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Citation for final published version:

Moorhead, Richard and Cahill-O'callaghan, Rachel 2016. False friends? Testing commercial lawyers on the claim that zealous advocacy is founded in benevolence towards clients rather than lawyers' personal interest. *Legal Ethics* 19 (1) , pp. 30-49. 10.1080/1460728x.2016.1186453 file

Publishers page: <http://dx.doi.org/10.1080/1460728x.2016.1186453>  
<<http://dx.doi.org/10.1080/1460728x.2016.1186453>>

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# **‘False Friends? Testing Commercial lawyers on the claim that Zealous Advocacy is Founded in Benevolence towards Clients rather than Lawyers Personal Interest’**

Richard Moorhead\* and Rachel Cahill-O’Callaghan\*\*

## **ABSTRACT**

Commercial lawyers often signal that ‘client first’ is an essential element of their DNA, and some scholarly proponents have laid claim to a moral justification for zeal. That moral justification is found, in particular, in the notion of lawyers as friends. One critique of zeal is that this moral claim is bogus: that ‘client-first’ is a convenient trope for disguised self-interest. This paper explores the empirical validity of this ‘client first’ ideal through a value-based analysis of zeal in lawyering. Our data suggest plausible differences in ethical decision-making related to those values. The data are consistent with more zealous lawyers having stronger self-interested rather than client-interested motivations. More zealous lawyers are also less constrained by valuing conformity to rules. If our results are valid, they suggest that the claim that zeal is motivated by placing a high value on the interests of the client is false.

## **KEYWORDS**

zealous advocacy; standard conception; values; commercial lawyers

## **ACKNOWLEDGEMENTS**

We are grateful for the insightful and constructive comments of our anonymous reviewers.

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\* Professor of Law and Professional Ethics, Director of the Centre for Ethics and Law, University College London, UK

\*\* Lecturer, Cardiff Law School, Cardiff University, UK

There is a growing interest in what the behavioural sciences can tell us about legal ethics.<sup>1</sup> This paper examines what a well validated values instrument may tell us about some of the theoretical claims made for zealous advocacy. While the topic is of broad relevance, in the context of this Special Issue we focus on survey data collected from experienced commercial practitioners in private practice and in-house. We examine associations between those practitioners values and their inclinations towards zeal. In so doing we tease out whether a claimed referent of zeal, client loyalty is associated with greater zeal or whether zeal is more often associated with lawyer self-interest.

## Context

Commercial lawyers have played a role in serious wrongdoings that throw into sharp relief the importance of re-examining arguments about zealous advocacy. Various in-house and private practice lawyers have opined and/or assisted in wire-stripping by BNP Paribas and Standard Chartered Bank, and the legal aftermath of hacking at News of the World and The Times.<sup>2</sup> Allen & Overy were accused by a Crown Court judge of putting inappropriate pressure on a prosecution witness leading to an abortive trial.<sup>3</sup> Clifford Chance litigated a client's fraud case which was found by a (now) Court of Appeal judge to be to be artificial and 'replete with defects, illogicalities and inherent improbabilitiew'.<sup>4</sup> That raised serious professional misconduct issues.<sup>5</sup> Evidence during a Russian Oligarch's trials was 'polished'.<sup>6</sup> Two former Barclays general counsels have been interviewed under caution.<sup>7</sup> In-house lawyers at General Motors have been in the spotlight for the way they dealt with fatal accident claims.<sup>8</sup> And some banks had a practice of sending letters from fake law firms.<sup>9</sup>

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<sup>1</sup> Andrew M. Perlman, 'A Behavioral Theory of Legal Ethics' (2015) 90 *Indiana Law Journal* 1639; Jennifer K. Robbennolt, 'Behavioral Ethics Meets Legal Ethics' (2015) 11(1) *Annual Review of Law and Social Science* 75

<sup>2</sup> David Kershaw and Richard Moorhead, 'Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession,' (2013) 76 *MLR* 26; Richard Moorhead, 'On the Wire' (2012) *New Law Journal*, 17 August 2012, 1080; a prosecution of an in-house and a private practice lawyer is pending before the Solicitors' Disciplinary Tribunal, see <<http://www.sra.org.uk/sra/news/press/statement-chapman-abramson-sdt-august-2014.page>> accessed 31 March 2016.

<sup>3</sup> Caroline Binham and Jane Croft, 'Allen and Overy put pressure on prosecution witness, court hears' *Financial Times* (London, 6 November 2013)

<sup>4</sup> *Excalibur Ventures LLC v Texas Keystone Inc and others* [2013] EWHC 4278 (Comm)

<sup>5</sup> Richard Moorhead, 'Excalibur raises serious professional conduct concerns for Clifford Chance' 2014, <<http://lawyerwatch.wordpress.com/2014/01/15/excalibur-raises-serious-professional-conduct-concerns-for-clifford-chance/>> accessed 31 March 2016

<sup>6</sup> *Berezovsky v Abramovich* [2012] EWHC B15 (Ch)

<sup>7</sup> Caroline Binham, 'Ex Barclays bankers to give evidence to fraud agency' *Financial Times*, (London, 24 September 2014)

<sup>8</sup> See Rob Rosen in this Special Issue, 'The Sociological Imagination and Legal Ethics'.

<sup>9</sup> Michele Benedetto Neitz, 'Shades of Enron: the Legal Ethics Implications of the General Motors Scandal' <<http://www.legalethicsforum.com/blog/2014/06/professor-michele-benedetto-neitz-shades-of-enron-the-legal->

Within this group, several lawyers have been fired, some investigated (including criminally) and at least one prosecuted successfully by their regulators. Equally, some remain unpunished, perhaps tolerated or even supported by the regulators.<sup>10</sup> Such case studies above contain a range of behaviour from those zealously pursuing the client's interests in ways seen to be clearly illegal to those merely seen as professionally questionable. Some may even see some of these examples of such zeal as defensible within the finest traditions of a profession fearlessly representing its clients' interests. In the main, we do not know whether all or some of these lawyers breached the law or their professional codes. Yet each of these case studies shines its own light on a signature debate surrounding legal ethics: to what extent lawyers should be zealous advocates for their clients?

Zealous advocacy in its strongest form is based on the idea that lawyers should be dedicated to serving their clients' ends by *all* means possible unless such means are unlawful or prohibited by rules of conduct. It is an idea broadly uncontroversial in the profession but very controversial within the academy.<sup>11</sup> The controversy stems from the contested boundaries of lawfulness and professional ethics. Do legal boundaries only restrain action where something is certain and *clearly* prohibited by law or professional conduct rules, or do they still restrain when the law and rules are unclear?<sup>12</sup> While good lawyers are 'professionally obligated to pursue the interests of their clients', partisanship may lead the lawyer to push the legal limits to the benefit of the client and the detriment of others.<sup>13</sup> As our examples above show, zeal can also ultimately damage the interests of the client and the lawyer.

In the academic literature, such debates have often been the focus of a moral philosophical inquiry, centred on whether it is possible to be both a good lawyer and good person.<sup>14</sup> Where the law and professional rules are unclear, can a lawyer be a good person if they assist clients with probably illegal actions where there is an argument that the action may be legal? Can

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ethics-implications-of-the-general-motor.html> accessed 31 March 2016 and *United States District Court Southern District Of New York, United States of America v BNP Paribas, S.A, Statement Of Facts*, <<http://www.justice.gov/sites/default/files/opa/legacy/2014/06/30/statement-of-facts.pdf>> accessed 31 March 2016>accessed 31 March 2016

<sup>10</sup> In England and Wales, because the existence of approved regulator investigations is usually confidential unless and until someone is charged, we do not know whether some of these matters have been or are under investigation and what investigations that ended without charges have concluded.

<sup>11</sup> See, for example, William H Simon, *The Practice of Justice: A Theory of Legal Ethics* (Harvard University Press 1998); W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton University Press, 2012); David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press 1988); Tim Dare, *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer's Role* (Routledge 2016).

<sup>12</sup> Charles Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation', *Yale. LJ* 85 (1975) 1060.

