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## The Client Who Did Too Much

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## THE CLIENT WHO DID TOO MUCH\*

Nancy B. Rapoport\*\*

*The whole point of the MacGuffin is that it is irrelevant. In Hitchcock's own words, the MacGuffin is:*

*the device, the gimmick, if you will, or the papers the spies are after. . . [.] The only thing that really matters is that in the picture the plans, documents or secrets must seem to be of vital importance to the characters. To me, the narrator, they're of no importance whatsoever.*

*Angus McPhail, who may have been the first to coin the term, explained its meaning with a nonsense story. Two men were travelling on a train from London to Scotland. An odd shaped package sat on the luggage rack above their seat.*

*"What have you there?" asked one of the men. "Oh, that's a MacGuffin," replied his companion. "What's a MacGuffin?" "It's a device for trapping lions in the Scottish Highlands." "But there aren't any lions in the Scottish Highlands!" "Well, then, I guess that's no MacGuffin!"*

*The MacGuffin is the engine that sets the story in motion.*

-Alfred Hitchcock<sup>1</sup>

In Alfred Hitchcock's *The Man Who Knew Too Much*,<sup>2</sup> a married couple becomes enmeshed in an assassination plot purely by

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\*\* Interim Dean and Gordon Silver Professor of Law, William S. Boyd School of Law, UNLV. The views in this essay are mine alone and not those of the Boyd School of Law or UNLV, as you can probably guess from the way that the essay is written. Special thanks to the Joseph G. Miller and William C. Becker Center for Professional Responsibility for inviting me to participate in this symposium, and to Jeff Van Niel, Katharine Van Tassel, and Morris Rapoport for their helpful comments.

1. Mark Duguid, *Hitchcock and the MacGuffin*, BFI SCREENONLINE, <http://www.screenonline.org.uk/tours/hitch/tour6.html> (italics added).

2. THE MAN WHO KNEW TOO MUCH (Paramount Pictures 1956).

happenstance.<sup>3</sup> Although they don't care one way or another about the target of the plot, they have to decide whether to stop the assassination or stand aside and let it happen. In the end, they have to weigh the importance of helping a perfect stranger or protecting (spoiler alert!) their son.<sup>4</sup>

As with any Hitchcock movie, *The Man Who Knew Too Much* has a MacGuffin — the motivator for the protagonist's actions that advances the storyline.<sup>5</sup> Cases have their MacGuffins, too. The clients in a case (and their lawyers) are likely to care passionately about certain things that, to the rest of the world, are often of no particular interest. A case's MacGuffin will be the focus of discovery and of argument, and clients and lawyers alike will spend significant amounts of time debating the MacGuffin, planning the best ways to present it, and theorizing about any MacGuffins on the other side.

A client's input about her<sup>6</sup> case — including any MacGuffins — is crucial. In the world of “who knows the most,” the client (and the party on the other side) will always know the most about the facts of the case; then comes her lawyer (and the lawyer on the other side); and last comes the judge, who really only knows those facts that the lawyers choose to share with him.<sup>7</sup> Depending on the personalities and skill levels of a client and her lawyer, there can be tension between how the lawyer wants to present the case and how the client wants it presented. Even though Model Rule 1.2 sets out the division of authority between the client and the lawyer,<sup>8</sup> there is no clear line of demarcation.<sup>9</sup> The

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3. Stop reading this paragraph and skip to the next one if you don't want me to spoil the plot for you.

4. In the first (also-Hitchcockian) version, the child in question is a daughter. The two versions have strengths and weaknesses. The first one has Peter Lorre (as the villain) and Edna Best (who shows real turmoil in the Albert Hall scene); the second one has Jimmy Stewart and Doris Day as the couple caught in the middle. Doris Day tries to show the same level of anguish in the Albert Hall scene, but she's just not as good as Edna Best.

5. See, e.g., Duguid, *supra* note 1. There are several websites devoted to the various MacGuffins in Hitchcock's movies. See *id.*; see also Jeffrey Michael Bays, *Definitive List of Hitchcock MacGuffins*, BORGUS.COM, <http://borgus.com/hitch/macguffins.htm>. For a video of Hitchcock discussing the MacGuffin, see *Interview by Dick Cavett with Alfred Hitchcock* (1972), available at <http://www.youtube.com/watch?v=OBRZ6GEFjG4>.

6. To avoid confusion, I'm going to refer to clients as “she” and lawyers as “he.” Don't read anything into that choice. It's just a convention.

7. My friend Ted Gavin has told me that being a judge is like sitting alone in a dark room with a television, turning the television on fifteen minutes into a show, turning it off again five minutes later, and then asking the judge to write the entire one-hour script.

8. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012) provides, in part, that “a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”

9. *Id.* at cmt. 2 provides:

common wisdom is that the client decides the objectives of the representation and the lawyer determines how best to achieve those objectives.<sup>10</sup> But what happens when the client directs the lawyer to do something unnecessary or wasteful?

I first became aware of the effect of a lawyer pursuing actions based on pressure from his client while doing work as a bankruptcy fee examiner.<sup>11</sup> Before I can describe the phenomenon in more detail, though, let me set out the parameters that triggered my attention in the first place.

Bankruptcy cases, like other types of fee-shifting<sup>12</sup> cases, often have non-clients paying some of the legal bills. “Estate-paid” professionals in bankruptcy can include the debtor-in-possession’s lawyers, accountants, financial advisors, and other assorted professionals, as well as the professionals hired by the creditors’ committee or other official committees in the case.<sup>13</sup> Even my own fees and expenses as a fee examiner are paid from estate funds. (Those estate funds are sometimes funded from a carve-out of a secured creditor’s

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On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client’s objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved.

10. See, e.g., Glenn E. Bradford, *Who’s Running the Show? Decision-Making in the Courtroom in Civil and Criminal Cases*, 62 J. MO. B. 148, 150 (2006).

11. I’ve been doing a fair amount of that type of work. For discussions of what I’ve found as a fee examiner, see Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. & TECH. L. 117, 149-151 (2012); Nancy B. Rapoport, *Rethinking Fees in Chapter 11 Bankruptcy Cases*, 5 J. BUS. & TECH. L. 263 (2010); Letter from Nancy B. Rapoport, Interim Dean and Gordon Silver Professor of Law, William S. Boyd School of Law, UNLV, to Exec. Office of the United States Trustee, (Nov. 6, 2012), available at [http://www.justice.gov/ust/eo/rules\\_regulations/guidelines/docs/proposed/Prof\\_Rapoport\\_Comment2.pdf](http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/proposed/Prof_Rapoport_Comment2.pdf); Letter from Nancy B. Rapoport, Gordon Silver Professor of Law, William S. Boyd School of Law, UNLV, to Exec. Office of the United States Trustee, (May 1, 2012), available at [http://www.justice.gov/ust/eo/rules\\_regulations/guidelines/docs/proposed/Prof\\_Rapoport\\_SupplementalComment.pdf](http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/proposed/Prof_Rapoport_SupplementalComment.pdf); (Dec. 14, 2011), available at [http://www.justice.gov/ust/eo/rules\\_regulations/guidelines/docs/proposed/Prof\\_Rapoport\\_Comment.pdf](http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/proposed/Prof_Rapoport_Comment.pdf).

12. For a discussion of how some bankruptcy courts have applied non-bankruptcy fee-shifting cases to bankruptcy cases, see, e.g., C.R. “Chip” Bowles, Jr., *Fee Enhancements: Rare and Exceptional*, 30-MAY AM. BANKR. INST. J. 18, 80 (2011). For a classic non-bankruptcy fee-shifting case, see, e.g., *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010).

13. See 11 U.S.C.A. §§ 327, 328, 330, 331, 1102 (West 2013); see also FED. R. BANKR. P. 2014, 2016.

collateral; in other words, part of the value of the secured creditor's collateral goes to pay those estate-paid professionals.) Often, though, the funds to pay estate-paid professionals come from funds that would otherwise be distributed to the debtor's unsecured creditors. In that more frequent situation, the unsecured creditors are essentially reaching into their own pockets — on a *pro rata* basis — to pay those professionals who are assisting the debtor, the creditors' committee, and the like. A single unsecured creditor isn't paying the bill; the collective group of unsecured creditors is paying that bill.

I've written before about what the diffusion of responsibility for those bills does in terms of curbing their size.<sup>14</sup> In essence, when no single client is responsible for paying a professional's bills, the likelihood that those bills will be scrutinized goes down dramatically. There's a big difference between the level of scrutiny that a client gives a bill that will be paid from his own budget and the level of scrutiny that, say, the chair of a creditors' committee gives to a bill that reduces the unsecured creditors' recovery by a percent or two. Stories abound on how general counsel are refusing to pay for the work done by summer associates or by first- and second-year lawyers<sup>15</sup> and refusing to allow firms to increase their hourly rates automatically.<sup>16</sup> Those general counsel are "bill watchdogs," but that's because the watchdogs are guarding their own budgets. When someone other than the client is bearing the cost, there's often no watchdog around.<sup>17</sup>

The diffusion of responsibility for monitoring the estate-paid professional's bill is what makes me so sensitive when I review bills as a fee examiner. Much of bankruptcy work is reactive — depending on the actions that one party in interest takes, other parties in interest have to react to the action with actions of their own, creating a ripple effect of legal fees.<sup>18</sup> It's a bit like watching a game of pool. A player strikes one ball, and that ball may cause several other balls to move.

