Table 3.

153. See *supra* Table 2.

154. See *supra* Table 3. The results also are consistent with the data generated in three earlier—albeit much smaller—studies, which found that public defenders actively involve their clients in the decision to plead guilty. See Poythress et al., *supra* note 131, at 442-43.

155. See *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966). Although the ultimate decision regarding a plea bargain is the client's, counsel is obligated to give the defendant her best professional advice regarding that decision. See *Boria v. Keane*, 99 F.3d 492, 496-97 (2d Cir. 1996).



there were disagreement about the decision to accept or reject a plea bargain, the final call would be the client's.<sup>156</sup>

Although 97% of the respondents also contended that in practice they secured the client's consent before making the decision whether the client will testify,<sup>157</sup> a slightly smaller percentage, 94.4%, believed that such consent should be secured.<sup>158</sup> Rather surprisingly, only 83% strongly agreed with this proposition, while 11.4% agreed only somewhat.<sup>159</sup> Once again, the vast majority of the respondents, 93.4%, felt that if counsel and the client were at an impasse, the client should have the ultimate decision regarding testifying.<sup>160</sup> It is interesting to note, however, that fewer respondents were willing to respect the client's right to make this fundamental decision than were willing to support the client's call regarding the other two fundamental decisions.<sup>161</sup>

More than 88% of the respondents indicated that lawyers should have the client's consent before deciding whether to waive a preliminary hearing<sup>162</sup> and 89.1% claimed they generally obtained the client's consent before making this decision.<sup>163</sup> In all five jurisdictions, the defendant has a statutory right to a preliminary hearing; therefore, it is not surprising that many defenders involve the client in this decision.<sup>164</sup> Yet, this

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156. See *supra* Table 5.

157. See *supra* Table 3.

158. See *supra* Table 2.

159. See *supra* Table 2.

160. See *supra* Table 5.

161. Remarkably, 46 respondents, or 6.6%, admitted that they would make the final call on the question of whether the defendant would testify. See *supra* Table 5. It is remarkable not only because *Rock v. Arkansas*, 483 U.S. 44 (1987), *Jones v. Barnes*, 463 U.S. 745 (1983), STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2(a) (3d ed. 1993), and the MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1989) all indicate that this strategic decision is the client's, but also because of repeated judicial pronouncements about the importance of the defendant's personal right to decide whether to testify. See, e.g., *Brown v. Artuz*, 124 F.3d 73, 76-78 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1077 (1998); *United States v. Ortiz*, 82 F.3d 1066, 1070 (D.C. Cir. 1996); *People v. Robles*, 466 P.2d 710, 716 (Cal. 1970) (en banc). Moreover, these 46 respondents represent a statistically significant number when compared with the 4 respondents claiming the lawyer should have the final say over accepting or rejecting a plea bargain and the 22 respondents giving the final call to the lawyer on the question of jury waiver. Apparently, some public defenders are willing to override a client's decision even in this most fundamental of decisions if they deem such action necessary to protect a client. See *People v. Harris*, 236 Cal. Rptr. 680, 684 (Cal. Ct. App. 1987) (declaring that "astute" defense counsel who kept his client off the witness stand in an effort to avoid the death penalty because the defendant wanted to confess violated the defendant's personal right to testify).

162. See *supra* Table 2.

163. See *supra* Table 3.

164. Indeed, 78.2% of the respondents believe that the client should make the final call when the client and lawyer disagree about whether to waive the preliminary hearing. See *supra* Table 5. Nonetheless, some authority exists that allows defense counsel to decide whether to waive a preliminary hearing as a matter of trial strategy. See *People v. Moody*, 630 P.2d 74, 77 (Colo. 1981)

decision is not more significant than deciding whether to file a suppression motion or whether to exercise a peremptory challenge at trial, decisions that the respondents to our survey perceived as more lawyer-centered. A partial explanation may be that the preliminary hearing waiver generally is made in open court, thereby forcing the lawyer to discuss the question with the client and allowing the client a better opportunity to voice an objection should the client disagree with the lawyer's decision.<sup>165</sup>

It is interesting that 46.7% of the respondents either strongly agreed or somewhat agreed that they should secure the client's consent before talking to the prosecutor about a possible plea bargain<sup>166</sup> and that 40.9% claimed they usually obtained such consent.<sup>167</sup> What is especially interesting is that a significantly higher percentage, 68.6%, stated that if there were disagreement regarding initiating plea discussions, the client would be the ultimate decisionmaker.<sup>168</sup> This result is somewhat unexpected because the current version of ABA Standard 4-6.1(b) does *not* require the client's consent before initiating plea bargaining.<sup>169</sup> Perhaps the willingness of so many public defenders to defer to the client's wishes on this issue is explained by the fact that earlier editions of the ABA Standards suggested that "ordinarily" the client's consent should be secured before engaging in plea discussions with a prosecutor.<sup>170</sup> It may be, however, that many public defenders simply recognize

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(en banc); *State v. Brendeland*, 402 N.W.2d 444, 445 (Iowa 1987).

165. See CAL. PENAL CODE § 859b (West 1985 & Supp. 1998) (requiring defendant to waive personally his or her right to a preliminary hearing).

166. See *supra* Table 2.

167. See *supra* Table 3.

168. See *supra* Table 5.

169. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-6.1(b) (3d ed. 1993). Unlike earlier editions, the commentary to the ABA's latest version of Standard 4-6.1(b) states that "[t]he client's consent ordinarily need not be sought and obtained before any approaches are made, as there will be occasions when some discussion, perhaps only of a very tentative and preliminary nature, will occur before an opportunity arises to obtain the defendant's consent." STANDARDS FOR CRIMINAL JUSTICE Standard 4-6.1(b) commentary at 205 (3d ed. 1993).

170. In the first edition of the ABA Standards, Standard 6.1(b) observed that "[w]hen the lawyer concludes, on the basis of full investigation and study, that under controlling law and the evidence a conviction is probable, he should so advise the accused and seek his consent to engage in plea discussions with the prosecutor, if such appears desirable." STANDARDS FOR CRIMINAL JUSTICE Standard 6.1(b) (1st ed. 1971). Standard 6.1(c) of that same edition added that "[o]rdinarily the lawyer should secure his client's consent before engaging in plea discussions with the prosecutor." STANDARDS FOR CRIMINAL JUSTICE Standard 6.1(c) (1st ed. 1971). As the commentary to the first edition of Standard 6.1 made clear, the client's permission was to be secured in advance before negotiations were initiated because the decision to plea bargain belonged to the client. See STANDARDS FOR CRIMINAL JUSTICE Standard 6.1(b) commentary (1st ed. 1971).

The second edition of the ABA Standards dropped Standard 6.1(c) and modified Standard 6.1(b) to read as follows: "A lawyer may engage in plea discussions with the prosecutor, although ordinarily

that obtaining the client's consent prior to initiating plea bargaining is likely to make the defendant more receptive to accepting a proposed settlement.