<sup>13</sup> *ibid*; Richard Wasserstrom, 'Lawyers as Professionals: Some Moral issues' (1975) *Human Rights* 1.

<sup>14</sup> Wasserstrom (*ibid*)

they advance legal but morally reprehensible actions? Can they advance lawful and just ends by means that are questionable in legal or ethical terms?

The jurisprudential philosophy of zealous advocacy tends towards answering these questions with a yes, albeit sometimes a qualified yes.<sup>15</sup> The justifications for doing so and in particular the reasons for dedicating oneself as a lawyer to zealous advocacy are partly centred on individual rights and pluralism.<sup>16</sup> Pepper and Dare argue that the client rights should be prioritised and not inhibited by a lawyer's queasiness about the morality of advancing those rights or by a lawyer's doubts about the extent of those rights in law. In uncertain situations, in matters of law and legal process, the zealous lawyers should give effect to the client's rights and promote their client's priorities over their own. Markovits suggests that lawyers, 'should try aggressively to manipulate both the facts and the law to suit their clients' purposes'.<sup>17</sup>

A justification for zealous advocacy from moral philosophy makes a particular virtue of prioritising another's interest (the client's) over all others, with the lawyer deriving moral worth from selfless dedication to the client. Indeed, Charles Fried in his seminal piece on the 'The Lawyer as Friend' argues that:

[In] relations friendship, kinship, we recognize an authorization to take the interests of particular concrete persons more seriously and to give them priority over the interests of the wider collectivity.<sup>18</sup>

For Fried, paying special attention and prioritising the client's rights is *intrinsically* justified; this 'preference grows out of the profoundest springs of morality: the concepts of personality, identity, and liberty.'<sup>19</sup> In this context, the lawyer is seen as special-purpose friend, a friend who acts in the client's interests, not their own; or more specifically who adopts the client's interests as their own.<sup>20</sup>

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<sup>15</sup> Tim Dare, 'Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers Tim Dare' (2004) 7 *Legal Ethics* 24.

<sup>16</sup> Stephen L Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities' (1986) *American Bar Foundation Research Journal* 24; Dare (ibid).

<sup>17</sup> Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton University Press, 2009) 3.

<sup>18</sup> Fried (n 12).

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*

More recently Markovits extends this argument proposing that the foundation for zeal derives its moral worth from lawyering being, 'intimately connected to the deep and enduring ethical ideal of respect for persons.'<sup>21</sup> This respect for persons requires lawyers to suppress, 'their own judgments of truth and justice' and to do so through a notion of fidelity to the client's interests that includes, 'partisan partiality in favour of clients over others' and a strong form of identification with the client that requires them to think themselves into the position of the client.<sup>22</sup> The virtue comes in them developing the skill to do this but also in, 'self-effacement in lawyers who are cast as servants', who can identify and articulate the client's interests in a way that meets the client's preferences.<sup>23</sup>

The client as friend, or intimate relations justification for zealous advocacy is not without its critics. Spaulding has pointed out a contrasting foundation for zealous advocacy, suggesting that the justifications based on self-sacrifice are a convenient proxy for self-interest:

First, we must be willing to suspend the conviction, so deeply embedded in role criticism and popular discourse (I have in mind the all too familiar lawyer jokes and epithets), that client-centered lawyering is the same as self-centered lawyering, that lawyers who have perverted the service norm for their own interests are ideal typical for any client-centered conception of the role. Suspending this belief will be difficult.<sup>24</sup>

Indeed, in this scepticism one sees a starkly contrasting foundation for zeal suggesting that zeal is not based on benevolence and a self-sacrificial prioritising of the client's needs above the lawyers own but rather is based on more selfish and self-centred interests.<sup>25</sup> Elkins argues that zeal simply reflects the shrouding of lawyers' more personal interests (status, money and promotion) in the language of 'principles, craft, and ethics'.<sup>26</sup> Bowie proposes that these interests reflect the foundational motivations of business and economics rather than the more

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<sup>21</sup> Markovits (n 17) 1.

<sup>22</sup> It is in some ways redolent of Cain's conceptive ideologist: Maureen Cain, 'The General Practice Lawyer and the Client: Towards a Radical Conception,' (1979) *International Journal of the Sociology of Law* 331.

<sup>23</sup> Markovits (n 17) 11.

<sup>24</sup> Norman W. Spaulding, 'Reinterpreting Professional Identity' (2003) 74 *University of Colorado Law Review* 1, 2.

<sup>25</sup> James R. Elkins, 'The Moral Labyrinth of Zealous Advocacy' (1992) 21 *Cap. UL Rev* 735; Donald C. Langevoort, 'Ego, Human Behavior, and Law.' (1995) *Virginia Law Review* 853.

<sup>26</sup> Elkins (ibid) 755.

altruistic foundations of a profession.<sup>27</sup> This argument can be supported by an analysis of professional rules which seem primarily to protect lawyers' own business priorities, for example, some argue that legal professional privilege promotes professional self-interest over the clients; or that the cab rank rule protects the reputation and interest of the profession more than it serves a genuine public interest.<sup>28</sup>

Equally, as Kruse shows, the jurisprudential turn in legal ethics marked by the work of Simon, Wendel and Dare provides a justification different from Fried's moral claim.<sup>29</sup> A pluralist justification for zeal draws on a positivist view of law – a zealous lawyer under the jurisprudential approach puts justice through the interpretation of law first, making space for the client's morality and the morality of superior decision makers (such as judges).<sup>30</sup> The claim, nicely captured in Dare's phrase 'mere-zeal', is that while there is a range of approaches to the interpretive problem that arises when positive law is uncertain, the basic emphasis in jurisprudential approaches to (mere) zeal is some level of restraint: the law comes first, the client comes second and the lawyer's own interests come a (distant?) third. Indeed, Kruse, drawing on Schneyer, points to the importance of identifying a link between excessive zeal and the lawyer's pursuit of their own commercial and reputational interests.<sup>31</sup> In broad terms, excessive zeal may be marked out by self-interest and appropriate zeal by justice and then benevolence.

Another critique of zeal, relevant to the interpretative problem, emanates from social psychology. It suggests that zeal may reinforce, in a harmful way, existing biases in favour of the client. So, for example, Perlman argues that 'placing a lawyer in a partisan role' can adversely affect professional objectivity.<sup>32</sup> Such a lack of objectivity may damage the client (lawyers being overly confident or overly aggressive on their client's behalf) and damage the public interest (lawyers being overly careless of the restrictions that public interest obligations place upon them). In doing so, zealous advocacy creates bias which that may cloud objectivity, blur ethical boundaries and lead to improper conduct.<sup>33</sup>

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<sup>27</sup> Norman Bowie, 'The Law: From a Profession to a Business' (1988) 41 Vanderbilt Law Review 741.

<sup>28</sup> John Flood and Morten Hviid, *The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market* (Report for the Legal Services Board London, 2013); Daniel R. Fischel, 'Lawyers and Confidentiality' [1998] 65 U Chi L Rev 1.

<sup>29</sup> Katherine R. Kruse, 'The Jurisprudential Turn in Legal Ethics' (2011) 53 Arizona Law Review 493.

<sup>30</sup> *ibid*, 518.

<sup>31</sup> *ibid*, 522.

<sup>32</sup> Perlman (n 1) 1640.

