

Principal, producer and consumer: the client's role in the co-production of lawyers' services

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Introduction

We are accustomed to thinking about legal services in terms of what lawyers and other specialists provide for their clients, who are perceived as consumers of experts' services. The standard conception of legal services emphasizes the expert's role in legal representation, advice or assistance. The client's production role in legal service delivery is not readily acknowledged in conventional accounts of lawyers' work. Yet consumers of legal services often do play a role in legal service delivery, as demonstrated at least by empirical studies of lawyers and their clients.¹

A general theory of consumer co-production in services has been developed over the last few decades, principally in studies of the consumer's role in the general services economy. This is a theory about the role of consumers in the production and delivery of services. So far, however,

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¹ Some of these studies are referred to below, most notably W Felstiner and A Sarat (1992) 'Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Relations' 77 *Cornell Law Review* 1447 and R Hunter with A Genovese, A Melville and A Chrzanowski (2000) *Legal Services in Family Law*, Justice Research Centre, Sydney, pp 200-204. Consumer participation in legal service delivery is also evident in parts of the marketplace where the inaccessibility of lawyers' services obliges people with legal needs to make best use of their own resources, with little or no expert assistance. See for example J Giddings and M Robertson (2001) "'Informed Litigants with Nowhere to Go": Self-help legal services in Australia' 26 (4) *Alternative Law Journal* 184; S Scott and C Sage (2001) *Gateways to the Law: an exploratory study of how non-profit agencies assist clients with legal problems*, Law and Justice Foundation of New South Wales, Sydney.

there has been little detailed examination of this particular theory in the context of lawyers' services. Nor, apparently, has a possible link been explored between this theory and some of the empirical literature on lawyer-client relationships, where the client's participatory role, most notably in relation to decision-making, has come under increasing scrutiny. It seems that the two streams of work, from different disciplinary traditions, make some similar claims or assumptions about the role of the client in lawyers' services.

This article seeks to examine the relevance of the theory of service co-production to legal services offered by lawyers, focussing particularly on personal services legal work. The main argument, in line with co-production theory, is that many kinds of lawyers' services are better described in terms of what both the provider and the consumer bring to the service transaction, rather than merely the efforts of the 'supplier'. Therefore, the client has a production, as well as a consumption role. A second but closely allied point is that the co-production perspective enhances our understanding of the actual and potential role of the client in lawyers' services. In exploring these issues, the point is made that a notion of client co-production is already a theme in some of the literature on lawyers and their clients, even though co-production theory itself has not commanded specific attention in that literature. In fact, the 'co-production' terminology is seldom, if ever, used in accounts of lawyers' work.

One question arising from the argument about the aptness of co-production to lawyers' services is whether the agency doctrine appropriately describes and accounts for representation relationships between lawyer and client. In other words, are clients for the most part correctly perceived, in legal doctrinal terms, as principals and their lawyers as their agents? Or does the notion of agency present an incomplete picture of relationships in which clients are, in reality, producers as well as principals and consumers?

Articulating the co-production perspective is especially helpful at a time when evidence of 'unbundled legal services' is being detected in Australian legal practice.² An unbundled legal service, whether known by that name or not, involves a negotiated or implied understanding, between lawyer and client, about an alteration to the traditional service co-production mix. The client performs tasks that would otherwise be done by the lawyer. The result is an enhanced production role for the client, and the provision of less than the full service package by the lawyer. The theory of service co-production provides an avenue through which to make sense of legal services in which the client, through necessity or design, takes greater responsibility for the tasks that make up a legal service.

The article begins by summarizing service co-production theory through a review of the literature. Next, a number of perspectives on

² For example, Hunter et al (2000), pp 200-204.

legal services are analyzed in order to ascertain the extent to which these accounts of lawyers and their work either overlook or acknowledge the client's participatory role in legal service delivery. These perspectives include traditional, doctrinal, empirical, sociological, and client-centred accounts of lawyers' work, together with a consideration of unbundled legal services. Then, in drawing both on the services literature and on the studies of lawyers and their clients, the potential participatory roles of lawyers' clients are presented in a suggested classification scheme, followed by a summary of the factors that are most likely to influence client co-production levels.

The theory of service co-production

Services have been defined as 'all those activities that are intangible and imply an interaction to be realized between service provider and consumer'.³ The essential nature of services - as distinct from goods - is evident in the common use of descriptions like 'performances', 'deeds', 'efforts', and 'processes'.⁴ Services are said to have certain properties and characteristics that distinguish them from goods (or tangible products). This understanding is evident from a growing body of literature that has developed since the 1970's,⁵ reflecting the importance of services in national and global economies.⁶

Services theory holds that there are four key properties of services that make them distinctive products in the marketplace.⁷ First, services are said to be intangible: they cannot be sensed in the way that goods can be. This is the most obvious 'difference' between goods and services. Second, it is said that services are simultaneously produced and consumed. This

³ B Van Looy, R Van Dierdonck and P Gemmel (eds) (1998) *Services Management: An Integrated Approach*, Financial Times/Pitman Publishing, p 5.

⁴ V Zeithaml and M Bitner (1996) *Services Marketing*, McGraw Hill, p 5; C Lovelock (1996) *Services Marketing*, Prentice Hall, p 16; K Hoffman and J Bateson (1997) *Essentials of Services Marketing*, Dryden Press, p 5. Most of this phraseology is attributable to L Berry (1980) 'Services Marketing is Different', May-June, *Business Magazine*, pp 24-29.

⁵ A general introduction to the current state of the discipline's theoretical underpinnings is provided in D Iacobucci (1998) 'Services: What do we know and where shall we go? A view from marketing' in T Swartz, D Bowen and S Brown (eds) *Advances in Services Marketing and Management: Research and Practice*, Vol 7, JAI Press Inc.

⁶ It has been estimated that the service sector comprises up to 80% of some economies: Swartz, Bowen and Brown (eds) (1998), p 5. In Australia, the legal services industry generated a total annual income of \$7034.3m for the financial year ended June 1999 and employed 73,186 persons. These figures were based on mainstream legal service providers only, that is, solicitors and barristers: Australian Bureau of Statistics, *Australia Now - Service Industries: Selected business professions*, Legal Services Industry, Australia, 1998-99 (8667.0) <http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/0c8e4868b61156f0ca2569de002842bf!OpenDocument>, 28 November 2001.