The respondents were almost evenly divided over the issue of whether there is a need to secure the client's consent before raising an affirmative defense. While 54.4% responded that the attorney should secure the client's consent before deciding to raise an affirmative defense, only 21.8% strongly agreed with this statement.<sup>171</sup> Over 60% of our respondents claimed that, at least most of the time, they obtain the client's consent before deciding whether to raise an affirmative defense.<sup>172</sup> Given the critical nature of this decision,<sup>173</sup> it is not surprising that a majority of

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the client's consent to engage in such discussions should be obtained in advance." STANDARDS FOR CRIMINAL JUSTICE Standard 4-6.1(b) (2d ed. 1980). The commentary to the second edition echoed that of the first edition, insisting that "[u]ltimately, the definitive decision whether to engage in plea discussions is for the client, as is the decision to plead . . . [C]ounsel may have an opportunity to advance the client's interests without making any disclosures concerning the defense. Ordinarily, the client's consent should be sought and obtained before any approaches are made . . ." STANDARDS FOR CRIMINAL JUSTICE Standard 4-6.1(b) commentary (2d ed. 1980).

Although the third edition's version of Standard 4-6.1(b) no longer requires defense counsel to secure the client's consent before contacting the prosecutor, it is still remarkable that 31.4% of our respondents report a willingness to initiate settlement discussions even over the client's objection. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-6.1(b) (3d ed. 1993). Perhaps the public defenders who are willing to do so feel that the defendant is likely to change his mind about the merits of a plea bargain. Or perhaps these lawyers believe it is their duty to assess the merits of an alternative other than trial and, if the prosecution's case is strong, to persuade the client that a plea bargain is in the client's best interest. Even so, it is problematic to initiate plea bargaining without the client's permission, and even more so to engage in plea discussions over the client's objection. The lawyer's decision to seek a plea bargain despite the client's objection is likely to damage an already fragile attorney-client relationship. It suggests to the defendant that the lawyer wants to "deal" the case, thereby undermining the client's confidence in his lawyer. For a further discussion of the wisdom of securing the client's permission before plea bargaining, see Uphoff, *The Criminal Defense Lawyer*, *supra* note 8, at 95-98.

171. See *supra* Table 2.

172. See *supra* Table 3.

173. The choice of what the defense presents at trial is often inextricably tied to the defendant's decision whether to testify. In addition, the decision to raise a particular defense, such as an insanity defense, may have significant consequences for the defendant even if the defense is successful. Arguably, because the choice of raising or rejecting a particular defense is sufficiently fundamental, it should be the defendant's choice, not counsel's. In *Foster v. Strickland*, the United States Court of Appeals for the Eleventh Circuit looked to EC 7-7 of the Model Code to hold that defense counsel was ethically bound to follow the client's wishes not to present an insanity defense. See 707 F.2d 1339, 1343 & n.3 (11th Cir. 1983). Since *Foster*, a number of federal courts have recognized that defense counsel is obligated to present the defense demanded by the defendant. See, e.g., *Felde v. Blackburn*, 795 F.2d 400, 402 (5th Cir. 1986); *Autry v. McKaskle*, 727 F.2d 358, 362-63 (5th Cir. 1984); *Alvord v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir. 1984).

State courts have done likewise. "Indeed, where such fundamental rights are involved, there is an ethical obligation imposed on defense counsel . . . to advise the defendant of the available defenses and to abide by the defendant's choice regarding these fundamental decisions." *State v. Soares*, 916

the public defenders surveyed involve their clients in such a decision. What is unexpected is that so many defenders do not, especially in view of Model Code EC 7-7's use of the example of whether to waive an affirmative defense as the type of decision that is the client's to make.<sup>174</sup>

What is even more remarkable, in light of the number of respondents who said they would secure the client's consent regarding affirmative defenses, is that 72.7% of the responding public defenders believe that if counsel and client disagree over this issue, the lawyer should have the final say.<sup>175</sup> Of the five jurisdictions involved in our study, however, only in Illinois do public defenders find precedent that specifically places the responsibility of selecting the affirmative defense to present at trial in counsel's hands. In *People v. Ramey*,<sup>176</sup> the Illinois Supreme Court held that the choice of defense theory was a matter of tactics and of trial strategy that ultimately must be left to counsel.<sup>177</sup> Given this clear authority, it is not surprising that 65.4% of the Cook County public defenders say that the lawyer ultimately should decide this issue.<sup>178</sup>

Conversely, public defenders in both the District of Columbia and California are bound by decisions giving the defendant the personal right to choose whether an insanity defense should be presented.<sup>179</sup> Neither

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P.2d 1233, 1257-58 (Haw. Ct. App. 1996); *see also* *Burton v. State*, 651 So. 2d 641, 656 (Ala. Crim. App. 1994) ("An attorney can only make recommendations to a client as to how to conduct his defense; the ultimate decision, however, lies with the client."); *State v. Brown*, 451 S.E.2d 181, 186-87 (N.C. 1994) (stating that trial court acted properly in ordering defense counsel to proceed according to the defendant's wishes regarding trial strategy, even though counsel felt the tactics contravened the client's best interests). *See generally* Lloyd Epstein, *Choice of Defense and the Attorney-Client Relationship: Whose Call Is It?*, THE CHAMPION, Nov. 1994, at 30 (arguing that the choice of defense is fundamental and should be the client's call).

174. *See supra* note 38 and accompanying text. It should be noted, however, that only two of the five jurisdictions involved in this study, Ohio and Tennessee, follow the Model Code. *See* OHIO CODE OF PROFESSIONAL RESPONSIBILITY (Anderson 1998); TENN. CODE OF PROFESSIONAL RESPONSIBILITY (LEXIS 1998 & Supp. 1998).

175. *See supra* Table 5.

176. 604 N.E.2d 275 (Ill. 1992).

177. *See id.* at 281; *see also* *People v. Guest*, 655 N.E.2d 873, 879 (Ill. 1995) (holding that choice of defense theory is ordinarily a matter of trial strategy for counsel to decide); *cf.* *People v. Anderson*, 641 N.E.2d 591, 599 (Ill. App. Ct. 1994) (stating that defense counsel's role as manager of the case gives counsel the authority to present an insanity defense over the defendant's objection).

178. *See infra* Table 6.