<sup>33</sup> *ibid*

There is some evidence that the work environment within which the decisions are being made may have a significant role on the enabling of such bias. This is particularly true of highly competitive professions such as the legal profession. Langevoort suggests that the systems of promotion for in-house lawyers in corporate contexts may serve to promote risk takers who may fully appreciate the risk but choose to act because short term incentives create a risk taking bias.<sup>34</sup> The law firm environment may also reduce professional independence and objectivity where practitioners 'get too comfortable' or are cognitively 'co-dependent' with their colleagues, adopting the risk taking norms of the organisation rather than objectively questioning the ethical position.<sup>35</sup> Risk taking behaviour is generally (although not always) rewarded by firms because the down side of risk tends not to manifest itself. Those 'lucky' enough to have taken a risk that pays off are likely to be rewarded as these tend to advance the firm, whereas the pay-off from refusing to take a risk is the status quo (or worse, lower revenue) with reward less likely. Thus the strongest positive feedback mechanism is towards risk-taking and personal gain:

An above-average tolerance for legal risk and a 'flexible' cognitive style in evaluating such risk are survival traits in settings where corporate strategy and its surrounding culture are strongly attuned to competitive success.<sup>36</sup>

The research suggests that the law firm environment, and the structures of promotion and esteem, suggest a bias towards risk taking, reduced objectivity and increased zeal in advocacy that may serve to encourage less than ethical decision-making founded on self-interest. As well as environmental factors, individual personality may play a role in response to professional legal ethical dilemmas, as we will demonstrate shortly. In reaching a decision in this context, the decision-maker draws on both deontological evaluations centred on rightness or wrongness in relation to law, professional rules and, more intrinsic values and evaluations of the likely consequences of the decision. These evaluations require an objectivity that is in tension with overt pressures and subconscious biases which can lead them to seek to lean

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<sup>34</sup> Donald C. Langevoort, 'Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk and the Financial Crisis' (Georgetown Law and Economics Research Paper No. 11-27, 2011). Available at SSRN: <http://ssrn.com/abstract=1932398>

<sup>35</sup> *ibid*

<sup>36</sup> Richard Moorhead and Steven Vaughan, *Legal Risk in the Corporate World: the Changing Role of In-House Counsel* (Hart Publishing, *forthcoming*)



towards the client in ways that ‘can have a particularly strong distorting effect’ on objective professional judgment.<sup>37</sup>

It is tempting to assume that such pressures consist principally of social and economic pressures of the ‘he who pays the piper’ type; but Perlman cites a series of experimental studies across politics, law and accountancy that highlight the automatic partisan nature of representation. Simply thinking of a set of facts with an assumption that facts relate to a client biases the interpretation of legal rules in ways that are partial to the imaginary client.<sup>38</sup> Thus, objectivity is very likely to be compromised in an automatic way that may be underappreciated by the lawyers themselves. An undeveloped part of Perlman’s argument is that there may be other reasons beyond this client-centred bias for thinking lawyers are vulnerable to partisan behaviour. Kreiger argues that, ‘lawyers are tremendously prone to insecurity and an unhealthy need for status – a likely manifestation of the related law school paradigms around contingent self-esteem and comparative worth.’<sup>39</sup> A competitive instinct may compound the client-centred bias toward winning and self-interest rather than moral or ethical decision-making in situations where a tension exists between the two.

Woolley and Wendel draw on Williams to suggest that while legal ethics discussions are dominated by philosophical debates, our approach to such tensions may relate to personal traits. A zealous advocate:

will have a constrained commitment to ordinary moral values and a stronger commitment to the role specific moral values of fidelity and zeal. She must be able to accept or live with a level of dis-integrity in her moral person, and be willing to be highly contextual in her moral analysis.<sup>40</sup>

In this way, Woolley and Wendel can be read as seeing zeal as consistent with Fried’s emphasis on the lawyer as a friend, but with a diminished valuing of personal morality. It is this interest in an ‘individuals personal features ...her dispositions, personality, character,

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<sup>37</sup> Perlman (n 1).

<sup>38</sup> *ibid*

<sup>39</sup> Lawrence S. Krieger, ‘Institutional denial about the dark side of law school, and fresh empirical guidance for constructively breaking the silence.’ (2002) *Journal of Legal Education* 112.

<sup>40</sup> Alice Woolley and W. Bradley Wendel, ‘Legal Ethics and Moral Character’ (2010) 23 *Georgetown Journal of Legal Ethics* 1065, 1093.

cognition, emotions'<sup>41</sup> and the idea that it may have an important role in risk taking and ethical decisions that our research explores.

### **Some circumspection**

In what follows we concentrate on an individual's psychological motivations; but we should emphasise that we are not arguing that personal characteristics or general biases account for the entirety of a person's behaviour. Indeed, legal decision-making reflects the complexities of the situations that present themselves to lawyers, how these are presented to them and how they are interpreted by them. The power of the situation to influence ethicality is important, perhaps more powerful than an individual's dispositions, and it would be wrong to suggest that values or biases determine the entirety of any individual's behaviour.<sup>42</sup> Equally, even where there is strong situational pressure to behave unethically, most experiments show that a proportion of the cohort resist and that individual responses to given situations also vary and do so in systematic ways. Individual psychology is part, but part only, of the explanation for ethicality.

Our interest in this paper is in exploring whether an individual's psychology provides insight into the debate about the motivation for zealous advocacy. If zealous advocacy is motivated by a concern for clients and if more zealous advocates really do value the client's interests more highly than less zealous advocates then the relational, client-as-friend kind of explanation for zeal is supported. If zealous advocacy is motivated by lawyer self-interest, then some of the critiques of zeal are supported. In examining the congruence of value types and zeal we can shed some light on the question: are those lawyers motivated to be zealous advocates more likely to be selfless or selfish-maximisers of the client interests? Such arguments do not settle the debate about zeal, but they do inform that debate.

### **Values**

At an intuitional level, most people recognise the significance of personal characteristics in moral and ethical decision-making. Indeed, ways of describing principles and attitudes: cultivated or aspirational virtues, moral or emotional intelligence, moral courage and

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<sup>41</sup> *ibid* 1066

<sup>42</sup> See, for example, John M. Doris, *Lack of Character: Personality and Moral Behavior* (Cambridge University Press 2002).

conscience,<sup>43</sup> 'moral intensity'<sup>44</sup> and guilt<sup>45</sup> might all be used to enrich the literature surrounding zealous advocacy and ethical decision-making.

Our approach to understanding lawyers' underlying individual psychologies of motivation is to look at their values. Psychological theory recognises personal values as central to personhood defining values as goals, things we would like to gain or protect.<sup>46</sup> Values underpin attitudes and moral positions.<sup>47</sup> They are pervasive, but also implicit, influences on decision-making, acting 'as standards or criteria to guide not only action but also judgment, choice, attitude, evaluation, argument, exhortation, rationalisation and...attribution of causality.'<sup>48</sup> They 'frame' our choices and help us prioritise which elements of any given situation we find salient. Personal values are thus central to self and serve as, 'normative standards by which human beings are influenced in their choice among the alternative courses of action they perceive.'<sup>49</sup> Though fairly stable, they can change over time or in response to particularly strong environmental change.<sup>50</sup> John Weber demonstrated a close relationship between values and moral reasoning with values, mediated through moral reasoning, providing the impetus and direction of the resulting decision.<sup>51</sup> Indeed, values have been associated with ethical decision-making in a variety of professions including business consulting,<sup>52</sup> marketing<sup>53</sup> and nursing,<sup>54</sup> and other healthcare professionals.<sup>55</sup> In a legal context an association has been identified between values and judicial decision making in the

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<sup>43</sup> For approaches which prioritise emotionally-driven explanations for moral decision-making see, especially, Jesse Prinz, 'The Emotional Basis of Moral Judgements' (2006) 9(1) *Philosophical Explorations* 29.

<sup>44</sup> Anusorn Singhapakdi, Scott J. Vitell, and Kenneth L. Kraft, 'Moral Intensity and Ethical Decision-Making of Marketing Professionals' (1996) 36(3) *Journal of Business Research* 245; Douglas R. May and Kevin P. Pauli, 'The Role of Moral Intensity in Ethical Decision-making A Review and Investigation of Moral Recognition, Evaluation, and Intention,' (2002) 41(1) *Business & Society* 84.

<sup>45</sup> Robert M. Brown, Joseph D. Beams, 'An Experiment Testing the Determinants of Non-Compliance with Insider Trading Laws' (2003) 45(4) *Journal of Business Ethics* 309.

<sup>46</sup> Eldad Davidov, Peter Schmidt, and Shalom H. Schwartz, 'Bringing Values Back in the Adequacy of the European Social Survey to Measure Values in 20 Countries,' (2008) 72(3) *Public Opinion Quarterly* 420.