⁷ It is also recognised that these characteristics are helpful in distinguishing between different kinds of services: D Iacobucci and A Ostrom (1996) 'Perceptions of services' 3 (4) *Journal of Retailing and Consumer Services* 195.

is atypical of most manufactured goods, where the product, usually in complete form, is made available to the consumer for subsequent consumption or use. Third, services are said to be heterogeneous. This means that services are inconsistent and diverse: 'service experiences differ from occasion to occasion'.⁸ It follows, for example, that standardizing services and mass producing them is far more difficult than it is in the case of goods. Fourth, unlike goods, services cannot be stored for use at a later time. In this sense they are described as 'perishable'.

The second property, also referred to as the 'inseparability' of production and consumption, points to the fact that the customer, by consuming the service in time with its production, is really a *participant* in the service transaction. However, participation is often not limited to consumption alone.⁹ In many, but not all, service delivery settings consumers participate in the *making* of the service,¹⁰ while the quality of the consumer's input can have a direct bearing on the quality of the service itself.¹¹ In other words, 'customers themselves participate at some level in creating the service and ensuring their own satisfaction.'¹² Typically, the consumer's contribution takes the form of information or effort,¹³ which could be physical, intellectual, or emotional.¹⁴

Consumers can contribute at a number of points in the service delivery process, depending on the kind of service involved. First, consumers can play a part in the specification of the service.¹⁵ Second, they can supply data or information that makes the service provider's role possible. An example is the supply of information to a medical specialist,¹⁶ or financial information given to an auditor.¹⁷ Third, the consumer can perform some of the tasks that make up the service, without which the service outcome may not be possible. Other functions include quality control and the development of quality service systems.¹⁸ An alternative but overlapping

⁸ Swartz, Bowen and Brown (eds) (1998), p 10.

⁹ For example, J Bateson (1985) 'Perceived Control and the Service Encounter' in J Czepiel, M Solomon and C Surprenant (eds) *The Service Encounter: Managing Employee/Customer Interaction in Service Businesses*, Lexington Books, p 72.

¹⁰ See for example M Bitner, W Faranda, A Hubbert and V Zeithaml (1997) 'Customer contributions and roles in service delivery' 8 (3) *International Journal of Service Industry Management* 193; C Lovelock and L Wright (1999) *Principles of Service Marketing and Management*, Prentice Hall, p 59.

¹¹ Bitner et al (1997), p 197.

¹² Bitner et al (1997), p 193; V Zeithaml and M Bitner (2000) *Services Marketing: Integrating Customer Focus Across the Firm*, McGraw-Hill, pp 317-26.

¹³ P Mills and D Moberg 'Perspectives on the Technology of Service Organizations' 7 (3) *Academy of Management Review* 467.

¹⁴ R Normann (1991) 'The client as customer - the client as co-producer', *Services Management*, 2nd ed, John Wiley and Sons, pp 79-83.

¹⁵ Normann (1991), pp 80-81.

¹⁶ Bitner et al (1997), p 197.

¹⁷ Bitner et al (1997), p 195.

¹⁸ Normann (1991) pp 79-83; S Kelley, J Donnelly Jr and S Skinner (1990) 'Customer Participation in Service Production and Delivery' 66 (3) *Journal of Retailing* 315; M Bowers, C Martin and A Luker (1990) 'Trading Places: Employees as Customers, Customers as Employees' 4 (2) *The Journal of Services Marketing* 55.

classification of consumer roles sees customers or clients as productive resources, contributors to quality, satisfaction and value, and as competitors to the service provider.¹⁹

A growing literature on professional services, mainly in the context of marketing and management, argues that professional services are for the most part also intangible, inseparable, heterogeneous, and perishable.²⁰ Different professional services can be distinguished from one another by reference to these characteristics. For example, solicitors' services are likely to involve high labour intensity, high client interaction, and high customization of the service product. However, the amount of solicitor-client contact (meaning, the proportion of time for which the client is present) is low when compared with other services (like dental services).²¹

The degree of consumer co-productive involvement in services is variable. In some services consumer input is 'mandatory'²² but it can also be a matter of consumer or management choice within the provider-consumer relationship.²³ At one extreme are relationships in which the parties decide or assume that the provider will do as much of the work as possible, thus relieving the consumer of as much responsibility as the circumstances permit. At the other extreme are relationships in which the parties agree or assume that the consumer will take greater responsibility for the performance of tasks that are necessary to complete the service. Here, the consumer becomes a more active co-producer.²⁴ Appropriately, these models of service provision have been described respectively as 'relieving' and 'enabling' ones.²⁵

Consumer participation has also been classified as 'low', 'moderate' or 'high', depending on the service context. In circumstances where

¹⁹ Bitner et al (1997), pp 197-199.

²⁰ F Crane (1993) *Professional Services Marketing: Strategy and Tactics*, The Haworth Press, p 12 and K Koelmeijer and M Vriens (1998) 'The Professional Services Consumer' in M Gabbott and G Hogg (eds) *Consumers and Services*, John Wiley and Sons, p 165; These properties also pose particular challenges in the marketplace, particularly for service providers, including lawyers: M Davies (1995) *Legal Practice Handbook: Legal Marketing*, Blackstone Press Ltd; D Maister (1993) *Managing the Professional Service Firm*, The Free Press; P Janus (1998) 'Marketing Your Legal Services', Practice Development and Marketing, <http://www.abanet.org/lpm2/newsletters/skills/s98janus.html>, 28 November 2001; J Fenton and A Grutzner (1996) *The Rain Dance: A Marketing Book for Lawyers*, Fenton Communications; B Cutler and K Schimmel (1998) 'A Relationship Marketing Perspective for Direct Marketing in the Legal Services Industry' 17 (1) *Journal of Professional Services Marketing* 141; R Stevens (1998) 'Getting it done: Achieving law firm objectives through the development of effective marketing strategies' 16 (1) *Journal of Professional Services Marketing* 105.

²¹ J Dotchin and J Oakland (1994) 'Total Quality Management in Services, Part 1: Understanding and Classifying Services' 11 (3) *International Journal of Quality and Reliability Management* 9, pp 22-24.

²² Bitner et al (1997), p 194.

²³ P Mills and J Morris (1986) 'Clients as "Partial" Employees of Service Organizations: Role Development in Client Participation' 11 (4) *Academy of Management Review* 726 and Bowers et al (1990).

²⁴ Bowers et al (1990).