179. *See* *U.S. v. Marble*, 940 F.2d 1543, 1546-47 (D.C. Cir. 1991) (relying on *Faretta* in holding that a competent defendant has the right to direct his own defense and make the strategic decision regarding raising or waiving an insanity defense); *People v. Frierson*, 705 P.2d 396, 401-06 (Cal. 1985) (holding that defense counsel erred in overriding defendant's express wishes to present a diminished capacity defense). Although *Frierson* has been cited repeatedly for the proposition that counsel cannot make tactical decisions that deprive a defendant of the right to present the only viable defense, subsequent decisions suggest a defendant does not have the unlimited right to insist upon any defense. *See, e.g.,* *People v. Jones*, 811 P.2d 757, 771-72 (Cal. 1991); *People v. Burton*, 771

**Table 6: Comparison of Responses for "Who Makes the Call" Items by Office**  
(Percentage of respondents reporting that the client should make the call)

"Who Makes the Call" Item	Chicago	D.C.	Cleveland	L.A.	Memphis
Whether to accept or reject a plea bargain	99.7%	100.0%	100.0%	99.2%	100.0%
Waiving a jury trial	97.3%	100.0%	100.0%	96.1%	100.0%
Whether the client will testify	93.6%	100.0%	94.7%	92.7%	100.0%
Waiving a preliminary hearing	68.0%	100.0%	84.2%	84.8%	88.9%
Initiating a plea bargain	86.1%	82.4%	68.4%	54.3%	33.3%
Whether to request a lesser included instruction	42.7%	94.1%	52.6%	29.2%	22.2%
Raising an affirmative defense	34.6%	68.8%	47.4%	17.3%	66.7%
Filing a suppression motion	22.1%	47.1%	36.8%	11.5%	33.3%
Using peremptory challenges	19.1%	100.0%	52.6%	8.8%	22.2%
Which defense witnesses to call to testify	13.4%	76.5%	36.8%	5.4%	11.1%
Requesting appointment of expert witness	12.1%	41.2%	15.8%	3.1%	0.0%
Interviewing prosecution witnesses	5.1%	35.3%	26.3%	2.3%	0.0%

jurisdiction expressly provides that the defendant has broad power over the selection of defenses. Still, given the California case law on the insanity defense, we anticipated that the Los Angeles public defenders would be more client-centered on this issue. Yet only 17.3% of the Los

P.2d 1270, 1278-79 (Cal. 1989); *People v. Ratliff*, 715 P.2d 665, 677-78 (Cal. 1986). Defense counsel "may be compelled to yield to his client's right to insist on the presentation of a defense of his own choosing," *People v. Ledesma*, 729 P.2d 839, 871 (Cal. 1987), but only when an express conflict arises between counsel and the defendant must the defendant's wishes prevail, *see, e.g., In re Horton*, 813 P.2d 1335, 1342 (Cal. 1991).

Angeles respondents reported that the ultimate call on raising an affirmative defense should be the client's, compared to 27.3% of all respondents.<sup>180</sup> Even more striking is that 68% of the D.C. public defenders view this decision as the client's.

The respondents in our survey were almost equally divided on the decisionmaking issue that the Woodward defense team confronted. That is, 51.6% of the public defenders answered that the client's consent should be obtained before making the decision on requesting lesser included jury instructions,<sup>181</sup> while 51% claimed to secure that consent in practice.<sup>182</sup> Just as in the case of the related decision regarding affirmative defenses, however, a significantly smaller percentage of the respondents, 37%, believe that if the lawyer and client disagree, the client should make the ultimate call.<sup>183</sup> Although case law also is sharply divided on this issue,<sup>184</sup> there is considerable authority, including language in the commentary to the second edition of ABA Standard 4-5.2,<sup>185</sup> that squarely places ultimate control for this important decision in the client's hands. Illinois is the only jurisdiction involved in our study with case law directly holding that the decision whether to request a lesser included instruction is for the defendant.<sup>186</sup> Despite this fact, only 42.7% of the

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180. See *infra* Table 7.

181. See *supra* Table 2.

182. See *supra* Table 3.

183. See *supra* Table 5.

184. Compare *People v. Petrovich*, 664 N.E.2d 503, 504 (N.Y. 1996) (recognizing the decision to request lesser included instruction is the defendant's), *In re Trombly*, 627 A.2d 855, 857 (Vt. 1993) (holding that tactical decision regarding submission of lesser included instruction is for the defendant), and *State v. Boeglin*, 731 P.2d 943, 945 (N.M. 1987) (stating that it is defendant's choice, not counsel's, to request lesser included instructions), with *Van Alstine v. State*, 426 S.E.2d 360, 363 (Ga. 1993) (noting that decision to request lesser included instruction is matter of trial strategy involving complex legal considerations and generally in the province of counsel), and *People v. Thompson*, 245 N.W.2d 93, 94 (Mich. Ct. App. 1976) (holding that when counsel and client disagree over whether to tender a lesser included instruction, the strategic decision must ultimately be made by counsel).

185. The commentary states:

It is also important in a jury trial for the defense lawyer to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury. Indeed, because this decision is so important as well as so similar to the defendant's decision about the charges to which to plead, the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses.

STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 commentary at 68 (2d ed. 1980). In the third edition of the ABA Standards, however, this language has been deleted and replaced with only the admonition that defense counsel should "consult fully" with the accused about any lesser included instruction. STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 commentary at 202 (3d ed. 1993).

186. See *People v. Brocksmith*, 642 N.E.2d 1230, 1232-33 (Ill. 1994). In *Brocksmith*, the Illinois Supreme Court equated the seriousness of the decision to tender a lesser included instruction with that of the decision of which plea to enter, and concluded, therefore, that the decision should belong

respondents from Cook County viewed this decision as the client's.<sup>187</sup> This 42.7% figure, however, is higher than the 37% of all respondents answering this question who indicated that this decision is the client's,<sup>188</sup> and is more client-centered than the Cook County response to the related question concerning affirmative defenses.<sup>189</sup> Nevertheless, the public defenders from Cleveland were even more client-centered—52.6%—on this issue, and those from the District of Columbia dramatically more so—94.1%—despite the fact that case law in both jurisdictions suggests that defense counsel should make this tactical decision.<sup>190</sup> The Los Angeles public defenders once again were much less client-centered with only 29.2% contending that the client should have the final say on this issue.<sup>191</sup> Overall, 63% of the respondents were willing to override the client's wishes on such a decision even though such a call, as in the *Woodward* case, may mean the difference between life imprisonment and acquittal.<sup>192</sup> It is worth noting that this 63% figure nearly mirrors the 62% of the respondents identified in Table 4 as disagreeing with the general statement about client decisionmaking responsibility.

The respondents to our survey also were sharply divided about the decision regarding defense witnesses. Only 8.4% strongly agreed that the defendant's consent should be secured before calling such witnesses.<sup>193</sup> Almost twice that percentage claimed, however, that in practice, they almost always secured the client's consent prior to calling defense witnesses, while 46.9% stated that they did so most of the time.<sup>194</sup> Thus, even though ABA Standard 4-5.2(b) gives defense counsel control over the choice of witnesses,<sup>195</sup> nearly half of the respondents reported they

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to the defendant. *See id.*

187. *See supra* Table 6.

188. *See supra* Table 5.