<sup>47</sup> Milton Rokeach, *Understanding Human Values* (Simon and Schuster 2000).

<sup>48</sup> Milton Rokeach, *The Nature of Human Values* (The Free Press 1973).

<sup>49</sup> Philip E. Jacob, J J Flink and Hevda. L. Shuchman, 'Values and Their Function in Decision-Making: Toward an Operational Definition for Use in Public Affairs Research' (1962) 10(1) *American Behavioral Scientist* 4.

<sup>50</sup> Anat Bardi, 'Value Stability and Change during Self-Chosen Life Transitions: Self-Selection versus Socialization Effects.' (2014) 106(1) *Journal of Personality and Social Psychology* 131.

<sup>51</sup> John Weber, 'Exploring the relationship between personal values and moral reasoning' (1993) 46(4) *Human Relations* 435; Donald McCabe, Janet M. Dukerich, and Jane Dutton, 'Context, values and moral dilemmas: Comparing the choices of business and law students' (1991) 10 *Journal of Business Ethics* 951.

<sup>52</sup> Jeff Allen and Duane Davis. 'Assessing some determinant effects of ethical consulting behavior: The case of personal and professional values.' (1993) 12(6) *Journal of Business Ethics* 449.

<sup>53</sup> Anusorn Singhapakdi and Scott J. Vitell. 'Personal and professional values underlying the ethical judgments of marketers.' (1993) 12(7) *Journal of Business Ethics* 525.

<sup>54</sup> Michal Rassin, 'Nurses' professional and personal values.' (2008) 15(5) *Nursing Ethics* 614.

<sup>55</sup> William C. Frederick, David Wasieleski, and James Weber, 'Values, Ethics, and Moral Reasoning among Healthcare Professionals: A Survey' (2000) 12(2) *HEC Forum* 124.

UK Supreme Court.<sup>56</sup> Personal values have also associated with ethical decision-making in Australian and American law student populations.<sup>57</sup> We take this further by examining the influence of personal values on ethical decision-making by practising lawyers and the impact this may have on the debates surrounding the foundations of zealous advocacy.

## Measuring values

Personal values can be assessed relatively easily and meaningfully using standardised psychometric tools. The most developed and robust psychometric test and model of personal values was created by Schwartz.<sup>58</sup> The test is trans-situational: it applies across all social contexts and is not limited to a specific aspect of life such as work or family life. The model seeks to represent most human values and has been assessed in numerous contexts.<sup>59</sup> It measures ten overarching motivational values: *self-direction*, *stimulation*, *hedonism*, *achievement*, *power*, *security*, *tradition*, *conformity* and *benevolence* and *universalism* (Table 1). Although individuals share these values, the prioritisation of values varies among individuals; this is key in the psychology of decision-making.<sup>60</sup>

Some values are positively related, sharing the same broad motivational emphasis. *Power* and *achievement*, for example, are positively related because they emphasise social superiority and esteem.<sup>61</sup> Similarly *achievement* and *hedonism* both focus on self-centred satisfaction. Other positive relationships include *stimulation* and *self-direction* which are both motivated by the desire for mastery and openness to change; and *universalism* and *benevolence* are both concerned with the enhancement of others.<sup>62</sup>

As well as showing how the values are organised in relation, and opposition to, each other, values can be further simplified into two bi-polar dimensions. The first centres on the conflict between values that emphasise ‘openness to change’ and those that resist such change

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<sup>56</sup> Rachel J. Cahill-O'Callaghan, ‘The Influence of Personal Values on Legal Judgments’ (2013) 40(4) *Journal of Law and Society* 596; Rachel J. Cahill-O'Callaghan, ‘Reframing the Judicial Diversity Debate: Personal Values and Tacit Diversity’ (2015) 35(1) *Legal Studies* 1.

<sup>57</sup> Jane Palermo and Adrian Evans, ‘Relationships between personal values and reported behaviour on ethical scenarios’ (2007) 25 *Behavioural Science and the Law* 121.

<sup>58</sup> Shalom H. Schwartz, ‘Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries’ (1992) 25 *Advances in Experimental Social Psychology* 1.

<sup>59</sup> Shalom H. Schwartz, ‘Are there universal aspects in the structure and contents of human values?’ (1994) 50 *Journal of Social Issues* 19, 21.

<sup>60</sup> Davidov et al (n 46) 425.

<sup>61</sup> Of note, both *achievement* and *power* are motivated by social esteem but in two very different ways. *Achievement* emphasises the active demonstration of competence within a social structure whereas *power* emphasises attainment or preservation of a dominant position within the social structure.

<sup>62</sup> *Universalism* is contrasted with *benevolence* which focuses on the individual rather than society as a whole.

(‘conservation’). ‘Openness to change’ encompasses values that emphasise independence of thought, action, and readiness for change (*self-direction, stimulation*) and ‘conservation’ encompasses those values that emphasise order, self-restriction, preservation of the past, and resistance to change (*security, conformity, tradition*).

The second dimension focuses on the opposition between values that promote ‘self-enhancement’ and those which emphasise ‘self-transcendence’ values. Self-enhancement values emphasise pursuit of one’s own interests, relative success and dominance over others (*power, achievement*) and self-transcendence values emphasise concern for the welfare and interests of others (*universalism, benevolence*). *Hedonism* shares elements of both openness to change and self-enhancement.

To provide greater granularity, we have also used a refinement of Schwartz’ 10 value model in one of our studies, developed by Schwartz, and identifying 19 value subtypes providing ‘greater and more precise insight into the value underpinnings of beliefs’.<sup>63</sup> The relationship between the models is presented in Table 1.

**Table 1: Schwartz’s 10 and 19-dimension models**

<b>10 dimension model</b>	<b>19 dimension model</b>	Description
<b>Self-direction</b>	<b>Thought</b>	Freedom to cultivate one’s own ideas and abilities
	<b>Action</b>	Freedom to determine one’s own actions
<b>Stimulation</b>		Excitement, novelty, and change
<b>Hedonism</b>		Pleasure and sensuous gratification
<b>Achievement</b>		Success according to social standards

<sup>63</sup> Shalom H. Schwartz, ‘Refining the Theory of Basic Individual Values,’ (2012) 103(4) *Journal of Personality and Social Psychology* 663.

<b>Power</b>	<b>Dominance</b>	Power through exercising control over people
	<b>Resources</b>	Power through control of material and social resources
	<b>Face</b>	Security and power through maintaining one's public image and avoiding humiliation
<b>Security</b>	<b>Personal</b>	Safety in one's immediate environment
	<b>Societal</b>	Safety and stability in the wider society
<b>Tradition</b>		Maintaining and preserving cultural, family, or religious traditions
<b>Conformity</b>	<b>Rules</b>	Compliance with rules, laws, and formal obligations
	<b>interpersonal</b>	Avoidance of upsetting or harming other people
	<b>Humility</b>	Recognizing one's insignificance in the larger scheme of things
<b>Benevolence</b>	<b>dependability</b>	Being a reliable and trustworthy member of the in-group
	<b>Caring</b>	Devotion to the welfare of in-group members
<b>Universalism</b>	<b>Concern</b>	Commitment to equality, justice, and protection for all people
	<b>Nature</b>	Preservation of the natural

		environment
	<b>Tolerance</b>	Acceptance and understanding of those who are different from oneself

The significance of values can be seen in the various studies that have correlated values profiles and behaviour:<sup>64</sup> ‘basic values exhibit predicted associations with attitudes toward war, right-wing authoritarianism, and social dominance orientation;<sup>65</sup> attitudes toward human rights;<sup>66</sup> interpersonal trust, political activism, and attitudes toward immigration;<sup>67</sup> environmental attitudes;<sup>68</sup> and materialism.<sup>69</sup> More generally than attitudes, *benevolence* and *universalism*, values encompassed within self-transcendence, have also been associated with more pro-social behaviour whereas those who rank *security* and *power* highly ‘typically oppose pro-social behaviour’.<sup>70</sup> Values have also been seen to influence our decisions through the framing of those decisions. For example ‘self-transcendence values incline bystanders who see an assault as a situation requiring help, security values as one to avoid harm.’<sup>71</sup> Finally, values may also impact on the range of potential solutions we can see to any problem.<sup>72</sup> Outcomes that fit with our value preferences are more satisfying to us.<sup>73</sup> They may also impact on the extent to which we feel responsibility to become involved in any given situation.<sup>74</sup>

It should also be noted that the influence of values is not without constraint. As with many facets of our psychology, values are influenced by both external and internal modifiers. Our

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<sup>64</sup> *ibid*

<sup>65</sup> J. Christopher Cohrs, ‘Personal Values and Attitudes Toward War,’ (2005) 11(3) *Peace and Conflict: Journal of Peace Psychology* 293.