When an action is necessary, of course, many of the reactions will

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14. See discussion *supra* note 11.

15. See, e.g., Ashby Jones & Joseph Palazzolo, *What's a First-Year Lawyer Worth?*, WALL ST. J., Oct. 17, 2011, [http://online.wsj.com/article/SB10001424052970204774604576631360989675324.html?mod=ITP\\_marketplace\\_0&cb=logged0.7879950232420504#](http://online.wsj.com/article/SB10001424052970204774604576631360989675324.html?mod=ITP_marketplace_0&cb=logged0.7879950232420504#).

16. See, e.g., Jennifer Smith, *Law Firms Face Fresh Backlash Over Fees*, WALL ST. J., Oct. 22, 2012, <http://online.wsj.com/article/SB10001424052970203400604578070611725856952.html>.

17. Other than the lawyer. (And, in bankruptcy cases, the court and the Office of the United States Trustee.)

18. The ripple effect also holds true when other estate-paid professionals (such as financial advisors) take actions that cause reactions.

also be necessary.<sup>19</sup> But an unnecessary action will cause many hours of reactions — some necessary in themselves, and possibly some that aren't necessary. Let's say that a client pressures her lawyer to file an unnecessary motion. Someone (maybe more than one party) will file an opposition, which will in turn trigger a reply to the opposition. It's not an exaggeration to say that one unnecessary action — in this example, one unnecessary motion — could trigger numerous reactions. And those actions and reactions, of course, will generate countless hours of fees.<sup>20</sup>

Occasionally, I've discovered internal actions (actions only between the client and her lawyer) that have also seemed odd. These internal actions might never trigger reactions from the opposing party, because they might never see the light of day;<sup>21</sup> nonetheless, those actions generated unnecessary legal work. The best examples come from my review of bills that reflected a significant amount of activity by the client in editing the lawyer's work product. Those edits, in turn, required a lot of client-lawyer discussions and re-edits, and the legal fees increased exponentially. The entries looked something like this:

Day 1 Send draft to client 0.1

Day 2 Telephone conference with client re draft 1.0

Day 3 Review and revise client's revised draft 2.0

Day 4 Discuss revised draft with client; resend draft 0.5

Day 5 Telephone conference with client re draft 1.5

You get the point. The client was rewriting the lawyer's draft — and not because the draft was wrong as to any of the facts. The client was rewriting the draft because she didn't like some of the words that the lawyer used in the draft. The lawyer spent unnecessary time<sup>22</sup> dealing with a client who wanted to play both roles (client and lawyer). In part, the client might just have been persnickety.<sup>23</sup> In part, though, the client knew that the legal bills were going to come out of someone

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19. Some, though, aren't strictly necessary, such as filing a pleading that agrees with some other party's position on an issue. I call those pleadings the "me, too" pleadings.

20. Even when estate-paid lawyers are dealing with necessary actions, they might do so in wasteful ways. I've certainly seen examples of activity that seemed to exceed what was reasonably necessary. For example, there's nothing wrong with filing a statement that says "me, too" to someone else's motion. But there's something wrong when a simple, two-page "me, too" statement takes a full billable hour to draft. There's also something wrong when a party files an eight-page motion for stay relief for which the bill lists upwards of thirty hours. (For folks reading this essay who aren't familiar with stay relief motions, let's just say that large portions of those motions can be cribbed from stay relief motions in other cases.) But overbilling and overstaffing are two issues that I've discussed elsewhere and won't discuss here. *See supra* note 11.

21. Unless, of course, that lawyer submits a request to have his fees paid with estate funds.

22. And certainly more time than was reasonable.

23. Rather like law review editors who want to take out all of my contractions.

else's pocket.<sup>24</sup> My guess is that the diffusion of responsibility for those legal fees contributed to the client's willingness to do a line-by-line edit of her lawyer's work.

There has to be a way of drawing a line between normal client-lawyer interactions and those that unnecessarily drive up the fees in a case. When the client is paying those fees herself, of course, it is her choice as to how much extra work she wants to ask her lawyer to do.<sup>25</sup> But in situations in which someone other than the lawyer is paying the client's fees, the question of when a client should "help" the lawyer do the lawyer's job — or urge the lawyer to do more on a case than the lawyer thinks is reasonable — should not be based solely on the client's own preferences.