²⁵ Normann (1991), pp 83-85.

participation is high, service creation is ultimately dependent on the client's involvement, whose role 'guides the customized service'.²⁶ It has been argued that this level of involvement is true of 'complex services' (like legal ones), which are 'task interactive', and where there is 'a great dependence on the client'.²⁷

As to *why* the consumer's involvement varies, a number of insights have been developed. Some of the main ones will be referred to here, although this summary cannot be regarded as exhaustive. First, as indicated, variation is a function of the nature of the service itself. For example, in 'maintenance-interactive' services such as some associated with banking, 'well-developed rules and established guidelines' tend to 'define' the customer's role as being low in production terms. By contrast, 'personal-interactive' services such as those involving education or health care sometimes require high client involvement.²⁸ Second, the amount of control exerted on client behaviour by the provider has a significant bearing on client involvement. This point warrants special mention, and is discussed further below. Third, client participation will be more difficult where services are complex and demanding, such as in knowledge-based service relationships.²⁹ Added but related factors here are the problems of uncertainty and information asymmetry in these kinds of relationships.³⁰

Fourth, client skills are a relevant factor, and particularly where services are complex and demanding.³¹ Fifth, the client's motivational level and attitude are important, including the question of whether the client enjoys active involvement. Some clients seek or expect to be active participants, while others do not.³² However, motivational level may itself be affected by the extent to which the service provider exerts control over the relationship in order to meet the efficiency demands of the service organisation.³³ Sixth, the degree of client involvement may be strongly influenced by cost factors to the client³⁴ or as measured by the service provider in its management system.³⁵ Again, issues of control in the service delivery system are relevant to this factor. Seventh, client involvement may be influenced by the client's own perceptions of issues such as the amount of time available to the client, the efficiency of involvement (to the client), and the apparent expertise and benevolence

²⁶ Bitner et al (1997), pp 194-195.

²⁷ Mills and Morris (1986), pp 726-727.

²⁸ Mills and Morris (1986), pp 727-728.

²⁹ P Mills and D Moshavi (1999) 'Professional concern: managing knowledge-based service relationships' 10 (1) *International Journal of Service Industry Management* 48.

³⁰ Mills and Moshavi (1999), pp 49-50.

³¹ Bowers et al (1990), p 65; Mills and Morris (1986), p 727.

³² Bowers et al (1990), p 65.

³³ Bateson (1985), pp 75-77.

³⁴ Mills and Morris (1986), p 729.

³⁵ Mills and Morris (1986), pp 12, 16, 31, 26.

of the service provider (meaning that responsibility can comfortably be entrusted to the provider).³⁶ Finally, the importance the client attaches to exerting some personal control over the service process is a highly relevant factor.³⁷ In summary, consumer involvement varies according to the nature of the service and the qualities and preferences of both the provider and the consumer.

Questions of influence and control loom large in this summary. Indeed, much of the research in the literature referred to in this review of co-production studies is directed towards understanding ways in which business enterprises can more efficiently manage and control the service process and with it their service consumers.³⁸ As one leading writer puts it, '[w]hatever else happens in a service encounter, the customer must give up some control.'³⁹

The literature dealing specifically with professional or knowledge-based service providers suggests two main 'client control mechanisms', both of which have perceived advantages and disadvantages. For example, the mechanism of 'social distance', which involves a formality gap and reliance on status through which the provider's authority can be exercised, is thought to be valuable in enhancing information exchange. But it also 'has the potential to corrupt service providers by facilitating authoritarianism and the abuse of power.'⁴⁰ By contrast, the mechanism of 'psychological attachment' involves a 'more personal and familiar interaction' amounting to a 'peer' relationship between the parties. But this, too, can be counterproductive in that 'it is likely to limit the provider's ability to exercise authority when needed.'⁴¹

Client participation is seen to have both advantages and disadvantages, from both parties' perspectives. The main advantage to the service enterprise is that client participation can increase productivity and quality.⁴² A disadvantage is that consumer participation has the potential to bring uncertainty to the production process and so should be avoided or minimized where possible.⁴³ From the consumer's side, the degree of involvement may have a bearing on the degree of satisfaction with the

³⁶ E Langeard, J Bateson C Lovelock and P Eiglier (1981) *Services Marketing: New Insights from Consumers and Managers*, Marketing Science Institute, Cambridge, MA; P Dabholkar (1996) 'Consumer evaluations of new technology-based self-service options: an investigation of alternative models of service quality' 13 (1) *International Journal of Research in Marketing*, pp 29-51; Mills and Moshavi (1999), p 50.

³⁷ Bowers et al (1990), p 62.

³⁸ Bateson (1985); Mills and Morris (1986); Bowers et al (1990); Mills and Moshavi (1999).

³⁹ Bateson (1985), p 78.

⁴⁰ Mills and Moshavi (1999), p 51.

⁴¹ Mills and Moshavi (1999), p 52; a third option, referred to as 'professional concern' is suggested by these authors. It involves a 'paradox' of being close to the client and simultaneously detached and involves provider authority, social affiliation, client accountability, and objective attitude; at pp 54-58. Questions of power and control will be returned to, below, in the context of lawyer-client relationships.

⁴² Mills and Morris (1986), p734.

⁴³ Zeithaml and Bitner (2000), p 323.

service product. Participation may also provide a sense of control over the process and minimize the 'boredom and anxiety' that results from waiting for developments.⁴⁴ For this reason, there is some advantage, from the provider's point of view, in educating inexperienced customers about their potential roles in co-productive activity.⁴⁵

Are lawyers' services co-produced?

Legal services are often cited in the services literature as examples of service settings that attract moderate or high levels of client productive involvement,⁴⁶ yet a detailed explanation of what this actually means is difficult to find within this literature. The question that will be explored here, therefore, is whether and to what extent the literature on lawyers and their work supports the view that lawyers' services are co-produced, in the ways identified above. The focus will be on information supply and contributing to service tasks – that is, participation in the 'production and delivery process'⁴⁷ – although legal clients may well participate at other levels too (such as service specification⁴⁸ and simultaneous consumption⁴⁹).

Traditionally, lawyers' services are described in terms of advice,

⁴⁴ Bowers et al (1990), p 62.

⁴⁵ Lovelock and Wright (1999), p 59.

⁴⁶ See, for example, M Gabbott and G Hogg (1998) 'Consuming Services' in M Gabbott and G Hogg (eds) *Consumers and Services*, John Wiley and Sons, p 71; Mills and Morris (1986); A Boon (1995) 'Client Decision-making in Personal Injury Schemes' 23 *International Journal of the Sociology of Law* 253; Mills and Moshavi (1999); and Bitner et al (1997), p 193.

⁴⁷ Kelley, Donnelly and Skinner (1990), p 315.