<sup>66</sup> Dario Spini and Willem Doise, ‘Organizing Principles of Involvement in Human Rights and Their Social Anchoring in Value Priorities,’ (1998) 28(4) *European Journal of Social Psychology* 603.

<sup>67</sup> Shalom H. Schwartz, ‘Value Orientations: Measurement, Antecedents and Consequences across Nations’ in Roger Jowell, Caroline Roberts, Rory Fitzgerald and Gillian Eva (eds) *Measuring Attitudes Cross-Nationally: Lessons from the European Social Survey* (Sage Publications 2007) 169–203.

<sup>68</sup> Wesley Schultz and Lynnette Zelezny, ‘Values as Predictors of Environmental Attitudes: Evidence for Consistency across 14 Countries’ (1999) 19(3) *Journal of Environmental Psychology* 255.

<sup>69</sup> James E. Burroughs and Aric Rindfleisch, ‘Materialism and Well-Being: A Conflicting Values Perspective,’ (2002) 29(3) *Journal of Consumer Research* 348.

<sup>70</sup> *ibid*

<sup>71</sup> Schwartz (n 5860) 14

<sup>72</sup> Gian Vittorio Caprara and Patrizia Steca, ‘Prosocial Agency: The Contribution of Values and Self-efficacy Beliefs to Prosocial Behaviour Across Ages,’ (2007) 26(2) *Journal of Social and Clinical Psychology* 218.

<sup>73</sup> Schwartz (n 608) 15

<sup>74</sup> Shalom H Schwartz, ‘Basic Values: How They Motivate and Inhibit Prosocial Behavior’, in Mario Mikulincer and Phillip R Shaver (eds) *The Hebrew University of Jerusalem* (American Psychological Association 2010) 221–241.

environment and other social actors may influence how the problem is perceived and potentially influence the values ‘activated.’<sup>75</sup> The influence of values can be altered by encouraging problems to be reframed to activate or deactivate different values.<sup>76</sup> Self-transcendence values can be devalued by minimising the sense of harm resulting from an action; portraying potential solutions as less effective or more costly; or diminishing a person’s personal responsibility for a situation.<sup>77</sup> Thus ‘defensive processes’ may ameliorate pro-social values and vice versa.<sup>78</sup>

Psychometric assessment of values in a legal context is rare. McCabe and colleagues compared the value priorities of law and business students. Law students valued the equality, salvation and wisdom encompassed in *universalism* more than business students who valued *hedonism* and *stimulation* more highly.<sup>79</sup> Evans and Palermo started to examine the relationship between ethical decisions and values in a population of law students using an early psychometric value assessment developed by Rokeach.<sup>80</sup> The most important values associated with Rokeach’s model of ethical conduct were found to be honesty and equality. Under Schwartz’s model honesty, fidelity, reliability, trustworthiness and dependability are all encompassed within *benevolence*, which has an overarching motivation of preserving and enhancing the welfare of the in-group. *Universalism* extends these motivations beyond the in-group to society as a whole and encompasses respect for dignity, equality and social justice. The authors demonstrated an association with a more ethical position and the values encompassed within self-transcendence, motivated by the subversion of one’s own needs for the greater good of society.

If we return to the description of values from Woolley and Wendel<sup>81</sup> described earlier, we can see an association between the universal value motivations of the Schwartz model and those

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<sup>75</sup> B. Verplanken and R. W. Holland, ‘Motivated Decision Making: Effects of Activation and Self-Centrality of Values on Choices and Behavior,’ (2002) 82 *Personality and Social Psychology* 434.

<sup>76</sup> Schwartz (n 74).

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

<sup>79</sup> McCabe et al (n 51).

<sup>80</sup> Adrian Evans, ‘Lawyers’ Perceptions of Their Values: An Empirical Assessment of Monash University Graduates in Law, 1980-1998’ (2001) 12 *Legal Education Review* 209. See in addition, Adrian Evans and Josephine Palermo, ‘Australian Law Students Perceptions of Their Values: Interim Results in the First Year of a Three-Year Empirical Assessment,’ (2002) 5(1) *Legal Ethics* 103; Josephine Palermo and Adrian Evans, ‘Relationships Between Personal Values and Reported Behavior on Ethical Scenarios for Law Students’ (2007) 25(1) *Behavioural Sciences and the Law* 121. The Rokeach psychometric test is limited as it is a ipsative forced-choice model, which means that subjects cannot rate values equally. The psychometric test is not as refined as the later Schwartz test.

<sup>81</sup> Woolley and Wendel (n 40). For a critique of Woolley and Wendel’s argument see David Luban, ‘How Must a Lawyer Be-A Response to Woolley and Wendel’ (2010) 23 *Geo. J. Legal Ethics* 1101.



values identified as relevant to understanding lawyer ethics. Woolley and Wendel suggest that values such as courage, honesty, justice, respect for dignity, equality of others, fidelity, agreeableness, being reliable, trustworthy, orderly, dependable, organised, and rule-following for example would be associated with more ethical decision-making.<sup>82</sup> These values are largely encompassed in Schwartz's overarching motivation of self-transcendence, although some would be found elsewhere (rule-following is an element of conformity and the referent for courage in Schwartz may be best found in self-direction).

Of particular interest to us in this paper is any relationship between values and zeal. As we have seen, proponents of zeal tend to rely on claims of justice, equality and rights. This would lead one to expect zeal to be associated with *universalism*. Other defences centre on the concept of friendship, fidelity and responsibility to the client. The best referent for this in Schwartz's model is *benevolence*, the valuing of the welfare of those close to us (in-group members). This does, however, raise the interesting question of who constitutes the in-group. For in-house practitioners, is it colleagues, senior executives or a broader group of stakeholders; for private practice lawyers would their colleagues, clients or (say) the profession constitute the in-group? The logic of Fried's defence of zeal suggests that the clients ought to be regarded as the in-group, so relying on *benevolence* as a proxy for 'client as friend' is strongly suggested. As discussed *benevolence* and *universalism* are values encompassed within the overarching motivation of self-transcendence: concern for the welfare and interests of others. In theory, if zealous advocacy is underpinned by *universalism* and/or *benevolence*, then we would expect zealous lawyers to value *benevolence* and *universalism* more highly than less zealous lawyers. We would have a new empirical basis for accepting that zeal was authentically linked to self-transcendent values.

Conversely, if the foundation of zeal is a convenient subterfuge for self-interest, then zeal would be associated with different value priorities. Values associated with self-interest and self-enhancement including *achievement* (success according to social standards); *power (dominance)*: power through exercising control over people or *power: resources* (power through control of material and social resources); *face* (security and power through maintaining one's public image and avoiding humiliation), and personal satisfaction such as *hedonism* (pleasure and sensuous gratification) might be more strongly valued by zealous advocates.

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<sup>82</sup> Woolley and Wendel (n 40).

In theory then, the values model has the potential to tease out some of the alternative understandings of what may motivate zeal; the self-transcendent motivation placing the client's needs first or the self-enhancement motivation of prioritising the lawyers needs for success and dominance.

### **Looking at value motivations associated with ethical decisions**

In the studies that follow we were able to evaluate the value preferences of lawyers and examine any relationships between value preferences and decision-making on ethical problems. For our ethical problems, we used the scenarios described below where the more zealous pursuit of a client interest is not clearly prohibited but is associated with a more ethically risky approach to a problem. For proponents of zeal, the balance between public and client interest is a balance to be struck in favour of the client. As we have seen the philosophical justifications for that are founded either in justice claims or benevolence (client friendship) claims. We test whether the underlying psychology reflects those justifications.