189. As Table 6 reflects, only 34.6% of the Cook County respondents indicated that the client should make the decision regarding raising an affirmative defense.

190. *See supra* Table 6. Although the appellate courts in Ohio and the District of Columbia have not ruled on the specific issue of the allocation of control as between counsel and client regarding the lesser included instruction decision, each jurisdiction has case law suggesting that such a decision is a matter of trial tactics for counsel to make. *See, e.g., Bostick v. United States*, 605 A.2d 916, 920 (D.C. 1992); *State v. Guffy*, No. 13167, 1993 WL 169115, at \*3 (Ohio Ct. App. Apr. 16, 1993); *State v. Clayton*, 402 N.E.2d 1189, 1191 (Ohio 1980).

191. *See supra* Table 6; *see also* *People v. Cooper*, 809 P.2d 865, 897 (Cal. 1991) (stating that it is unnecessary to secure the defendant's personal waiver of a lesser included instruction when defense counsel makes the strategic choice to pursue an all-or-nothing strategy).

192. *See supra* Table 5.

193. *See supra* Table 2.

194. *See supra* Table 3.

195. STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2(b) (3d ed. 1993).

obtained their client's consent when selecting the witnesses to call at trial.<sup>196</sup> Yet, when asked whose decision controlled if counsel and client disagreed about calling a witness, 88.6% of the public defenders claimed the final decision was the lawyer's,<sup>197</sup> a position that is consistent with most case law on this question.<sup>198</sup>

In a series of cases, Illinois appellate courts have confirmed that the decision to call certain witnesses is a strategic one ultimately reserved for trial counsel.<sup>199</sup> Similarly, in California<sup>200</sup> and Ohio,<sup>201</sup> defense counsel explicitly is empowered to make the decision regarding the selection of witnesses. If defense counsel opts to defer to the defendant's wishes regarding calling a witness, however, the defendant will not—at least not in California—be able to complain that counsel rendered ineffective assistance by following the defendant's instructions even though counsel felt that calling the witness was strategically unwise.<sup>202</sup> Nevertheless, it is still noteworthy that 88.6% of the public defenders were willing to override the defendant's wishes on this issue,<sup>203</sup> especially in light of the fact that well-respected criminal defense experts, including Monroe Freedman, argue that the defendant should have the final say on the selection of witnesses.<sup>204</sup> Only in the District of Columbia, and, to a

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196. See also PERFORMANCE GUIDELINES, *supra* note 94, at 94 n.11 (“The question of which witnesses to call . . . is for counsel to decide after consulting with the client.”).

197. See *supra* Table 5.

198. See cases cited *supra* note 61.

199. See *People v. Barrow*, 549 N.E.2d 240, 249 (Ill. 1989); *People v. Abt*, 646 N.E.2d 1341, 1348 (Ill. App. Ct. 1995); *People v. Anderson*, 641 N.E.2d 591, 599 (Ill. App. Ct. 1994); *People v. Johnson*, 581 N.E.2d 118, 124-25 (Ill. App. Ct. 1991).

200. See *In re Horton*, 813 P.2d 1335, 1342 (Cal. 1991) (confirming that counsel is “captain of the ship” and in control over all decisions except those expressly held to be fundamental); *People v. Williams*, 471 P.2d 1008, 1015 (Cal. 1970) (stating that counsel has authority to control selection of witnesses); *People v. Turner*, 10 Cal. Rptr. 2d 358, 362 (Cal. Ct. App. 1992) (reiterating that all non-fundamental tactical and strategic decisions, including the selection of witnesses, are the lawyer's to control “despite differences of opinion or even open objections from the defendant”).

201. See *State v. Rubenstein*, 531 N.E.2d 732, 740 (Ohio Ct. App. 1987) (“The decisions on what witnesses to call . . . and all other strategies or tactical decisions are the province of the lawyer after consultation with client.”).

202. See *People v. Gadson*, 24 Cal. Rptr. 2d 219, 224-25 (Cal. Ct. App. 1993); *People v. Galan*, 261 Cal. Rptr. 834, 835-36 (Cal. Ct. App. 1989). *But see State v. Lee*, 689 P.2d 153, 157-58 (Ariz. 1984) (in banc) (holding that counsel provided ineffective assistance of counsel by abdicating the duty to make tactical decisions and acceding to defendant's wishes to call witnesses counsel felt were detrimental to the case).

203. See *supra* Table 5.

204. See FREEDMAN, *supra* note 61, at 54. Freedman's client-centered views are trumpeted regularly in articles in *The Champion*, the journal of the National Association of Criminal Defense Lawyers, and in publications specifically written for criminal defense lawyers. See, e.g., Monroe Freedman, *Whose Case Is It Anyway*, THE ADVOCATE, June 1994, at 13, 13-15 (publication of the Kentucky Department of Public Advocacy reprinting an article by Freedman advocating that the



lesser extent, in Cleveland, is there substantial support for taking a client-centered approach on this issue.<sup>205</sup>

Turning next to the decision to file a suppression motion, only 27% of the respondents indicated that they believed a client's consent was needed before filing such a motion.<sup>206</sup> In practice, just 29.3% reported that they actually secured that consent before filing suppression motions.<sup>207</sup> Moreover, 46.3% of the public defenders felt strongly that this decision was the lawyer's,<sup>208</sup> and 44.1% stated that they rarely obtained their client's consent before filing such a motion.<sup>209</sup> Because the lawyer's failure to file such a motion may eliminate the defendant's ability to complain about the violation of his constitutional rights, and may severely cripple the defendant's success at trial, it is somewhat surprising that 82.2% of the respondents answered that if counsel and the client clash over filing a suppression motion, the lawyer should have the final say.<sup>210</sup>

There is, of course, considerable authority placing control over the decision to file motions in the hands of trial counsel.<sup>211</sup> Thus, we anticipated that many lawyers, especially busy public defenders, would make decisions regarding suppression motions without consulting with or securing the consent of their clients. Yet, it is rather surprising that so

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defendant be permitted to make the decision regarding witnesses).

205. See *supra* Table 6. As Table 6 reflects, 76.5% of the District of Columbia respondents and 36.8% of those from Cleveland report that the client should make this call compared to 5.4%, 11.1%, and 13.4% of the respondents from Los Angeles, Memphis, and Chicago respectively.

206. See *supra* Table 2.

207. See *supra* Table 3.

208. See *supra* Table 2.

209. See *supra* Table 3.

210. See *supra* Table 5. If it can be shown on appeal that trial counsel's failure to file a suppression motion deprived the defendant of a crucial defense, the defendant may be able to demonstrate that trial counsel rendered ineffective assistance of counsel. See *People v. Farley*, 153 Cal. Rptr. 695, 704 (Cal. Ct. App. 1979). Admittedly, however, the defendant on appeal will have great difficulty showing that the unfiled motion would have been successful. Cf. *e.g.*, *Allen v. Nix*, 55 F.3d 414, 417 (8th Cir. 1995) (finding that motion not suppress was not likely to succeed); *United States v. Gibson*, 55 F.3d 173, 179 (5th Cir. 1995) (stating that motion to suppress was without merit).