There are many ways in which a client's actions can increase her own lawyer's fees. She can — as some Chapter 11 clients with estate-paid professionals might want to do — urge her professionals to leave no stone unturned.<sup>26</sup> Moreover, a client can call her lawyer (or e-mail, or write to her lawyer) with a frequency that approaches obsession. Those multiple communications can add up, especially if a lawyer charges his minimum rate for every time that he responds to a client's question.<sup>27</sup> Or a client can have a vendetta against the opposing party and instruct her lawyer to pull every (legal) trick in the book to make the litigation

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24. At the symposium, Professor Susan Cable pointed out, quite correctly, that the lawyer could have (and should have) billed the client directly for that behavior, rather than billing the estate.

25. That's not the end of the issue, though. Vexatious litigation and other stalling tactics aren't kosher, *see, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.1-3.2 (2012), so a lawyer shouldn't indulge a client's whims in a way that increases the other side's fees unnecessarily.

26. And when lawyers are representing clients who are themselves fiduciaries for others, then there's a real push to leave no stone unturned. The client has duties to her beneficiary. The lawyer has fiduciary duties to his client. As one of my favorite authors has explained in discussing a lawyer's fiduciary duties, "[t]here are three core aspects to fiduciary duties: a duty of loyalty, a duty of care, and a duty of impartiality in the event of multiple beneficiaries." Susan M. Freeman, *Are DIP and Committee Counsel Fiduciaries for Their Clients' Constituents or the Bankruptcy Estate? What Is a Fiduciary, Anyway?*, 17 AM. BANKR. INST. L. REV. 291, 338-39 (2009). The duty of loyalty places the interests of the beneficiary above that of the fiduciary. The duty of care "requires that the fiduciary act with the care and skill that is standard in that locality for the fiduciary's work and level of skill." *Id.* at 340. The duty of impartiality requires that — when the fiduciary has more than one beneficiary — the fiduciary not prefer one of the beneficiaries to others. Of these three duties, the one that's implicated by "cover your butt" lawyering has to do with the duty of care. In order to avoid accusations that the fiduciary didn't do enough to protect his beneficiary, the fiduciary might decide to do "too much" rather than risk being accused of doing too little. That decision might be fine in terms of the duty of care, but it might not be fine in terms of keeping fees reasonable. (Unreasonable fees, of course, could also affect the conclusion of whether the lawyer met his duty of care.)

27. Of course, that's a whole other ethics issue right there: charging fees for communications that might be thirty seconds long.

more expensive for the other side. If a lawyer's duty is to keep his fees reasonable,<sup>28</sup> does the lawyer have a corresponding obligation to control his client's behavior to avoid driving the bills ever upward?

*The eas(ier) situation: the client as the lawyer's scrivener.*

What got me started thinking about undue client pressure on a lawyer's work product was the phenomenon of the client who constantly redrafts the lawyer's work product, combined with a lawyer who can't tell his client to stop micromanaging his writing. I think that the economics of law practice today creates, or at least magnifies, that problem.<sup>29</sup> As Bill Henderson explains,

[T]he legal services market is gradually being upended by new entrants who are offering legal *inputs* and legal *products* to law firms, legal departments, and average citizens. The principal attraction behind a legal input or a legal product is very simple: technology or a better-designed process is reducing the need for expensive, artisan-trained lawyers. In many cases, by removing the lawyer from the value chain, cost goes down, quality goes up, and service delivery time becomes faster.

This is a paradigm shift.<sup>30</sup>

When the demand for legal services goes down, then the client's ability to exert extra influence on the size and composition of her legal fees goes up.<sup>31</sup> Law firms get squeezed, and they become increasingly nervous about losing their clients' business. If most top law firms (big or small) have well-credentialed, hard-working, smart lawyers, then it's difficult for them to compete on the basis that "our lawyers are better

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28. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2012).

29. For a good discussion of the changes, see, e.g., William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 461-462 (2013); Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 92 (2011).

30. Henderson, *supra* note 29, at 479 (emphasis in original) (footnotes omitted). Law schools are reacting to this paradigm shift. They're cutting their entering class sizes, and they're trying to create incubators in which their recent graduates can work. See, e.g., Ashby Jones, *Top Law School Cuts Admissions*, WALL ST. J., Mar. 11, 2013, <http://online.wsj.com/article/SB10001424127887324281004578354490114584144.html>; Ethan Bronner, *To Place Graduates, Law Schools Are Opening Firms*, N.Y. TIMES (Mar. 7, 2013), [http://www.nytimes.com/2013/03/08/education/law-schools-look-to-medical-education-model.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/08/education/law-schools-look-to-medical-education-model.html?pagewanted=all&_r=0).