⁴⁸ It can be assumed that in many, but not all, legal service relationships the client has some role in specifying the nature of the assistance being sought. Some clients rely on their lawyers to identify what it is that their circumstances require but others – like repeat players – know what services are needed. See further below the reference to the relevance of 'power' and control in lawyer-client relationships.

⁴⁹ For example, in relation to consumption, it seems obvious that many legal services are simultaneously produced (by the lawyer) and consumed (by the client). The giving of oral legal advice can be described as a service being 'created and consumed in real time' (Swartz, Bowen and Brown (eds) (1998), p 8.). Representation of a client in court can be described as a lawyer performing a service (leading and cross-examining witnesses, making legal arguments etc) for and on behalf of someone who simultaneously receives the benefit of the representation. In this sense the client is a passive 'participant' in the service transaction.

⁵⁰ Sir H Benson (1979) *The Royal Commission on Legal Services: Final Report*, Vol 1, October, (Cmnd 7648) p 11; United Kingdom (1989) *The Work and Organisation of the Legal Profession*, January (Cm 570) p 5; I McEwin (1992) *Cost of Legal Services and Litigation: Access to Legal Services: The Role of Market Forces*, background paper prepared for the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, February, p 11; *Courts and Legal Services Act 1990* (UK) c 41; *Access to Justice Act 1999* (UK) c 22; United Nations, General Assembly (1990) Resolution 45/12, 'Access to Lawyers and Legal Services', 14 December, <http://www.oil.ca/rights/bprl/bprl.html>, 28 November 2001.

assistance and representation to their clients⁵⁰ or in more specific terms under each of these categories.⁵¹ It follows that lawyers' descriptions of legal work tend to emphasize lawyers' skilled input in deeds such as the 'preparation and conduct of proceedings', or 'drawing, filling up or preparing an instrument'.⁵² This lawyer-centered perspective includes an emphasis on lawyers' expertise, including the 'fundamental skills necessary to participate effectively in the legal profession'.⁵³ Not surprisingly, the importance of these attributes is reflected in literature on the appropriate standards of legal education and training⁵⁴ university legal curricula, professional legal training courses⁵⁵; and in the professional literature.⁵⁶ In this somewhat technical view of legal work there is no explicit reference to the client's role in service construction, beyond the underlying assumption that no service is possible without the client's instructions.⁵⁷ Instead, clients are depicted for the most part as beneficiaries or consumers of legal services.

Another strand of the legal literature on lawyers' work concerns the notion of professionalism, and the role of the lawyer in serving the client's legitimate legal interests in a system that conforms to the principles of the rule of law.⁵⁸ Although theoretical perspectives on the meaning of and motivation behind the professional agenda vary considerably, lawyers

⁵¹ For example, Law Council of Australia, Policy Statement on the Reservation of Legal Work for Lawyers, <http://www.lawcouncil.asn.au/readpolicy.html?oid=1957352961>, 28 November 2001; and in legislation: Legal Profession Act 1987 (NSW) s 48E; Legal Practitioners Act 1981 (SA) s 21.

⁵² *Queensland Law Society Act 1952* (Qld) s 39; *Legal Profession Act 1987* (NSW) s 48E; *Legal Practice Act 1996* (Vic) s 314; *Legal Practitioners Act 1981* (SA) s 21; *Legal Practitioners Act 1893* (WA) ss 76 and 77; *Legal Practitioners Act 1970* (ACT) ss 193 and 194.

⁵³ American Bar Association: Section of Legal Education and Admissions to the Bar (1996) 'Report to the House of Delegates', 82 (August) *ABA Journal* 129.

⁵⁴ Australian Law Reform Commission (1999) *Review of the federal civil justice system*, DP 62, August, ch 3; Australian Law Reform Commission (1997) *Review of the adversarial system of litigation: Rethinking legal education and training*, IP 21, August; and Australian Law Reform Commission (2000) *Managing Justice: A review of the federal civil justice system*, ALRC 89, ch 2.

⁵⁵ Where lawyers' work is characterised as 'client service in the public interest': College of Law (NSW), 'The Professional Programme' <http://www.collaw.edu.au/pp.htm>, 28 November 2001; University of Wollongong, Practical Legal Training Unit, Faculty of Law, 'Graduate Diploma in Legal Practice' http://www.uow.edu.au/law/law_web_main/pltsecondpage.htm, 28 November 2001; The Australian National University, Graduate Program in Law, <http://law.anu.edu.au/Postgraduate/NewBrochure.pdf>, 22 November 2001.

⁵⁶ For an example of a comprehensive report see American Bar Association: Section of Legal Education and Admissions to the Bar (1992) *Selected Excerpts from the MacCrate Report: Legal Education and Professional Development: An Educational Continuum*: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, July; American Bar Association: Section of Legal Education and Admissions to the Bar (1996) 'Report to the House of Delegates', 82 (August) *ABA Journal* 129.

⁵⁷ See for example Queensland Law Society (1996) *Solicitors Handbook*, Update 2, 1999, Rule 5.

⁵⁸ One of the principles of the rule of law is that 'there be a recognized, organized, and independent legal profession ... legally empowered to advocate causes before courts': R Summers (1999) 'The Principles of the Rule of Law' 74 *Notre Dame Law Review* 1691, p 1695.

have tended to portray their professional project as 'a self-regulating counterweight' to the state.⁵⁹ Professionalism, in this view, tends to emphasize the overwhelming role and prominence of the lawyer in providing special skill and learning in service to the client and to the public more generally.⁶⁰ The client is the immediate beneficiary of the service, the community the ultimate beneficiary, but the service is exclusively what the lawyer provides, acting more or less autonomously. Professional autonomy includes control over interaction, and an 'ability to define' the client's problem, the nature of the work to be done, and the way it is to be done.⁶¹

In doctrinal terms, the lawyer's professional role in Australia is exemplified largely in the notion of the client's authority delegated to the lawyer through the agency contract. This has been described as 'the paradigm example of an agency relationship'.⁶² The terms of the agency contract, which determine the scope of the lawyer's authority, are contained and expressed in the notion of a 'retainer'. Under and through the retainer the lawyer acts for the client, ideally bringing to bear the skills, experience and judgment (in all their legal and ethical complexity) that the agency authority requires in the circumstances. Without the mandate, there can be no representation. The lawyer acts on *behalf* of the client. As one writer on professional responsibility puts it, '[because] the client is the principal and the lawyer the agent, agency law dictates that the agent must follow the directions of the principal excepting a legal or professional impediment in so doing'.⁶³ In this sense, the client is ultimately in charge. However, this does not imply that the lawyer has no independent discretion. For example, the matter of *how* the work is performed is often seen as the lawyer's prerogative, precisely because it is the lawyer who is regarded as the expert.⁶⁴

Strictly speaking, the logic of the agency doctrine appears to minimize the client's role in the delivery of the service. Formally, the client's role is to provide little more than appropriate authority and directions to enable

⁵⁹ R Abel (1988) *The Legal Profession in England and Wales*, Basil Blackwell, p 6, reflecting the structural functionalist theory of the legal profession.