The data were collected from two different surveys. One recruited 56 in-house counsel (junior to senior lawyers) recruited from a large financial services provider, the other included 100 practising lawyers, 68 lawyers from one very large private practice firm and 32 senior lawyers from a variety of commercial in-house positions.

Both are convenience samples. They were contacted by their employer or the private practice firm, and invited to respond anonymously to our online survey. We do not have population data or random sampling to test representativeness. Our results do not represent all UK lawyers, but the data does provide unique insight into the relationship between individual personal values and zeal in practising lawyers.

### ***Survey instruments and value profiles***

The participants were invited to complete a survey which that contained several elements. The first element was the psychometric test of value priorities, using the ten dimensions Schwartz's scale in the first survey and the more detailed 19 dimension scale in the second survey. Respondents were asked to read a series of descriptions of a person and think about how much each person is or is not like them rating statements such as:

- Thinking up new ideas and being creative is important to her. She likes to do things her own original way.

- Being very successful is important to her. She likes to impress other people.
- She thinks it is important that every person in the world be treated equally. She wants justice for everybody, even for people she doesn't know

All our respondents were engaged in commercial law practice. The first cohort of in-house counsel was employed by a single financial institution, whereas those in the second study provided services to several industries including the financial industry, pharmaceuticals and utilities companies. The pattern of service provision was comparable to the provision by the senior lawyers practising within the commercial law firms who were also surveyed in the second study.

The respondents ranged across a spectrum of length of service with a general emphasis on more experienced lawyers. In particular, in the second survey, post qualification experienced ranged from seven to 40 years, with a median of 19 years for those based in a law firm and 25 years for in-house counsel.<sup>83</sup> The first survey cohort had a predominance of male respondents (60% of the total), whereas only 22% of the respondents were male in the second survey.

***What are the values of commercial lawyers? Does it vary based on the form of commercial practice?***

The values priorities identified in both surveys were similar (Table 2). Both groups rated *benevolence*, *self-direction* and *security* highly.<sup>84</sup> The values that might be associated with the stereotypical amoral 'lawyer', those of *power* and *stimulation*, are located at the bottom of the priorities of both legal populations. Interestingly, from the point of view of lawyers as a conservative occupation, the values encompassed within *tradition* are lower for this legal sample than for the general UK population.<sup>85</sup> Studies suggest that middle adulthood is associated with a reduced emphasis on *achievement* and *stimulation* and enhancement of the values encompassed in *security*, *conformity* and *tradition*.<sup>86</sup> This is not reflected in these legal populations: *achievement* remained a priority value.<sup>87</sup> Although it was less of a priority for in-house counsel working for the large financial provider, there was little difference in the rating

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<sup>83</sup> We did not have length of service data in the first survey, but do know from our engagement with them that the group of in-house lawyers was an experienced group.

<sup>84</sup> This is not unusual, analysis of the European Social Survey data for 2012 (n = 2,264 UK respondents), reveals that the UK population rank *Benevolence*, *Security* and *Self-Direction* in the top four values. <<http://www.europeansocialsurvey.org>> accessed 31 March 2016

<sup>85</sup> Data drawn from the European Social Survey data 2012 ranked *tradition* as fifth.

<sup>86</sup> How values change with age. <http://essedunet.nsd.uib.no/cms/topics/1/2/2.html>

<sup>87</sup> Analysis of the data from the European Social Survey 2012 revealed that *achievement* is ranked sixth by the UK population.

of *achievement* between the law firm and in-house senior lawyers. The low rating of *universalism* in the second cohort is particularly unusual.<sup>88</sup>

**Table 2: Overall Values Comparison**

<b>In-house lawyers(54)</b>		<b>Legal Firm and In-House lawyers (100)</b>	
Self-Direction	0.69	Benevolence	1.01
Benevolence	0.50	Self-Direction	0.73
Universalism	0.23	Security	0.28
Security	0.20	Achievement	0.18
Conformity	0.15	Conformity	0.17
Achievement	-0.05	Hedonism	-0.08
Hedonism	-0.28	Universalism	-0.14
Stimulation	-0.52	Stimulation	-0.48
Power	-0.62	Tradition	-0.68
Tradition	-0.88	Power	-0.76

There was one significant difference between the first population of in-house counsel and the second population (in-house and legal firm) and that was the position of *universalism*.<sup>89</sup> The second population rated the *universalism* significantly lower than the first population. There

<sup>88</sup> Analysis of the data from the European Social Survey 2012 revealed that *universalism* was ranked a close second to *benevolence*.

<sup>89</sup> In-house (bank) Mean (SD) = -0.14 (0.63), in-house and legal firm Mean (SD) = 0.23 (0.55) Mann Whitney U, p<0.05

was no relationship between gender, or the form of practice, and the rating of the values encompassed within universalism in this population.

**Table 3: Comparison between Commercial In-House and Legal Firm Lawyers**

Legal Firm (67)		In-house (33)	
Benevolence	1.02	Benevolence	0.99
Self-Direction	0.70	Self-Direction	0.78
<i>Security</i>	0.40	Conformity	0.16
Achievement	0.23	Achievement	0.06
Conformity	0.18	Security	0.03
Hedonism	-0.05	Hedonism	-0.14
Universalism	-0.12	Universalism	-0.19
Stimulation	-0.62	Stimulation	-0.20
Tradition	-0.75	Tradition	-0.54
Power	-0.79	Power	-0.69

To assess whether the differences were related to the form of practice, comparisons were made between the values of those who worked in private practice and in-house counsel in the second cohort. There was no significant difference in the ranking of *universalism* between the two populations, suggesting that the high ranking of *universalism* in the first population may have been related to the specific cohort. A weaker but possible explanation is that both the private practice and in-house lawyers in the second cohort valued *universalism* more weakly than is generally considered ‘normal’ for lawyers. This is something that would need to be tested on more data with wider groups of lawyers. Once again *achievement* was lower in those

who were employed in-house compared with those in private practice but this difference did not reach significance.

Our particular interest is the values associated with zeal. The underpinning assumption is that if zeal is really founded on respect for individual rights, self-sacrifice, fidelity and responsibility then there would be an association between zeal and the values encompassed in self-transcendence (*benevolence* and *universalism*). In contrast, if the foundations of zeal are centred on the lawyer's self-interests and personal success, then there would be an association with the values encompassed in self-enhancement (*achievement* and *power*).

As we have seen, the value analysis of all the commercial lawyers suggests that commercial lawyers whether practicing in a law firm or as in-house counsel rate values encompassed in *benevolence* above the values associated with personal interest such as *power*. This may suggest that some fit between the arguments for zeal and its psychological referents, although the relative ranking of *universalism* is below adult population norms, suggesting that the lawyers studied here care about fairness to others less than the broader adult population from which they are drawn. In the next section, we test this with greater precision by identifying differences in value priorities specifically associated with greater zealous advocacy.

### **Did values influence answers to ethical questions?**

As noted above, theory and evidence outside of the world of law suggests a clear relationship between values and ethical decision-making. A question of some interest is whether, and to what extent, this theory may be true in legal professional contexts. Work questioning the objectivity of professional judgement suggests client leaning biases,<sup>90</sup> which might suggest that we should expect client zeal to be reflective of a benevolent approach to clients. It also may be that the influence of values within a legal context has less impact on decision-making where there is a clear line of institutional thought and that professional guidance and models have a strong influence on ethical decision-making. The theory of zealous advocacy, however, is designed to tackle areas where such guidance is not clear: the theory states (with varying degrees of emphasis), that where a situation is not clearly prohibited by law or professional conduct a lawyer may, or in the strongest versions, must take an action in the client's interest. The client, in other words, gets the benefit of any doubtful situation.

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<sup>90</sup> See the discussion of Perlman (n 1) above, for example.