31. More and more clients are refusing to pay for first- and second-year associates' work, for summer associates' work, and for automatic billing increases. See, e.g., Claire Zillman, *Law Firm Leaders Survey 2010: The New Normal*, AM. LAW. (ONLINE) (Dec. 1, 2010); see also David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, [http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?\\_r=3&pagewanted=1&ref=business](http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=3&pagewanted=1&ref=business).



than their lawyers.” It’s like Lake Wobegon: all the lawyers are strong (and good-looking).<sup>32</sup> If all of the potential lawyers are good, then they’d best be competing on the basis of providing faster and more complete<sup>33</sup> service.<sup>34</sup>

But the problem with trying to “out-service” the other law firms by catering to clients is that, sometimes, a client is flat-out wrong. We’ve seen frivolous lawsuits that a lawyer never should have filed — but for greed.<sup>35</sup> We’ve seen deals go through that make no long-term economic sense — except for greed. And we’ve seen lawyers kowtow to clients

32. The closing line to Garrison Keillor’s *Prairie Home Companion* public radio show is: “Well, that’s the news from Lake Wobegon, where all the women are strong, all the men are good looking, and all the children are above average.” See generally Mitch Tuchman, *The Investment News From ‘Lake Wobegon,’* FORBES (Mar. 8, 2013), <http://www.forbes.com/sites/mitchelltuchman/2013/03/08/the-investment-news-from-lake-wobegon/> (explaining the origin of the oft-cited closing line and what has become known as “the Lake Wobegon effect”).

33. I was going to say “more obsequious,” but my husband stopped me.

34. Professor Katharine Van Tassel, who was kind enough to read an earlier draft of this essay, suggested an intriguing analogy to health care. She taught me that there are two types of “overuse” concepts that might relate to “overlawyering”: supply-sensitive overuse and preference-sensitive overuse. As Professor Van Tassel explained to me:

Supply-sensitive care is care for which the supply of a specific resource (for example, number of physicians, hospital beds or specialized testing equipment) heavily influences the customary amount of care provided . . . . This type of overuse is linked to the ‘more is better’ myth . . . . Preference-sensitive care occurs when a condition has multiple possible treatment options, each with its own benefits and risks, and the type of care depends on the physician’s preference . . . .

E-mail from Katharine A. Van Tassel, Professor, The Univ. of Akron School of Law, to author (Mar. 27, 2013) (on file with author). I think the overlawyering that I’m describing has elements of both supply-sensitivity and preference-sensitivity. The “more is better” sensitivity is what encourages fiduciaries (e.g., debtors in possession, creditors’ committees) to tell their lawyers to leave no stone unturned. If someone else is paying the lawyers’ bills, then the only limitation on the supply of legal work is the 24-hour day. But see Jason Beahm, *Lawyer Bills More Than 24 Hours a Day, Gets Suspended*, STRATEGIST L. BLOG (Aug. 26, 2010, 5:58 AM), <http://blogs.findlaw.com/strategist/2010/08/lawyer-bills-more-than-24-hours-a-day-gets-suspended.html> (describing a situation where the Ohio Supreme Court disciplined an attorney for billing more than 24 hours in a day). Preference-sensitivity, in overlawyering terms, would relate to someone’s choice to behave in a scorched-earth fashion, rather than to behave reasonably at first. The lawyer whose client protests that he’s “not being mean enough and should yell more at the other side” is dealing with preference sensitivity. In addition to teaching me about the two types of sensitivity, Professor Van Tassel coined the word “MacGuffinitus,” which tickles me pink.

35. Many states have enacted statutes to deal with frivolous litigation, cf. Kenneth S. Klein, *Removing the Blindfold and Tipping the Scales: The Unintended Lesson of Ashcroft v. Iqbal Is That Frivolous Lawsuits May Be Important to Our Nation*, 41 RUTGERS L.J. 593, 597-98 (2010) (discussing statutes that are attempts to curb frivolous litigation); but as long as there are clients who pressure lawyers to pursue it (or greedy lawyers who find clients willing to let them pursue it), we’re going to keep having frivolous litigation. (The sad thing is that a lot of meritorious litigation gets swept under the “frivolous” rug because of the way that some news stories portray some lawsuits.)

who want their lawyers to drive up the other side's fees and expenses as a way of pressuring the other side to give in. The common refrain of those clients? "If you won't do what I'm asking, I'll find another lawyer who will." And often those clients are right. There *are* lawyers who "will."