⁶⁰ Dal Pont (2001), pp 5-9.

⁶¹ H Kritzer (1984) 'The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study' 2 *American Bar Foundation Research Journal* 409, p 412. Professionals seek to maintain control over their work in various ways, through diagnosis, treatment, 'inference' and the ordering of academic knowledge: see A Abbott (1988) *The System of Professions: An Essay on the Division of Expert Labor*, University of Chicago Press, pp 35-58. Lawyers' control over treatment, for example, may be central to their 'jurisdiction' (at p 46).

⁶² G Dal Pont (2001) *Lawyers' Professional Responsibility in Australia and New Zealand*, 2nd ed, p 49. But in the services market, agency-based relationships are the basis of many services: see for example Mills and Moshavi (1999), p 50.

⁶³ Dal Pont (2001), p 89, relying on a number of Australian cases.

⁶⁴ Kritzer (1984), p 412; see also a view on this issue in the services literature, and the difficulties it suggests: Mills and Moshavi (1999), p 50.

the provider to do the work. However, in spite of what this doctrine may suggest, in legal practice terms client involvement is probably more extensive. One way this point can be made is by considering the meaning and scope of the terminology 'taking instructions', a practice that lies at the core of lawyers' work on behalf of their clients.⁶⁵

The concept of 'the client's instructions' is not straightforward. It seems to embrace at least three distinct ideas.⁶⁶ The first two are closely linked, and are aligned with the agency concept. They are the authority that the lawyer needs in order to act as the client's agent, (or, in the absence of agency, the contractual authority to do the work)⁶⁷ together with the client's directions and decisions during the course of the retainer. The latter includes, for example, assessments and decisions in relation to important steps along the way, as well as settlement options.⁶⁸ The third aspect has to do with the factual and other information that the client supplies, without which the service would not be possible.⁶⁹ This involves the provision of many different kinds of 'information',⁷⁰ which only the client can supply, both at the beginning of the relationship and during the course of the retainer. This is not to suggest that the efficacy of client to lawyer communications can be taken for granted, however. This difficulty is referred to below.⁷¹

As the previous literature review suggests, this role of information supply, in particular, is significant from a co-production perspective⁷² (as is the client's decision-making role, discussed further below⁷³). In fact, this is an instance when the lawyer may be entirely dependent on the client to take the service forward,⁷⁴ and the client's *failure* to perform could pose

⁶⁵ See, for example, Queensland Law Society (1992) *Solicitors' Handbook*, rules 5.01 and 5.02 dealing with retainers and solicitors' duties, and the frequent use of the phrase 'accept instructions' to signify dealings with the client on commencement and during the retainer.

⁶⁶ Queensland Law Society (1992) *Solicitors' Handbook*, rules 5.01 and 5.02.

⁶⁷ In some jurisdictions, this authority may need to be evidenced in a 'client agreement'. See, for example, *Queensland Law Society Act 1952* (Qld), s 48.

⁶⁸ See also 'the case of the unsupported wife' in the empirical study by Felstiner and Sarat (1992) also referred to below.

⁶⁹ In this respect the client's role is similar to the patient's role in medical services: Bitner et al (1997), p 197.

⁷⁰ 'Information' is to be taken to be a broad concept. Most obviously, it includes factual information but might also include desired outcomes, preferences, perceptions, and concerns, all of which are inputs that may be taken seriously by the service provider. Felstiner and Sarat (1992), p 1462 refer to this as 'the raw information' that clients provide, which is presented with or without interpretation, posing difficulties for lawyers.

⁷¹ Studies of 'translation' in lawyer client relationships, considered below, indicate that at least some of the time lawyers do carry out their client's directions. But at other times this is not the case. See, for example R Uphoff and P Wood (1998) 'The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking' 47 *University of Kansas Law Review* 1.

⁷² For example, Bitner et al (1997).

⁷³ See the discussion of some of the sociological studies of lawyers and their clients, below.

⁷⁴ Mills and Morris (1986), p 727.

serious difficulties for the lawyer. Example are when the client fails to provide enough information to enable the lawyer to act at all, or selectively withholds crucial information in the belief that it may adversely affect the course of work, such as litigation.⁷⁵

Some familiar but simplified examples from legal practice illustrate the point about the significance of information supply. First, in the case of making a simple will, the client's 'instructions' must include some basic data (such as identities of beneficiaries, executors or trustees) and wishes regarding details of intended bequests. In more complex wills, the client's information input role could be more extensive, and may involve complex instructions, based upon the lawyer's prior advice, to take into account special circumstances. In either case it is inconceivable that the service outcome can be reached without the client's active information input.

Second, in a matter involving a family law dispute, the client will necessarily provide crucial factual information at the outset (which may form the basis of evidence given later in court) followed by ongoing information in response to changing circumstances in the conduct of the matter. In some instances, to make an obvious point, the client's participation could even include the giving of evidence (while being led by the legal representative). By actively participating in these various ways the client is co-producing the service outcome. This form of participation might, for convenience, be referred to as mandatory co-production, meaning that it is a form of client participation without which the legal service would falter.

Two qualifications seem necessary at this point. The first is that not all legal services necessarily fit this category. There may be service encounters between client and lawyer where the role of the former is so insignificant that it is almost undetectable.⁷⁶ Second, and more significantly, there is a serious question about the efficiency of client-lawyer communications. That is to say, client communication cannot always be taken for granted because what the client 'instructs' may not be the same as what the lawyer receives, hears or acts on. Therefore, the client's co-productive effort may not be accurately represented in the service outcome.

There is some support in the empirical literature to suggest that lawyers are good at 'translating' for their clients.⁷⁷ In short, translation is a theory about the lawyer's role in translating the client's objectives into legal discourse.⁷⁸ One study argued that translation, rather than control, was the 'specific practice of lawyers in terms of which their place in the

⁷⁵ Mills and Moshavi (1999), p 50.

⁷⁶ Seeking an interpretation of a particular rule of law, without any reference to the client's factual context, may be such an example. At most, the client is a participant at the point of consumption.