211. See, *e.g.*, *People v. Ramey*, 604 N.E.2d 275, 281 (Ill. 1992) (concluding that choice of defense theory and other strategic decisions, such as what trial motions to make, are lawyer's call); STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2(b) (3d ed. 1993) (stating that defense counsel should make decisions regarding "what trial motions should be made"); PERFORMANCE GUIDELINES Guideline 5.1, *supra* note 94, at 63-66 (suggesting factors counsel should consider in making strategic decision to file pretrial motions). Of our five jurisdictions, only California has a case directly on point holding that the decision to file a suppression motion is a tactical decision for counsel. See *People v. Turner*, 10 Cal. Rptr. 2d 358, 362 (Cal. Ct. App. 1992). But see *State v. Brown*, 451 S.E.2d 181, 186-87 (N.C. 1994) (concluding that although normally tactical decisions such as which motions to make are attorney's, if impasse between counsel and client, client's wishes must control (citing *State v. Ali*, 407 S.E.2d 183, 189 (N.C. 1991))).

many of our respondents were willing to deny their clients the right to make a choice regarding pursuing a non-frivolous suppression motion.<sup>212</sup> In light of Justice Brennan's and Justice Blackmun's positions in *Jones v. Barnes*,<sup>213</sup> one might expect that more defenders would be willing to defer to the client's wishes on this matter. Perhaps the fear of alienating judges (who are notoriously hostile to time-consuming motions), the low rate of success of such motions, a lack of time because of caseload pressure, and the professional's interest in controlling one's craft all contribute to our respondents' reluctance to give up decisionmaking control over this issue.<sup>214</sup>

Similarly, an overwhelming majority of the respondents in our survey, 83.3%, indicated that if the client and lawyer disagreed over the use of their peremptory challenges, the lawyer should make the decision.<sup>215</sup> Although 33.7% of the public defenders claimed they involved their clients in this decision at least most of the time,<sup>216</sup> of the 35.5% who believed that the client's consent should be obtained, only 4.9% felt strongly.<sup>217</sup> Nonetheless, it is significant that so many public defenders are willing to involve their client in a tactical decision—one that must be made quickly at trial with little opportunity for meaningful consultation—when that decision generally is viewed as exclusively the lawyer's.<sup>218</sup> Once more, the 35.5% who favor, at least to some degree, a more client-centered approach on the peremptory challenge question is

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212. A lawyer not only has the right, but also the duty to refuse to file a frivolous motion. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980).

213. See 463 U.S. 745, 755-64 (1983) (Brennan, J., dissenting); *id.* at 754 (Blackmun, J., concurring). For a discussion of these opinions, see *supra* text accompanying notes 76-82.

214. For a more extended discussion of the position that a lawyer should defer to the client's demand to pursue nonfrivolous pretrial motions, see generally George E. Bisharat, *Pursuing a Questionable Suppression Motion*, in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS 63 (Rodney J. Uphoff ed., 1995).

215. See *supra* Table 5.

216. See *supra* Table 3.

217. See *supra* Table 2.

218. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2(b) (3d ed. 1993) (stating that strategic and tactical decisions to be made by counsel include what jurors to accept or strike); PERFORMANCE GUIDELINES, *supra* note 94, at 100 (recommending that client's observation about jurors is one of the factors counsel should consider when deciding whether to accept or to excuse potential jurors). In his dissent in *Jones v. Barnes*, even Justice Brennan suggested that:

[i]n the course of a trial, however, decisions must often be made in a matter of hours, if not minutes or seconds. From the standpoint of effective administration of justice, the need to confer decisive authority on the attorney is paramount with regard to the hundreds of decisions that must be made quickly in the course of a trial.

463 U.S. 745, 760 (1983) (Brennan, J., dissenting). *But see* *State v. Ali*, 407 S.E.2d 183, 189-90 (N.C. 1991) (holding that defense lawyer acted properly in allowing client to control decision regarding the exercise of a peremptory challenge).

fairly consistent with the 38% responding in a more client-centered manner to the general inquiry on decisionmaking.<sup>219</sup>

As to the remaining two questions, our respondents were decidedly more lawyer-centered. Almost 81% of the public defenders disagreed, at least somewhat, with the proposition that a client's consent should be obtained before requesting the appointment of an expert,<sup>220</sup> and 79.7% stated they rarely or only sometimes secured that consent.<sup>221</sup> Similarly, 88.9% of the respondents disagreed, at least somewhat, that the client's consent should be secured before interviewing the prosecution's witnesses,<sup>222</sup> while 90.9% claimed they rarely or only sometimes actually obtained such consent.<sup>223</sup> Moreover, only 4.9% of the responding lawyers indicated that the client should have the final say if a disagreement arose over interviewing a prosecution witness, and only 8.1% gave the ultimate call to the client regarding the appointment of an expert.<sup>224</sup>

We expected that very few public defenders would claim that they sought their clients' permission before interviewing prosecution witnesses. Time constraints, communication difficulties, and counsel's duty to conduct a prompt investigation<sup>225</sup> frequently demand that defense counsel proceed to interview witnesses without waiting for the defendant's consent. What is surprising is that 95.1% of the respondents indicated that they would override the client's wishes about interviewing a prospective witness.<sup>226</sup> Perhaps many lawyers would feel compelled to do so because of counsel's obligation to conduct an adequate investigation of the case even in the face of the defendant's stated desire to plead

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219. *See supra* Table 4.

220. *See supra* Table 2.

221. *See supra* Table 3.

222. *See supra* Table 2.

223. *See supra* Table 3.

224. *See supra* Table 5.

225. *See* STANDARDS FOR CRIMINAL JUSTICE Standard 4-4.1 (3d ed. 1993).

226. *See supra* Table 5. During the early 1980s, Professor Uphoff was the Chief Staff Attorney of the Milwaukee Office of the Wisconsin State Public Defender. Neither he nor any of the more than 40 public defenders he worked with routinely sought the client's consent before interviewing prosecutorial witnesses. Nevertheless, given Professor Uphoff's experiences and other anecdotal evidence, we expected that more public defenders would defer to a client's express wishes if the client insisted that certain witnesses not be interviewed.

guilty.<sup>227</sup> Nevertheless, it is striking that so many public defenders would disregard the defendant's express wishes on such a matter.

Even more striking is that 91.9% of respondents would seek the appointment of an expert witness even though the client objected.<sup>228</sup> Certainly, it may be necessary for counsel to secure a psychiatric expert despite the client's objection, especially if competency is at issue. Arguably, however, a defendant's fear that the appointment of a handwriting or ballistics expert may produce incriminating evidence should not be disregarded.<sup>229</sup> Yet, the vast majority of the public defenders responding to our survey felt that this is a tactical choice that ultimately belongs to the lawyer.