To assess if there is a relationship between values, ethical decision-making and zealous advocacy, the respondents were asked to consider three different ethical scenarios. These scenarios were developed in consultation with experienced practitioners and piloted on a small group of practising lawyers for sense and meaning checks. The first is an ethical dilemma with a legal basis, but which takes place in a domestic context. The aim here was to explore ethics in a non-work context, allowing for the possibility that values might impinge at (say) home but not at work. The remaining dilemmas are situated in a legal professional context in which the respondents have to balance the client's interests and professional rules and principles.

### **The first vignette – Domestic Context**

*You come home to find that your son has lent to his friend his CD of the latest best-selling album and helped his friend 'rip' a copy onto his friend's MP3 player. Do you: (i) Do nothing?; or (ii) Insist the copy is destroyed?*

Both study cohorts addressed this vignette with an average of 75% of respondents stating that they would do nothing and only 25% of respondents stating that they would adopt a more ethical position and request that the CD was destroyed.<sup>91</sup> In both studies, there was a consistent association between values and the decision in this vignette. Those who did not want to do anything were significantly more likely to rate the values encompassed in self-enhancement more highly than those who wished to destroy the illegal copy.<sup>92</sup> In contrast, those who adopted the more ethical position rated values encompassed in self-transcendence higher.<sup>93</sup> When individual values were assessed, there was a consistently significant negative relationship between the values encompassed within *power* and the decision to destroy the illegal copy.<sup>94</sup> This shows that it was those who were less influenced by economic status and reward and less interested in control over people and resources who were likely to behave more ethically under this scenario. Similarly, there was also a positive relationship between the values encompassed within *universalism* and *benevolence* and the decision to destroy the

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<sup>91</sup> Of note, the senior lawyer population was less likely to ask for the CD to be destroyed with 82% of the cohort likely to do nothing.

<sup>92</sup> Financial in-house Kendall Tau-b -0.362 (p<0.001) commercial lawyers Kendall Tau-b -0.149 (p<0.05),

<sup>93</sup> Financial in-house Kendall Tau-b +0.239 (p<0.05), commercial lawyers Kendall Tau-b +0.150 (p<0.05),

<sup>94</sup> In the senior lawyers survey, the correlation statistic was -0.204 (p<0.01) and the financial in house lawyers the correlation was -0.355 (p<0.08).

illegal copy.<sup>95</sup> They were making their child destroy the copy not to exert control over them but because it was the right thing to do.

When these values were examined in more detail in the second survey, it was the element of *power* that was associated with dominance over resources and people, an element of self-enhancement, which was significantly related to not taking any action. Again, the least ethical action, consistent with Schwartz, was associated with those inclined to value self-interest more highly. Similarly, two aspects of the value of *universalism* were significantly related to taking the decision to destroy the illegal copy, those who valued concern and tolerance thought the right thing to do was destroy the copy. Both concern and tolerance are associated with self-transcendence – prioritising justice and the interests of others over personal interests. These data show how in a non-professional environment our respondents a less ethical decision is associated with self-enhancement and negatively associated with self-transcendence.

Our next problem was set in a legal professional context. Respondents were asked to consider a situation where a colleague had installed multiple copies of non-business software for which the company has no licence. The decision to do nothing remained an option, but lawyers could also take varying degrees of action from simply ensuring the copies were removed; reporting the matter internally; or, instigating a wider investigation.

The number of lawyers who would do nothing in this situation was significantly reduced with only 3.6% of the financial in-house lawyers and 2.0% of the lawyers in the second survey. They also were reluctant to instigate a wider investigation (2%). Altogether, 96% said they would deal with the matter internally, either by reporting it or requesting removal.

Once again there was a positive correlation between the values encompassed within self-transcendence and the decision to take positive action, as higher valuing of *universalism* was associated with action.<sup>96</sup> There was also a negative correlation with self-transcendence; no action being associated with higher valuing of *achievement*.<sup>97</sup> Those who valued conformity more highly were more likely to take action. In particular, this was associated with valuing

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<sup>95</sup> *Benevolence* financial in-house Kendall tau-b 0.255 (p<0.05), *Universalism* commercial lawyers Kendall Tau-b 0.181 (p<0.05),

<sup>96</sup> Senior lawyers Kendall Tau-b 0.173 (p<0.05), Financial in house Kendall Tau-b 0.260 (0.017)

<sup>97</sup> Financial in house Kendall Tau-b - 0.184 (p=0.09)



conformity to rules more highly; those who rated interpersonal relationships more highly were less likely to take action.

These two vignettes show how values have plausible relationships with the decision-making of our research subjects and those plausible relationships are of the kind we might be looking for in understanding the psychological referents of zeal. In our third vignette we look at the relationship between values and zeal. This vignette was designed to directly engage professional ethical issues of the kind typically in connection with client zeal. Centred on advising a client the scenario was described as follows;

*You are advising your Company an engineering company that sells machine tools. They want to hurry through transactions which may be in breach of import/export regulations in relation to a state subject to arms embargoes. A large proportion of the transactions are products unrelated to arms production, but you suspect a small proportion relate to dual use items which have the potential for weapons manufacture. The Company is frustrated that import/export licence process slows down legitimate transactions. You advise that these transactions are highly likely to be in breach regardless of the use to which the items are put and if any are found to be dual use serious consequences are likely to arise for the Company. Prior to the company deciding what to do, should you also advise the client on how to handle the transactions so the regulator is significantly less likely to scrutinise them?*

The problem is designed to investigate the extent to which in a situation of modest ambiguity (the transaction is *highly* likely to be in breach) the lawyer is willing to assist with what could be framed as a cover-up, but is presented neutrally here in a way that a corporate client might present it as ‘avoiding regulatory scrutiny’.<sup>98</sup> The answer offered was a simple yes or no to force the respondents to indicate a choice. A lawyer inclined to the view that they must or may do all that they can to assist a client unless there is a clear prohibition on that action is more likely to assist the client by giving the opinion sought in the machine tools. We thus take answering yes to this question as a proxy for taking a more zealous advocacy position. A yes is more likely to be consistent with the kind of zeal that philosophical justifications for zeal seek to justify and less consistent with more restrained versions.<sup>99</sup> In the first cohort, 53

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<sup>98</sup> We have discussed this problem with many in-house lawyers and the dilemma works well. In-housers see the issues and it works well in teasing out a zealous, ‘this is not clearly forbidden by law’ approach.

<sup>99</sup> Of course, once alerted to the possibility that the transaction may be prohibited in some way, professional obligations such as the solicitor’s duty to uphold the rule of law and administration of justice are pertinent and

answered the question, of which only three (5%) responded that they would advise the client. In contrast, 19 (27%) of those practicing in a law firm and 11 (34%) of the in-house lawyers responded positively in the second cohort.

**Figure 1: Graphic representation of values based on decision reached.**

The graph represents the values of those who would give advice and those who would not. \* p <0.05