⁷⁷ M Cain (1979) 'The General Practice Lawyer and Client' 7 *International Journal of the Sociology of Law* 331, especially at pp 334-336.

⁷⁸ S Wheeler (1991) *Reservation of Title Clauses: Impact and implications*, Oxford University Press, pp 187-8, in discussing Maureen Cain's earlier research.

social structure should be theorized' and that 'the model of lawyers as both agents of the bourgeoisie and translators is correct theoretically as well as empirically.'⁷⁹ However, there are many studies that draw different or opposing conclusions.⁸⁰ In warning against a relatively simple version of the lawyer's role as a translator of the client's wishes, it has been suggested that 'there may be very good reasons why solicitors cannot translate their clients' chosen outcomes.' One reason is the problem of quantifying the 'input' of each party to the relationship. Lawyer and client inputs are complex, indeterminate, and variable, meaning that it is difficult to be clear about 'whose input is represented by the outcome.'⁸¹

Furthermore, studies on language and power in the context of lawyer-client relationships warn of the ways in which client narratives are susceptible to distortion and manipulation, for a number of different reasons. These include the lawyer's propensity and desire to gain control over the conversation, the definition of the client's problem, and the way in which the problem will be addressed.⁸² Some of this work focuses on poverty law, and the particular difficulties faced by disempowered clients.⁸³

Ultimately, issues around communications between clients and their lawyers are intertwined with questions of power and control in these relationships. The significance of matters of power and control to understandings about client participation in lawyers' services is considered in the next section.

Empirical and sociological studies of lawyers and clients

The traditional picture of the service-providing professional lawyer agent,

⁷⁹ Cain (1979), pp 335-336.

⁸⁰ A Sarat and W Felstiner (1995) *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process*, Oxford University Press, pp19-21 and H Kritzer (1998) 'Contingent-fee Lawyers and their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-client Relationship' 23 *Law and Social Inquiry* 795, pp 796-798; for a study that illustrates the complexities of client-lawyer communications, see L Mather, R Maiman and C McEwen (1995) "'The Passenger Decides on the Destination and I Decide on the Route": Are Divorce Lawyers "Expensive Cab Drivers?"' 9 *International Journal of Law and the Family* 286.

⁸¹ R Ingleby (1992) *Solicitors and Divorce*, Oxford University Press, p 135.

⁸² L Smith (1995) 'Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centred" Interview' 1 *Clinical Law Review* 541, p 549. There is a large body of literature on these issues; see, for example, C Hosticka (1979) 'We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality' 26 (5) *Social Problems* 599; C Cunningham (1989) 'A Tale of Two Clients: Thinking About Law as Language' 87 *Michigan Law Review* 2459; Felstiner and Sarat (1992), pp 1459-1466; G Gellhorn, L Robins and P Roth (1994) 'Law as Language: An Interdisciplinary Study of Client Interviews' 1 *Clinical Law Review* 245.

⁸³ For example, A Alfieri (1991) 'Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative' 100 *Yale Law Journal* 2107; C Gilkerson (1992) 'Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories' 43 *Hastings Law Journal* 861.

acting expertly for the client, more or less autonomously, but under a mandate from the client (who is therefore in charge in a sense), who is also the beneficiary – or consumer – of the service, is somewhat confusing, to say the least. It is something of a descriptive and normative muddle that seems on one level to contain two potentially incompatible images. One image suggests that the lawyer-expert is really in charge, precisely because of the expertise and some other incidents of power (including those arising from dependency⁸⁴) that the lawyer alone possesses. The other image presents the client as having the final say because of the formal location of authority in the legal doctrine that underpins the lawyer-client relationship.

It is hardly surprising, therefore, that this arguably incoherent picture of the lawyer's work has been subjected to a steadily growing body of research on lawyers and their clients. In these studies, questions are asked about how lawyers really carry out their work, and what influence, if any, their clients really have.⁸⁵ It is in this literature, and particularly in the empirical studies on lawyer-client relationships, that more detailed and reliable accounts of clients' participatory roles are likely to be found.⁸⁶

A major theme of the empirical work is around questions of power, influence, and control in lawyer-client relationships.⁸⁷ Are clients able to exert control over their lawyers (which is what the 'doctrinal' position contemplates) so that their needs and interests are taken seriously, or 'do lawyers use their knowledge and position to influence their clients'?⁸⁸ In the main, these studies tend to examine the extent to which lawyers, or their clients, or both, exercise control over decision making.⁸⁹ The focus, therefore, is mainly on the extent to which clients participate or have a say over the conduct and outcomes of the legal service, and not principally on other forms of participation in service tasks.⁹⁰ However, studies show

⁸⁴ The rules of the Queensland Law Society, for example, speak of 'the client's position of dependence upon the practitioner and the high degree of trust that a client is entitled to place in the practitioner.' Queensland Law Society (1992) *Solicitors Handbook*, rule 5.02 (1).

⁸⁵ For example, some writers question whether the *service model* of lawyers' work accords with the realities of legal practice where, at times, lawyers 'assume full command of their client's cases'. N Naffine (1990) *Law and the Sexes: Explorations in Feminist Jurisprudence*, Allen & Unwin. See also references below to studies that tend to show, for example, that lawyers in the criminal justice system tend to dominate their clients.

⁸⁶ Much of this work can be traced back to D Rosenthal (1974) *Lawyer and Client: Who's in Charge?*, Russell Sage.

⁸⁷ J Heniz (1983) 'The Power of Lawyers' 17 *Georgia Law Review* 891; S Herr (1989/1990) 'Representation of Clients with Disabilities: Issues of Ethics and Control' 17 *New York University Review of Law and Social Change* 609; Kritzer (1998).

⁸⁸ Kritzer (1998), p 796.

⁸⁹ For example, Mather et al (1995).