## VI. FACTORS AFFECTING THE ALLOCATION OF DECISIONMAKING POWER

As our survey indicates, not only do criminal defense lawyers have different lawyering styles, but they also have differing attitudes about the allocation of decisionmaking power between lawyer and client. Although most of the public defenders in our survey took a traditional view of the lawyer's role in the decisionmaking process, a significant minority of the respondents claimed that defendants should be involved in key tactical and strategic case decisions. The respondents even reported that a substantial number of defendants *actually are* participating in important case decisions.

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227. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-4.1 (3d ed. 1993) ("[C]ounsel should conduct a prompt investigation. . . . The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty."). The defendant's initial insistence on pursuing a particular defense also does not diminish counsel's duty to undertake a thorough investigation. See *People v. Ledesma*, 729 P.2d 839, 871 (Cal. 1987). Although a defendant's wishes not to call certain witnesses may limit the scope of counsel's duty of investigation, a client's directives do not excuse counsel's failure to conduct an adequate investigation. See, e.g., *Thompson v. Wainwright*, 787 F.2d 1447, 1451-52 (11th Cir. 1986). But see *Knight v. Dugger*, 863 F.2d 705, 706 (11th Cir. 1989) (finding that defense counsel who followed defendant's instructions and failed to interview and to present defendant's mother did not render ineffective assistance); *State v. Ali*, 407 S.E.2d 183, 189 (N.C. 1991) (stating that attorney must comply with defendant's instructions regarding tactical decisions).

228. See *supra* Table 5.

229. It is particularly problematic for defense counsel to obtain an expert over a defendant's objection when that expert's observations or findings may be subsequently used against the defendant at trial. See *Noggle v. Marshall*, 706 F.2d 1408, 1410 (6th Cir. 1983) (finding no Sixth Amendment violation when prosecutor permitted to call as a rebuttal witness a psychiatrist retained by the defense to evaluate the defendant, but not called by defense at trial); *United States v. Pipkens*, 528 F.2d 559, 563 (5th Cir. 1976) (permitting handwriting expert retained by defense counsel but not used at trial, then subpoenaed over defense objection, to offer incriminating testimony against the defendant); *Gray v. District Court*, 884 P.2d 286, 291 (Colo. 1994) (allowing prosecution to access and to use reports of defense retained psychiatric experts despite fact defense did not intend to call experts at trial).

Unquestionably, a lawyer's attitudes and motivations shape that lawyer's style and manner of representation and, in turn, that lawyer's behavior.<sup>230</sup> The different attitudes of the public defenders in our survey toward client-centered decisionmaking undoubtedly influence the extent to which those respondents actually involve their clients in critical case decisions. We recognize that a lawyer's attitudes or orientation regarding decisionmaking represent only one of many factors affecting the behavior of criminal defense lawyers and their interactions with their clients. Certainly there may be a host of reasons why criminal defense lawyers may chose not to consult with their clients before taking specific action in any particular case. We were interested, however, in trying to identify the causal factors that were most likely to reduce or to limit the defendant's participation in case decisions. Based upon interviews with the public defenders in our pre-test, existing literature, and our personal experiences, we isolated eleven different factors that we believed were most likely to influence a lawyer's willingness to involve a client in decisionmaking.<sup>231</sup> We then asked the public defenders in our survey a series of questions seeking to determine how often these factors played an important role in reducing or limiting the client's participation in important trial decisions. Table 7 reports the attitudes of our respondents.

High caseloads are a harsh reality for every public defender program.<sup>232</sup> In the face of this caseload pressure, every public defender struggles to find the time to do all of the tasks that must be done to adequately serve the clients.<sup>233</sup> Time spent providing a client with sufficient information so that the client can participate meaningfully and effectively in strategic and tactical case decisions means less time to devote to investigation, legal research, or case preparation. Time problems may be exacerbated

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230. See Flemming, *supra* note 137, at 257-75; Ogletree, *supra* note 37, at 1244-89.

231. We surveyed the following eleven factors: (1) client has low general intelligence; (2) client has little experience with criminal justice system; (3) attorney's heavy workload; (4) time is of the essence; decision must be quick; (5) client is less than 21 years of age; (6) client gets bad advice from other sources; (7) attorney is court-appointed, not retained by client; (8) client may make poor decisions adversely affecting case; (9) client's suspicion and mistrust of his own attorney; (10) case involves possibility of death penalty or extreme penalty; (11) complexity of issue makes useful explanation too difficult or time-consuming. See *infra* Table 7.

232. See Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171, 1171-74 (1988).

233. For a look at the extent to which heavy caseloads adversely affect the delivery of indigent defense services and the measures that public defenders and indigent defense programs take to cope with caseload pressures, see, for example, RICHARD KLEIN & ROBERT SPANGENBERG, ABA SECTION OF CRIMINAL JUSTICE, THE INDIGENT DEFENSE CRISIS (1993); Edward C. Monahan & James Clark, *Coping with Excessive Workload*, in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS 318 (Rodney J. Uphoff ed., 1995); Klein, *supra* note 128; McConville & Mirsky, *supra* note 127; Ogletree, *supra* note 37, at 1240; Schulhofer & Friedman, *supra* note 20, at 84-85.

by the fact that so many defendants are incarcerated. Nonetheless, remarkably few of the responding lawyers answered that their workload was an important factor in determining a client's participation in trial decisions. The fact that 74.7% of the respondents believed workload was rarely a factor is inconsistent with our expectations and the literature.

**Table 7: Important Factors Reducing or Limiting Client's Participation in Important Trial Decisions**

Factor	Almost Always	Most of the Time	Sometimes	Rarely
Client has low general intelligence	10.7%	18.4%	46.5%	24.4%
Client has little experience with criminal justice system	3.9%	11.0%	35.0%	50.1%
Attorney's heavy workload	2.0%	3.5%	19.8%	74.7%
Time is of the essence; decision must be quick	3.3%	12.6%	47.8%	36.4%
Client is less than 21 years of age	2.0%	3.3%	23.8%	70.8%
Client gets bad advice from other sources	5.6%	11.4%	41.4%	41.7%
Attorney is court-appointed, not retained by client	2.4%	1.6%	5.3%	90.7%
Client may make poor decisions adversely affecting case	9.3%	17.8%	44.3%	28.7%
Client's suspicion and mistrust of his own attorney	3.0%	8.5%	42.7%	45.7%
Case involves possibility of death penalty or extreme penalty	6.8%	5.2%	18.8%	69.2%
Complexity of issue makes useful explanation too difficult or time-consuming	2.3%	3.9%	34.1%	59.7%

Echoing Justice Brennan's observations in *Jones v. Barnes*,<sup>234</sup> the commentary to ABA Standard 4-5.2 justifies placing decisionmaking power in matters of trial strategy and tactics in counsel's hands, at least in part, because

[n]umerous strategic and tactical decisions must be made in the course of a criminal trial, many of which are made in circumstances that do not allow extended, if any, consultation. Every experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness or follow opposing arguments or the judge's charge while the client "plucks at the attorney's sleeve" offering gratuitous suggestions.<sup>235</sup>

We anticipated, therefore, that many of the public defenders surveyed would identify time pressures and the need for an immediate decision as a factor limiting client participation in decisionmaking. Indeed, 47.8% of the defenders noted that, sometimes, it was an important factor. Only 15.9% of the respondents, however, reported that the need to make quick decisions was almost always or most of the time an important factor in limiting client-decisionmaking.

