

Decision-making models in legal counseling

How do lawyers strike a balance between the client's control over legal representation and the lawyer's control over it? Who should be in charge of making which decisions? Who should define the objectives of legal representation? Who should decide which means will be used to reach these objectives?

There exist three main models of distribution of the decision-making power between the client and her lawyer in the process of legal representation.

None of these is a "right" or "superior" model of counseling. Presumably, each advisor should be able to employ any of the three models, or a combination of these, depending on the particular circumstances.

1. The lawyer-centered model

In this model, the client delegates to the lawyer the responsibility for defining the objectives in legal representation and choosing the means for arriving to these objectives. The client's role in representation is largely passive, and is limited to relaying the facts relevant to the "case" to the lawyer. The lawyer then decides which legal avenues should be explored, and how the client should behave in the course of the legal proceedings. The lawyer takes full responsibility for each course of action chosen.

A *variation* of this model is where the client defines the desired final outcome – e.g. an acquittal, or the lowest possible sentence – and the lawyer decides which action should be taken, that, in the lawyer's view, is most likely to serve this outcome.

The lawyer-centered model has been criticized for being too dogmatic, condescending and paternalistic towards the client. There is also evidence that the lack of participation in own representation may lead to lower client's satisfaction with the outcome of the proceedings.

At the same time, often the lawyer-centered model is consistent with client's expectations. Many clients would expect lawyers to "take charge" of their case. Most clients do not have the necessary legal expertise or experience to know which course of action would be most optimal to achieve the desired outcome.

2. The client-centered model

In this model, the clients identify their problems, seek for possible solutions and decide on the course of action. Because the client's perspective is paramount in this model, it views the primary problem, or objective(s) of legal representation not in the legal terms, but in the terms used by the client. Achieving reconciliation with the alleged victim, the well-being of the client's family, the client's feelings of remorse, or the wish to protect the loved ones, are the examples of client's concerns that must be taken into account when determining the legal course of action.

The lawyer's role in this model is to: 1) help identify the problems from the client's perspective; 2) actively involve the client in the process of searching potential (legal and non-legal) solutions; 3) encourage the client to make (legal and non-legal) decisions, which are likely to lead to the outcomes

as formulated by the client; 4) provide legal advice based on the client's values; 5) acknowledge the client's feelings and recognize their importance; 6) repeatedly convey a desire to help.

This model espouses the professional relationship that that is client-dominant and is aimed at providing the client with "maximum satisfaction". It is based on the inherent trust in the client's reasonableness, intelligence and basic morality. The lawyer has to do the maximum to accede to his client's decisions and to use all possible (legal) ends and means to implement these decisions.

In this model, the lawyer does not give direct advice, but leads the client to "finding himself" the solution(s) that are best tailored to his or her wishes and feelings about the situation. This model recommends, for instance, conveying to the client that there is no one "right" or "wrong" solution, and actively encouraging the client to take responsibility for the decisions over his or her legal representation.

3. The collaborative model

In this model, the decision-making power is shared between the lawyer and the client.

The lawyer's role is to structure the process of arriving to the possible solution, so that the client could make a wise and informed decision. In the collaborative model, the lawyer is to: 1) identify the client's view on the legal problem at hand, and the client's own preferences of how to deal with it; 2) outline the (legal) options that are realistic for the client, and may help advance the client's wishes and preferences; 3) inform the client about the pro's and con's and the conditions of employing various options; 4) elicit the client's preference for this or that legal option; 5) devise an "action" plan, together with the client, of implementing the option chosen by the latter.

The collaborative model gives more power to the lawyer, than the client-centered model, because the lawyer exercises control over how the problem will be formulated, the kind of options to be chosen, and the information about the different options that will be shared with the client. This model gives more power to the client than the lawyer-centered model, because client retains the responsibility for taking decisions that are important for him or her, for example, whether to plead guilty or not.

In the collaborative model, the lawyer must act as a "friendly counselor" to his or her client, or as a "listener, sounding board, clarifier, evaluator and legal advisor." From the three outlined models, the collaborative model requires the most skill, and the most involvement, from the lawyer.

Text based on: "Legal Counseling, Negotiating, and Mediating: A Practical Approach", by J.N. Herman, J.M. Cary, 2009 (2nd ed.), LexisNexis, Chapter 2, para. 2.03 "Decision-making models" and R. F. Cochran, J. M.A. DiPippa, M. M. Peters, "The counselor-at-law: a collaborative approach to client interviewing and counseling", 2011, LexisNexis, Chapter 1 "Three models of legal counseling".