There's a difference between catering to a client's legitimate requests and simply kowtowing to that client out of the fear of losing the client's business. The hard part is figuring out exactly where the line is between those two options. My theory is that, at least for clients who are not law-trained themselves, a part of that line is where the client is "playing lawyer" with the lawyer's drafts. We absolutely need clients to verify the facts on which our work product is based, and we absolutely need clients to communicate their goals for the representation. What we don't need is a client who goes through a line-by-line edit of a lawyer's draft to change "because" to "whereas" because "whereas" sounds more "lawyerly."<sup>36</sup>

Again, if the client's paying the bill and wants to "play lawyer" — and the client's choices aren't affecting the opposing party — that's a different matter. When the client isn't paying the bill, though, we've lost the checks and balances that help to keep fees reasonable. Charging someone else for the pleasure of doing stylistic edits on the lawyer's draft is a clear waste of time. It's also a misallocation of costs, precisely because the client isn't paying the bill.

So why do lawyers let their clients pick up the red pen for wordsmithing purposes, no matter who's paying the bill? The lawyers who don't push back likely are feeling the heat from their partners to keep fees coming in. In this economy, with the significant changes in how clients are getting legal services, some firms are just running scared. That doesn't make the behavior right, but it does help to explain it. Let's assume that there's a continuum of lawyer behavior that ranges from the lawyer taking actions to achieve the client's legitimate objectives to the lawyer taking actions because the client is bullying him into it. The ends of the continuum are legitimate actions on one side and

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36. The tougher situation is where the non-law-trained client first makes some reasonable suggestions, then starts to suggest more things that smack of stylistic editing, and eventually develops a habit of editing everything that the lawyer sends her way. At some point, the lawyer will start asking himself why he's negotiating word choices with his client. When should the lawyer say, "You know — someone else is going to end up paying my fees on this matter, so perhaps we should try to keep them as reasonable as possible?" I don't mean to suggest that, just because someone other than the client is paying a lawyer's fees, the lawyer should put the payor's interests above the client's interests. A lawyer shouldn't do that. See MODEL RULES OF PROF'L CONDUCT R. 1.8(f), 1.7 cmt. 13 (2012).

wholly unjustified actions on the other side.

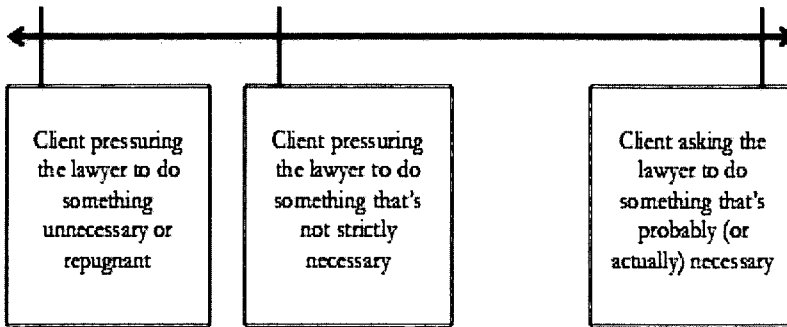


Fig. 1: A rough continuum of lawyer choices based on client requests.

When I've asked lawyers why they continued to let their clients do line-edits of drafts when it was clear that the clients were just wordsmithing, I generally heard that the client was a bully who wanted to exert control over the lawyer in as many ways as she could: "I just felt that I couldn't say no." To me, that response demonstrates the increased pressure on lawyers because of the changes in law practice. It's easy to say no when you have an unlimited number of clients. When you see your client base dwindle, it's not.<sup>37</sup>

37. In a declining legal market, there are very few levers that a firm can pull to keep itself out of the red — and lots of fixed costs, including payroll. As the salaries of first-year associates started climbing upward to \$160,000 at some of the biggest firms, those firms locked themselves into a spiral of having to raise their rates (or come up with other ways to maintain those ever-growing payrolls) or let workers go to make ends meet. And it's not just the starting salaries of first-year associates that hemmed in many law firms. Giving partners guaranteed draws of more than their books of business brought in certainly didn't help, and that was one of the factors that led to the demise of Dewey & LeBoeuf. See, e.g., Peter Lattman, *Dewey & LeBoeuf Files for Bankruptcy*, N.Y. TIMES, May 28, 2012, <http://dealbook.nytimes.com/2012/05/28/dewey-leboeuf-files-for-bankruptcy/>; Martha Neil, *Ex-Partner Blames Legal Recruiters, Excessive Pay Guarantees, Angry Colleagues for Dewey's Downfall*, ABA J. (May 10, 2012), [http://www.abajournal.com/news/article/former\\_partner\\_blames\\_legal\\_recruiters\\_excessive\\_pay\\_guarantees\\_for\\_dewey/](http://www.abajournal.com/news/article/former_partner_blames_legal_recruiters_excessive_pay_guarantees_for_dewey/).