Perhaps of greater significance is the fact that only 11.6% of the public defenders believed that client mistrust was an important factor almost always or most of the time in reducing or limiting a client's participation in decisionmaking. Yet, it is generally accepted that indigent defendants commonly are hostile to, and mistrustful of, the public defender thrust upon them.<sup>236</sup> Perhaps that explains why 42.7% of the defenders reported that mistrust was sometimes an important factor and only 45.7% noted that it rarely was an important factor.<sup>237</sup>

Many public defenders are able to overcome their clients' initial resentment and are able to forge good working relationships with most clients. For other defenders, however, client hostility and lack of trust make it difficult to forge effective attorney-client relationships. Rather than take the time to allay client suspicion and foster a good relationship, some public defenders opt simply to minimize client consultation and participation in decisionmaking. The 11.6% figure does not tell us, however, if our responding lawyers found their clients generally to be less mistrustful than reported in the literature, or if they usually were able to overcome their clients' initial suspicions and establish a good working

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234. See *supra* notes 77-83 and accompanying text.

235. STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 commentary at 202 (3d ed. 1993).

236. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting); MCINTYRE, *supra* note 137, at 62-73; Flemming, *supra* note 137, at 254-60.

237. It is interesting to note that the responses to the mistrust inquiry reflected in Table 7 are very similar to the responses regarding the importance of the impact of the client receiving bad advice from other sources.

relationship such that mistrust normally was a minimal factor in the allocation of decisionmaking responsibility.

Not surprisingly, few defenders acknowledged that defense counsel's status—retained or appointed—was a significant factor affecting their clients' participation in decisionmaking. In fact, 90.7% answered that counsel's court-appointed status was rarely a factor. On the other hand, the client's general low intelligence and a concern that the client would make a poor, hurtful decision were identified by the highest percentage of respondents as the two factors that almost always or most of the time limit the client's participation in decisionmaking. For the public defenders we surveyed, these factors were more significant in reducing client decisionmaking than the client's young age or lack of prior experience with the criminal justice system.

Finally, only 6.2% of the respondents believed that client involvement was restricted almost always or most of the time because the complexity of issues made useful explanations too difficult or too time consuming. Given the language and the commentary to ABA Standard 4-5.2 justifying lawyer-centered decisionmaking in part because of this factor,<sup>238</sup> this percentage is rather low. Again, it is unclear whether the respondents are disagreeing with the underlying notion that complexity is a significant variable or whether they simply believe that this factor actually has little to do with their individual decision whether to involve the client in decisionmaking. It may well be that all of the factors we identified affect, to varying degrees, the extent to which lawyers with a client-centered orientation actually share decisionmaking power with their clients. These factors may be of limited relevance to the majority of our respondents who are ideologically committed to a lawyer-centered approach and not open to the concept of involving their clients in strategic or tactical decisions. Additional research should focus on the extent to which these factors actually affect the willingness of attorneys to adopt a client-centered orientation.

Though our study is exploratory and examines only public defenders, we are able to make some comments regarding factors that appear to generate variation in attorney-client decisionmaking orientation. Specifically, Tables 8 and 9 evince three sources of variation: (1) gender of the respondent; (2) the effect of clinical legal education; and (3) the impact of office culture.

Table 8 shows that for the entire sample, the average Belief scale score is 29.46 (N=670) and the average Practice scale score is 32.74 (N=642). Observe that all comparisons of mean scores in Table 8 register a statistically significant difference except for the gender difference in

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238. STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 commentary at 202 (3d ed. 1993).



**Table 8: Mean Belief and Practice Scores by Respondent's Gender, Experience in Clinical Course, and Office Location**

Comparison Variable	Average Belief Score	Average Practice Score
<b>Mean Score for All Respondents:</b>	29.46 (N=670)	32.74 (N=642)
<b>Gender:</b>		
Male (N=386)	29.20*	32.55
Female (N=259)	29.90*	33.08
<b>Clinical Course:</b>		
Yes (N=192)	30.17**	33.35**
No (N=442)	29.19**	32.48**
<b>Public Defender Office:</b>		
1. Cook County Public Defender (Chicago) (N=295) <sup>239</sup>	30.98 (285)	33.98 (266)
2. Public Defender Service (Washington, D.C.) (N=17)	32.67 (15)	36.60 (15)
3. Cuyahoga County (Cleveland) (N=19)	31.17 (18)	34.67 (18)
4. Los Angeles County (Los Angeles) (N=359)	27.97 (343)	31.40 (334)
5. Federal Public Defender (Memphis) (N=9)	29.44 (9)	35.78 (9)

\* Difference in means significant at  $p < .05$  (T-test)

\*\*Difference in means significant at  $p < .01$  (T-test)

average Practice scores.<sup>240</sup> Regarding gender differences, female public defenders register a stronger commitment to the ideology of client-centered lawyering than do males, but this difference seems to disappear when compared with the respondents reporting of their actual lawyering

239. The number of cases differs depending on whether all of the Belief and Practice scale items were answered by each respondent. If a respondent did not answer one of the items used to construct either the Belief or Practice scale, that case was deleted. This is why the number of cases next to the average Belief and Practice scale scores may be less than the total number of cases (N) for that office.

240. For a discussion of the use of a T-test to measure the significance of statistical differences, see *supra* note 149.

practices.<sup>241</sup> Perhaps the demands and constraints of doing the job of public defending cause female public defenders to behave, in practice, more like their male counterparts.<sup>242</sup> On the other hand, it may be that women public defenders are more willing to acknowledge the gap between their beliefs and their practices.