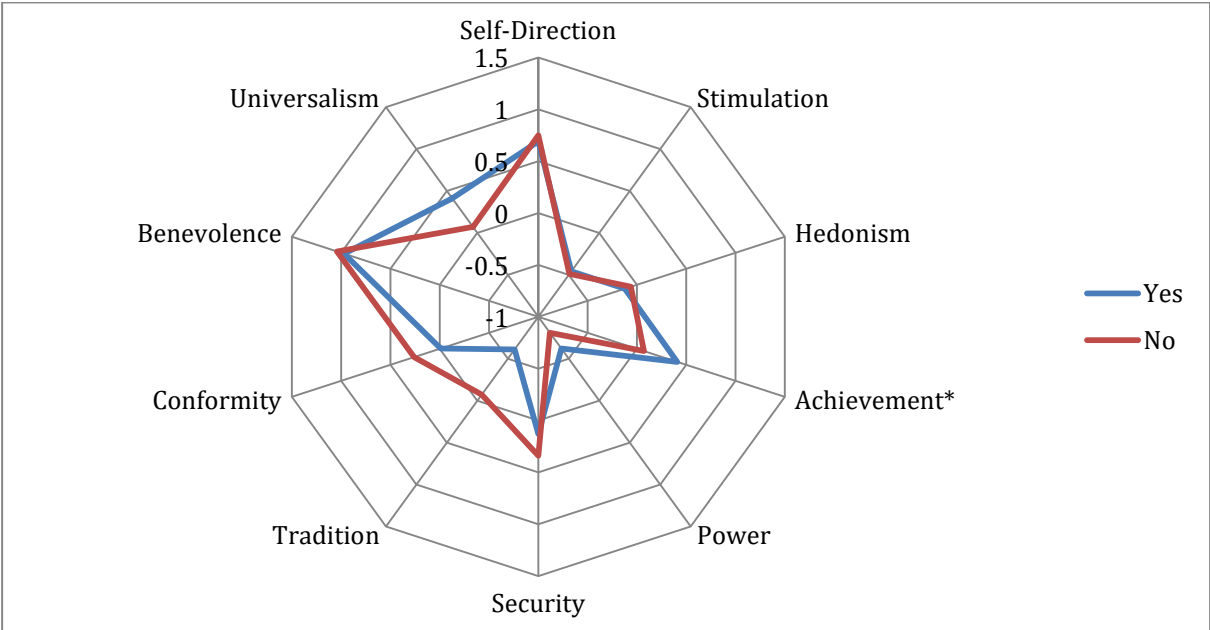


Figure 1 shows that those who indicated they would not advise on how to minimise regulatory scrutiny (the majority), valued *conformity*, *tradition* and *security* more highly than those who indicated they would give such advice. The differences were not statistically significant although the influence of *conformity* and *security* were near significance.<sup>100</sup>

There was, however, a significant relationship between achievement and the decision reached. Those who rated achievement highly were more likely to respond that they would advise the client how to handle the transactions so that the regulator is less likely to scrutinise them.<sup>101</sup> Valuing achievement means valuing the social recognition of one’s competence. It is encompassed within self-enhancement suggesting that, at least in this instance, zeal in

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there may be an argument that advice in such a situation may constitute the tort of dishonest assistance. It may also be argued that it is an Opinion which should not in fact be given in the best interest of the company. Some of these arguments that could be marshalled in favour of not giving the Opinion are consistent with zeal, but in broad terms they are consistent with restraint of zeal.

<sup>100</sup> Conformity Kendall Tau-b 0.14 (p<0.05), Security Kendall Tau-b 0.11 (p=0.09)

<sup>101</sup> Kendall Tau-b -0.165 (p<0.05).

commercial lawyers does not have a foundation in self-sacrifice but is rather motivated, in part at least, by self-interest (the desire for validation as good at one's job). It may not be an achievement orientation alone that is having an influence: what may also distinguish our more zealous lawyers was, if we emphasise the near-significant results on conformity and security, the weaker moderating effect of more conservation oriented values. Neither weaker conservation values nor higher achievement values are consistent with the moral claim made for zeal that draw on psychological referents: the moral case, as we have emphasised, is based on zealous advocates being motivated by *universalism* or *benevolence*.

## Conclusions

Commercial lawyers often signal that 'client first' is an essential element of their DNA,<sup>102</sup> and some scholarly proponents have laid claim to a moral justification for zeal. That moral justification is found, in particular, in the notion of lawyers as friends. One critique of zeal is that this moral claim is bogus: client-first is a convenient trope for disguised self-interest.

This paper has explored the empirical validity of this client-first ideal through a value-based analysis of zeal in lawyering. Our data suggest plausible differences in ethical decision-making related to those values. The data are consistent with more zealous lawyers having stronger self- rather than client-interested motivation. More zealous lawyers are also less constrained by valuing conformity to rules. If our results are valid, they suggest that the claim that zeal is motivated by placing a high value on the interests of the client is false.

We should emphasise the limits of our study before expanding on its significance. As a convenience sample, we do not claim that our respondents are representative of all commercial lawyers, still less of lawyers generally. Concerns about representativeness are partly assuaged because we are measuring differences within the sample; we are looking those who were more or less zealous within a fairly elite group of lawyers. The nature of the group makes it interesting and important in and of itself, but it does not 'prove' that all or most zealous lawyers are motivated by self-interest. It would be useful to replicate the study on wider and alternative groupings of lawyers in commercial law and elsewhere.<sup>103</sup> Similarly, devising problems which explored zeal in a wider range of ways and contexts would similarly help to replicate and render more robust our findings.

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<sup>102</sup> See, for example the report by David Hunt for the Law Society where he opined that client first was bred into him: David Hunt, *The Hunt Review Of The Regulation Of Legal Services* (The Law Society, 2009) 3.

<sup>103</sup> See, Richard Moorhead, Catrina Denvir, Mark Sefton and Nigel Balmer *The Ethical Capacities of New Advocates* (2016, *forthcoming*).

Although the survey methodology might be criticised as artificial, our discussions with practitioners suggest the problems used were sufficiently realistic to be testing and to engage them in a genuine endeavour to ‘find the right answer’ for themselves. That is still some distance from being able to claim that the survey shows how respondents would respond to similar ethical dilemmas in real life, but it is a reasonable assumption that their initial framing of such problems in real life would be similar.

In other words, the methods used provide a fresh and meaningful insight into the psychological referents of zeal, and the claims made for zeal as founded in selfless friendship, but we do not claim that they are or should be the last word on the topic. We have shown how psychometric tools can be used to explore one limb of the zealous advocacy argument. Our evidence tends to rebut the claim that zealous advocacy is founded, in part, on a client-centred motivation and support the claim that zeal is a false friend: what distinguishes the motivations of the more and less zealous is self-enhancement. In these two surveys, more zealous lawyers were more motivated by self-interest than other lawyers. The weaker valuing of conformity to rules in the more zealous elements of our cohort is also interesting. As we discussed above, lawyers generally are probably prone to a loyalty bias. Seemingly unknowingly, lawyers may substantially shade their analysis of case merits towards the interests of their client. A weaker valuing of conformity to rules might aggravate this problem.

Also interestingly the findings, if more robustly tested and developed, may suggest problems for jurisprudential justifications of zeal. Remember that there the primary motivation was fidelity to the law: if more zealous advocates are less likely to value conformity to rules then they are less likely to value fidelity to the law. While this remains speculation on our part, it is speculation worth voicing; it may even be that in relation to Dare’s mere-zeal, it should be restraint and not zeal that is emphasised. However a much fuller range of zeal invoking scenarios would need to be tested to look at this adequately though.

Even were such findings to be more widely replicated, we do not claim that the case for zealous advocacy is completely undone by this kind of motivational analysis. The ‘client first’ type of argument is but one justification for zeal. Other justifications may still have some traction: zeal may be a rationally superior yet psychologically conflicted approach. What our analysis suggests is that it is possible to test, and refute, the claim that zealous lawyers are particularly motivated by benevolence to the client, or concern for justice, or fidelity to the

law. It is evidence that the claim that zeal represented an idealised beneficence towards the client is a hollow one.

More generally the study supports the view that basic values influenced lawyers in their approach to ethical problems. If, as lawyers, we are keen to think of ourselves as hyper-rational beings, our rationality may need to encompass an acceptance and awareness of our values as initial framers or influencers of judgment. A number of corporate scandals have questioned the value of lawyerly zeal: Standard Chartered Bank, the News of the World, BNP Paribas and General Motors can all point to actions of their lawyers who zealously sought to promote the client's short-term interests and undermined their long term interests. A values-based analysis helps us to understand how such errors may be founded, in part, on a prioritisation of the lawyer's own interests, rather than those of the client. Our final suggestion of an implication is this: if lawyers think they are helping a client, when in fact they are motivated by helping themselves, then they are more likely to make mistakes that damage the profession and those they serve. Whether we should abandon notions of zeal, or temper them with a more sophisticated notion of client centrism<sup>104</sup> or restraint we cannot say – but we should certainly be a little worried about the values at work when lawyers claim that the sine qua non of their professionalism is that they put the clients first.

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<sup>104</sup> As Kruse (n 29) advocates.