The problem with high fixed costs in a competitive legal market is that something, eventually, has to give: either salaries have to go down, or collection of accounts receivable must go up. Even the most prestigious firms are starting to feel pushback on their rates from many of their clients, see, e.g., Burk & McGowan, *supra* note 29, and those sky-high starting salaries are beginning to come back down to earth, see, e.g., *Median Private Practice Starting Salaries for the Class of 2011 Plunge as Private Practice Jobs Continue to Erode*, NALP (July 12, 2012), available at [http://www.nalp.org/classof2011\\_salpressrel](http://www.nalp.org/classof2011_salpressrel); Ashley Post, *Median Starting Salaries Plummet*, INSIDECOUNSEL (July 13, 2012), <http://www.insidecounsel.com/2012/07/13/median-starting-salaries-plummet>; Ashley Post, *Median First-Year Associate Salaries Drop to \$145,000*, INSIDECOUNSEL (Sept. 21, 2012), <http://www.insidecounsel.com/2012/09/21/median-first-year->

The problem with a lawyer who feels constrained from saying no to a bully is that the lawyers (and their clients) on the other side can be affected, too. In my experience, a client who bullies her own lawyer will try to bully the other side as well. Bullying behavior means that reaching agreement on a settlement or a transaction takes exponentially longer because the bully, well, just likes to order people around.

The other explanation that I've heard from lawyers who let their clients encroach on decisions that should normally be the lawyer's prerogative is that the client became obsessed with the case and wanted to stay as involved in it as humanly possible. Let's call that explanation the "MacGuffin phenomenon": there's something embedded in the client's case about which the client cares deeply but which isn't essential to the legal posture of the case. The client wants to obsess over the MacGuffin. The lawyer (the audience) just wants to move the case (the plot) along. In either the "bullying client" or "obsessing client" scenarios, there has to be a point at which the lawyer knows that he's wasting time. My guess is that, at the time the lawyer notices the wasted time, a heck of a lot of already wasted time has passed. To make matters worse, in the situation in which an estate-paid lawyer has wasted some time, that lawyer's likely not to be paid for those wasted hours. Bankruptcy courts only allow reasonable fees for estate-paid professionals.<sup>38</sup> Unreasonable fees, then, don't get paid from estate funds. The lawyer's gotten squeezed from both ends: The client has persuaded the lawyer to waste time, and the court has determined that the wasted time won't be compensated.<sup>39</sup>

I want to focus on the middle-to-left part of the continuum: where the client persuades the lawyer to take actions that aren't completely necessary but aren't obviously unnecessary, either. There's no good

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associate-salaries-drop-to-14500; Debra Cassens Weiss, *Think \$160K Is the Standard BigLaw Salary? Think Again, NALP Says*, ABA J. (Sept. 20, 2012), [http://www.abajournal.com/news/article/think\\_160k\\_is\\_the\\_standard\\_biglaw\\_salary\\_think\\_again\\_nalp\\_says/](http://www.abajournal.com/news/article/think_160k_is_the_standard_biglaw_salary_think_again_nalp_says/). Even when the starting salaries are staying flat, firms are reacting by hiring fewer associates and more contract-type attorneys. See Debra Cassens Weiss, *Law Firms Express 'Growing Enthusiasm' for Contract Lawyers*, ABA J. (June 22, 2010), [http://www.abajournal.com/news/article/law\\_firms\\_express\\_growing\\_enthusiasm\\_for\\_contract\\_lawyers/](http://www.abajournal.com/news/article/law_firms_express_growing_enthusiasm_for_contract_lawyers/).

38. See Bowles, Jr., *supra* note 12, at 80.

39. The client in a bankruptcy case who wants a scorched-earth lawyer is likely pressuring the lawyer to do more because extra legal work on the client's behalf (the action) will cost the other side legal fees as well (the reaction) or gain the client some other coveted advantage. In an economy in which clients are exerting significant leverage, as long as there's one professional out there willing to do the dirty work, there will be other lawyers who will bow to the client's wishes.

ethics rule for that situation, although the rule regarding withdrawal<sup>40</sup> comes the closest. Even though we can't put our fingers on precisely the moment at which a client's request goes from reasonable to unreasonable, we've all experienced the realization that something that a client wants us to do is probably not the best idea in the world.