⁹⁰ Making a distinction between participation in decision-making and participation in tasks may have only limited utility, especially since the distinction may not always be clear. It is to be noted, however, that client decision-making roles are not emphasized in the services literature on professional service relationships, where delegation of authority tends to be assumed; see for example Mills and Mohavi (1999).

that clients may participate in a variety of ways, and not just at the level of decision making. For example, Rosenthal's 1974 study identified an 'index of client participation' which included physical and intellectual input of various kinds.⁹¹

The control issue, also a theme of the services literature referred to above, is highly relevant to the question of client co-production. This is because power and control factors are likely to have a direct bearing on who chooses to do or refrain from certain roles or tasks,⁹² assuming that there is scope for variation in the allocation of responsibility. One party's influence may be used either to assume control over particular work or to avoid responsibility for certain tasks, depending on the circumstances.⁹³ Overall, these studies suggest that there is no consistent answer to be found to the control question. The evidence points in different directions, or is ambiguous.⁹⁴ Some tend to support the 'predominant image' of 'professional dominance and lay passivity' in a relationship that is apparently characterized by minimal client involvement.⁹⁵ Others indicate that some clients exercise at least some control in some situations.⁹⁶

But in a significant study of lawyer-client interactions in divorce matters, it is claimed that the question of which party is in charge is itself misleading because it assumes that a 'single, stable answer can be provided'. In reality power in lawyer client relationships is 'ambiguous' and 'is less stable, predictable and clear-cut' than commonly assumed.⁹⁷ Relying on Foucault's insight,⁹⁸ the authors suggest that power in lawyer-client settings is multi-dimensional. It is enacted in domains of knowledge and understanding (for example, defining and giving meaning to situations) *and* in the domain of 'action and behavior.' In the latter domain the parties 'negotiate responsibility' in struggles over which party will do what and who will take responsibility to keep the service moving forward.⁹⁹ The service itself consists of a series of steps or tasks of which some (involving expertise beyond even sophisticated clients) are the lawyer's domain.

⁹¹ Activities, such as seeking medical attention and marshalling information to 'build a solid claim': Rosenthal (1974), pp 30-31. However, these examples are quite limited, as noted by Felstiner and Sarat (1992), p 1452. Further examples of client task input, from some empirical studies, are given below.

⁹² For example, Felstiner and Sarat (1992), p 1482-1483 where lawyer and client negotiate over who will take responsibility for subsequent negotiations with the client's former partner.

⁹³ Felstiner and Sarat (1992), p 1467.

⁹⁴ Kritzer (1998), p 798.

⁹⁵ As observed by Sarat and Felstiner (1995), pp 19-20; see also Mather et al (1995).

⁹⁶ For example, Cain (1979); A Southworth (1999) 'Collective Representation for the Disadvantaged: Variations in Problems of Accountability' 67 *Fordham Law Review* 2449 and G Hanlon and J Jackson (2000) *Solicitor Advocates in Scotland: The Impact on Clients*, Report of the Scottish Executive Central Research Unit.

⁹⁷ Sarat and Felstiner (1995), pp 21-22.

⁹⁸ M Foucault (1972) *Power/Knowledge*, p 109.

⁹⁹ Felstiner and Sarat (1992), p 1458; which is an earlier report of their 1995 publication: Sarat and Felstiner (1995).

Others, potentially, 'can be shared or assigned to the client' where it will be easier or cheaper to proceed in this way. However, the assumption or assignment of responsibility for tasks and for taking the service forward occurs within the context of 'enactments of power', and these are often 'unclear or confused'. Negotiation of responsibility is fraught with complexity and is attended by tactical maneuvers including procrastination, vacillation and indecision.¹⁰⁰

The analysis of lawyer-client interaction presented in this study demonstrates that the role of the client is profoundly significant. Clients are deeply involved in a process over the 'negotiation of reality' with their lawyers, and this necessarily engages them in communicating their interests and crucial information around which service goals are identified.¹⁰¹ At the same time, clients assume responsibility for tasks¹⁰² that are integral to the service itself. However, none of this involvement is straightforward: it is negotiated in a service setting in which power to influence reality and responsibility is 'mobile and volatile'.¹⁰³ The authors conclude that these findings are probably applicable to many areas of practice, where lawyers and clients must often negotiate over goals and over the 'division of labor between them'.¹⁰⁴

A recent Australian study in the empirical tradition also provides some insight into the types, frequency and significance of client participation in service tasks. The relevant data, which emerged in the context of cost reduction strategies used by solicitors, are contained in a wider study on family law practice.¹⁰⁵ Some lawyers (80% of the 37 who responded to the particular question) said that they involved their clients in various tasks ('unbundling')¹⁰⁶ including document drafting, typing, collecting and filing. A small proportion reported that they occasionally 'got their client to do their own court appearances' in pre-trial hearings, and others asked their clients to do statements of evidence, appraisals, investigative work, preparation of affidavits, and negotiations.¹⁰⁷ It is notable that these arrangements appear to have been the result of the lawyers' themselves deciding what, if anything, they were willing to allow their 'capable' clients to do. The arrangements were made in order to reduce costs, to spread available funding further and to allow clients to 'feel more in control'.¹⁰⁸

Some lawyers in this study were not confident about involving their

¹⁰⁰ Felstiner and Sarat (1992), pp 1466-1471.

¹⁰¹ Felstiner and Sarat (1992), pp1459-1466.

¹⁰² In the study of the 'Unsupported Wife' these tasks included some of the 'drudge work' and some significant negotiations, ostensibly in order to reduce the client's legal fees; Felstiner and Sarat (1992), pp 1474, 1486, 1490-1491.

¹⁰³ Felstiner and Sarat (1992), p1450.

¹⁰⁴ Felstiner and Sarat (1992), p 1498.

¹⁰⁵ Hunter et al (2000).

¹⁰⁶ See below.

¹⁰⁷ Hunter et al (2000), p 201.

¹⁰⁸ Hunter et al (2000), pp 202-203.

clients in these ways because they perceived some clients to be unable to manage tasks themselves. There were risks attached to these strategies, such as risks to service quality and to the lawyers' own reputations. A minority of respondents reported that, because of the dangers involved, they were opposed to this type of client involvement.¹⁰⁹

Client-centred legal practice

Another stream of the literature on lawyers and their clients contains strong resonance with the concept of a client as a service co-producer. The literature on client-centered lawyering¹¹⁰ relies on a participatory or collaborative model of the lawyer-client relationship¹¹¹ and claims that the actively participating client will be far better off, in a number of ways, than 'the passive recipient of services'. The benefits of participation include reaping psychological benefits from the service process.¹¹²

In this model emphasis is placed on the role of clients as active participants in 'identifying their problems, formulating potential solutions, and making decisions.'¹¹³ This model is contrasted with the 'traditional conception' of legal practice where lawyer-experts determine what is in the client's best interests 'with minimal client input'.¹¹⁴ The client-centered approach questions whether client problems are appropriately handled when information is placed in a 'doctrinal pigeonhole' and potential non-legal solutions are largely ignored. Clients should, it is argued, have a much more pronounced role in tackling their problems at least because they are 'usually more expert than lawyers when it comes to the economic, social, and psychological dimensions of problems.'¹¹⁵ It is for this reason that lawyers need to be client-centered, which includes adopting practices such as identifying problems from a client perspective, actively involving

¹⁰⁹ Hunter et al (2000), p 203; most of the solicitors in this survey appeared to take the view that it was their prerogative to remain in control (p 319) while claiming simultaneously to practise good client focussed skills, including empathy, listening and communication (pp 313-321).