Our study also demonstrates that those public defenders who took a clinical law course in law school are much more likely to have a client-centered orientation than those respondents who did not. Specifically, Table 8 reflects our finding that those public defenders who had a clinical course in law school are significantly more likely to believe in, and practice, client-centered decisionmaking. This is not particularly surprising given the fact that so many clinical law teachers are strong proponents of the client-centered approach.<sup>243</sup>

In addition, it is apparent that office culture has an even greater impact on adherence to client-centered decisionmaking. As Table 9 indicates, there were significant differences in our respondents average Belief and Practice scores from office to office. Public defenders from the Public Defender Service for the District of Columbia registered the highest Belief and Practice scores while the lawyers from the Los Angeles County Public Defender's office registered the lowest average scores.<sup>244</sup> The average Belief and Practice scores suggest, then, that as a group, the

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241. If, as others have suggested, women have a different style of moral reasoning, one that values contextual factors based on relationships, care, and communication more highly than abstract factors related to rights, logic, and abstract justice, then it is not surprising that women public defenders would be more committed to a client-centered approach. For discussions of gender differences in moral reasoning styles, see generally Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193 (1991); Janet Taber et al., Project, *Gender, Legal Education and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209 (1988).

242. For a look at the pressures on the "empathic" public defender, see Ogletree, *supra* note 37, at 1271-81. See generally Abbe Smith, *When Ideology and Duty Conflict*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS* 18 (Rodney J. Uphoff ed., 1995) (discussing the difficulties a feminist public defender encounters balancing her commitments and her role).

243. BINDER ET AL., *supra* note 22, Ogletree, *supra* note 37, Dinerstein, *supra* note 14, and Miller, *supra* note 16, are only a few of the many clinical law teachers who advocate a client-centered approach to lawyering.

244. Assuming that the office culture at the D.C. Public Defender Service remains as it was when Charles Ogletree worked there, see *supra* note 37, and the Cook County Office is similar to that described by Lisa McIntyre, see *supra* note 137, one would expect higher Belief and Practices scores from the D.C. office compared to those registered from Cook County. As Tables 6, 8, and 9 reflect, the public defenders from the D.C. office are significantly more client-centered than the Cook County defenders.

**Table 9: Comparison of Average Belief and Practice Scale Scores by City**

City # (see Table 8)	Average Belief Score	Average Practice Score
1. N=285	30.98	33.98*
2. N=15	32.67	36.60*
1. N=285	30.98	33.98
3. N=18	31.17	34.67
1. N=285	30.98**	33.98**
4. N=343	27.97**	31.40**
1. N=285	30.98	33.98
5. N=9	29.44	35.78
2. N=15	32.67	36.60
3. N=18	31.17	34.67
2. N=15	32.67**	36.60**
4. N=343	27.97**	31.40**
2. N=15	32.67**	36.60
5. N=9	29.44**	35.78
3. N=18	31.17**	34.67**
4. N=343	27.97**	31.40**
3. N=18	31.17	34.67
5. N=9	29.44	35.78
4. N=343	27.97	31.40**
5. N=9	29.44	35.78**

\* Difference in means significant at  $p < .05$  (T-test).<sup>245</sup>

\*\*Difference in means significant at  $p < .01$ .

Los Angeles County public defenders are less committed to a client-centered approach to decisionmaking than their counterparts in the other four public defender offices. Indeed, as the responses to the items in Table 8 indicate, the District of Columbia public defenders are markedly more client-centered than the lawyers in any other office, while the Los Angeles public defenders are decidedly more lawyer-centered. It is likely that this difference in lawyering orientation is explained, at least in part, by the amount of emphasis placed on client-centered decisionmaking in training sessions and by the lawyering orientation of those lawyers

245. Once again, asterisks mean that there is a statistically significant difference between the average scores on either the Belief or Practice scale for the city comparison in question. *See supra* note 149.

acting as mentors for newly hired public defenders.<sup>246</sup> Undoubtedly, the prevailing “office culture” of each public defender office also influences the degree to which our lawyer respondents involve their clients in important trial decisions.<sup>247</sup>

Finally, we looked at several other factors to determine if they affected the respondents’ decisionmaking orientation. It has been suggested, for instance, that younger, less experienced criminal defense lawyers prefer the traditional approach, but over time, they adopt a more participatory approach.<sup>248</sup> We found, however, no significant association between the age of the respondent and that respondent’s average Belief and Practice scores. Similarly, we looked at the time that had elapsed since the respondent had received his or her J.D. and the respondent’s average Belief and Practice scores. Again, we found no statistically significant correlation. Lastly, we examined the number of months our respondents were in their present job and found no significant association between the duration of the respondent’s current position and the average Belief and Practice scores.

## VII. CONCLUSION

As this Article demonstrates, many criminal defense lawyers still believe that as the “captain of the ship . . . ‘it is counsel, not defendant, who is in charge of the case.’”<sup>249</sup> Most lawyers also believe that they generally have the right to control trial tactics and strategy even in the face of the defendant’s contrary opinion or explicit objection. Yet, as our study shows, a significant minority of criminal defense lawyers are willing to share decisionmaking power with their clients in a number of important strategic case decisions. Unquestionably, both the commitment to, and the practice of, this client-centered approach varies significantly depending on the strategic or tactical decision to be made. Nonetheless, not only do a sizeable number of public defenders believe in a client-

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246. For a discussion of the importance of the mentor and office supervisors in shaping the attitudes of the new lawyer, see Ogletree, *supra* note 37, at 1285-89; Rodney J. Uphoff et al., *Preparing the New Law Graduate to Practice Law: A View From the Trenches*, 65 U. CINN. L. REV. 384, 405-07 (1997).

247. Numerous commentators have described the effects of the office culture on the behavior of those working in a particular office. See, e.g., Ogletree, *supra* note 37, at 1285-89 (touting the D.C. Public Defender Service for fostering a culture of winning and for inspiring its lawyers to attain excellence and to provide the best defense possible). For a detailed account of the culture of an office quite different from that of the D.C. Public Defender Service, see MCINTYRE, *supra* note 137, at 77-94 (describing the Cook County Public Defender Office of the early 1980s).

248. See Flemming, *supra* note 137, at 275.

249. *In re Horton*, 813 P.2d 1335, 1342 (Cal. 1991) (quoting *People v. Hamilton*, 774 P.2d 730, 741 (Cal. 1989)).

centered approach to decisionmaking, they also claim to practice such lawyering.

Our survey of public defenders, then, provides the first systematic look at both the ideological commitment to, and the actual practice of, client-centered decisionmaking among criminal defense lawyers. Admittedly, defense counsel's commitment to practicing a client-centered approach to decisionmaking reveals little about the quality of representation provided by that lawyer. In our experience, there are excellent criminal defense lawyers who demand absolute control over all tactical and strategic decisionmaking just as there are superb lawyers who share decisionmaking power with their clients in a manner that ensures both quality representation and maximum client satisfaction. Neither our survey nor this Article addresses the question of whether those lawyers taking a client-centered approach actually render better representation to their clients than those lawyers who follow the traditional approach. That question surely deserves more attention. In the end, however, no matter what counsel's orientation is toward decisionmaking, a criminal defendant will not be well-served unless defense counsel possesses the resources, skill, and will to provide zealous representation.