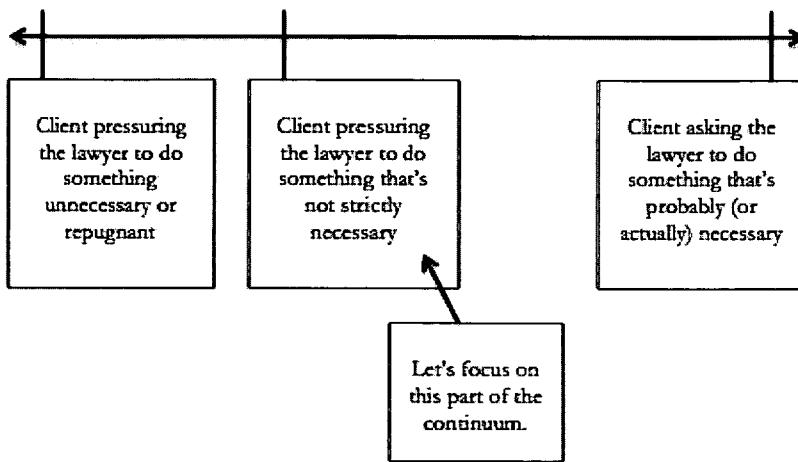


Fig. 2: The fuzzy area: requests that aren't frivolous but aren't necessary, either.

How can a lawyer whose gut says that he should push back on a client's request justify pushing back when he's likely to lose that client to another lawyer willing to comply with the client's request? I'm asking that question while knowing full well that, even in the best of circumstances, lawyers — who are people first<sup>41</sup> — can talk themselves into believing that a client request that makes them uncomfortable is actually quite reasonable when they think about it some more. Even smart people can talk themselves into just about anything.<sup>42</sup>

This issue may be one for which there's no solution, other than asking lawyers to be hyper-aware of the pressures being put on them to

40. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2012); especially R. 1.16(b)(4) (withdrawal when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement").

41. No matter what the lawyer jokes say.

42. There's lots of good social science literature on this point, much of which I've caded for some of my articles, including Nancy B. Rapoport, *Black Swans, Ostriches, and Ponzi Schemes*, 42 GOLDEN GATE U. L. REV. 627 (2012); Nancy B. Rapoport, *The Curious Incident of the Law Firm That Did Nothing in the Night-Time*, 10 LEGAL ETHICS 98 (2007) (reviewing MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004)), available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1017627](http://papers.ssm.com/sol3/papers.cfm?abstract_id=1017627); see also Rapoport, *supra* note 11 (*The Case for Value Billing in Chapter 11 and Rethinking Fees in Chapter 11 Bankruptcy Cases*).

take some action that might be unnecessary and wasteful.<sup>43</sup> At least when a third party has the opportunity to weigh in on an action's reasonableness — as a bankruptcy court does in determining whether to award fees to an estate-paid individual — there's a chance that a lawyer's future decisions might be altered.<sup>44</sup> (My guess is that it's a slim chance, though; operant conditioning<sup>45</sup> might work for some people, some of the time, but it clearly doesn't work for all lawyers whose fees have been denied because of their unreasonableness.) What's more likely to change behavior is when a whole lot of legal fees go unpaid by the clients who asked for the unnecessary work because, in retrospect, the clients themselves didn't want to pay for work that ended up being wasteful. When the client decides to give up on her own MacGuffin, either because she's had a change of heart or because her lawyer has persuaded her that the MacGuffin really is a "nothing,"<sup>46</sup> that's when we might see some real change.

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43. Some strategy decisions can be so expensive that they pile up legal fees the size of those in Dickens's BLEAK HOUSE. See CHARLES DICKENS, BLEAK HOUSE (Bantam Classics 1985).

44. State bars also may weigh in, if the issue of the reasonableness of fees comes before them. See Phil Pattee, *Client Chooses the Destination, But You Drive the Boat*, 14 NEV. LAW. 34, 34 (2006):

Many ethics complaints to the State Bar come from disgruntled clients who claim their cases were lost because the lawyer was incompetent. Unfortunately, we often find that the attorney acquiesced to the client's weird legal theories and followed a flawed course of litigation to defeat. Although the underlying cause is a backbone problem as well as an ethics problem, the outcome remains a disciplinary and/or malpractice problem.

45. For a definition of "operant conditioning," see, e.g., *Operant Conditioning*, ALLEYDOG, <http://www.alleydog.com/glossary/definition.php?term=Operant%20Conditioning> (a website designed to help students learn about psychology).

46. See Duguid, *supra* note 1.