¹¹⁰ There is a large and developing literature on this topic, much of it connected with clinical legal training; see for example: D Reynolds and D Tennant (2001) 'Collaborative Law: An Emerging Practice' 45 *Boston Bar Journal* 12; J Lawrence (2002) 'Collaborative Lawyering: A New Development in Conflict Resolution' 17 *Ohio State Journal on Dispute Resolution* 431; A Hurder (1996) 'Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration' 44 *Buffalo Law Review* 71; M Diamond (2000) 'Community Lawyering: Revisiting the Old Neighborhood' 32 *Columbia Human Rights Law Review* 67; S Ellman (1987) 'Lawyers and Clients' 34 *UCLA Law Review* 717.

¹¹¹ Rosenthal (1974), p 14.

¹¹² J Moliterno and J Levy (1993) *Ethics of the Lawyer's Work*, West Publishing Company, p 89.

¹¹³ D Binder, P Bergman and S Price (1991) *Lawyers as Counsellors: A client centred approach*, West Publishing Co, p 18.

¹¹⁴ Binder, Bergman and Price (1991), p 17.

¹¹⁵ Binder, Bergman and Price (1991), p 17.

a client in exploring solutions, and encouraging the client to take the role of primary decision maker.¹¹⁶ This approach to lawyering is not, however, without its critics.¹¹⁷

In one of the earlier studies of collaborative lawyering, Rosenthal devised an 'index of client participation' by clients in personal injury claims.¹¹⁸ The participating client assumes responsibility 'to grapple with the problem' and actively seeks information around the problem and the service goals, rather than 'delegating responsibility' and decision making to the professional.¹¹⁹ It would seem to follow from this that Rosenthal's participating client fails to some degree to take the agency principal's role seriously. As pointed out above, agency relationships are essentially about the delegation of the client's authority, to enable the lawyer to act on the client's behalf. The client who is ambivalent about delegation, or who provides a mandate yet seeks to participate in activities and decision making around matters that have really been delegated, is assuming two roles: those of principal and producer. It is an acceptance of this duality that appears to lie at the heart of collaborative lawyering models.

One of the Rosenthal's conclusions was that, contrary to what might be deduced from the traditional professional model, participating clients achieved better outcomes overall.¹²⁰ This claim, together with the suggestion that the participating client benefits psychologically from active engagement,¹²¹ is essentially the same as the co-production position on the likelihood of consumer involvement leading to a greater sense of satisfaction, and value, for the consumer.¹²²

The client-centered literature also asserts that some of what the client is capable of bringing to the relationship is superior to that which the lawyer is able to bring. This includes highly relevant 'nonlegal' information together with inputs concerning the client's 'unique needs and goals'.¹²³ Service theorists, it should be noted, make a similar point about the importance of the consumer's intellectual and emotional inputs into the service transaction.¹²⁴

Participation, however, does not come without burdens to the client. For example, many clients may find that 'confronting complex and uncertain problems with heavy risks' imposes too heavy a price 'for the benefits of participation'. Consequently, some clients may not be able 'to cope with

¹¹⁶ Binder, Bergman and Price (1991), pp 19-21.

¹¹⁷ Hurder (1996), Diamond (2000), Ellman (1987) and W H Simon (1991) 'Lawyer Advice and Client Autonomy' 50 *Maryland Law Review* 213.

¹¹⁸ Rosenthal (1974), p 30.

¹¹⁹ Rosenthal (1974), p 14; but Rosenthal acknowledges the existence of lawyer-power as a factor that works against participatory lawyering: Rosenthal (1974), p 172.

¹²⁰ Rosenthal (1974), p 39.

¹²¹ Moliterno and Levy (1993), p 91.

¹²² Bowers et al (1990), p 62; Bitner et al (1997), pp 197-199.

¹²³ Binder, Bergman and Price (1991).

¹²⁴ For example, Normann (1991) p 82.

¹²⁵ Rosenthal (1974), pp 170-2.

the emotional stress of responsible participation'.¹²⁵ Others might simply not care to know about or become involved with the details of their case as long as it is being handled properly.¹²⁶ Hence, there is a suggestion that 'where the client has a guarantee of the lawyer's competence and expertise, the requirement for participation is minimized.'¹²⁷ Moreover, in certain kinds of legal services the opportunities for client involvement, such as in strategic decision-making, may seem limited.¹²⁸ These insights are especially relevant to the question of what factors are likely to enhance or inhibit client co-productive effort,¹²⁹ and also have significance for the style of legal service delivery considered next.

'Unbundled' legal services

As already suggested, co-production theory assumes that in many service transactions a consumer's role is inevitable. But in some service settings, this role can be expanded to include tasks that might otherwise have been performed by the service provider. Therefore, the parties' production roles are potentially variable.¹³⁰ By implication this suggests that some services can be viewed as a series of linked but separable tasks, some of which are capable of being performed either by one party or the other. In other words, there are service roles that consumers can perform with minimal assistance, or perhaps with no assistance at all.

One legal service delivery arrangement that relies upon task identification and enhanced client co-production ('enabling', to use that term)¹³¹ is increasingly referred to as the 'unbundling' of legal services by lawyers. In the recent American literature on unbundled legal services, a distinction is drawn between a lawyer's full legal service and an 'unbundled' service.¹³² In the latter, the client selects 'a portion of the full package' and contracts with the lawyer on this basis.¹³³ The assumption is that some services consist in reality of a series of 'discrete tasks' that can be unbundled to allow the client to nominate which tasks the lawyer will complete, and which will be tackled by the client.

For example, the family lawyer's full service package can be broken down into seven general categories. These are fact gathering, advising,

¹²⁶ Boon (1995), p 265.

¹²⁷ Boon (1995), p 266.

¹²⁸ Boon (1995), p 266.

¹²⁹ See below.

¹³⁰ Mills and Morris (1986) and Bowers et al (1990).

¹³¹ Normann (1991), pp 83-85.

¹³² R Micklewright (2000) 'Discrete Task Representation a/k/a Unbundled Legal Services' 29 (1) *The Colorado Lawyer* 5.

¹³³ F Mosten (1994) 'Unbundling of Legal Services and the Family Lawyer' 28 (3) *Family Law Quarterly* 421, p 423.

¹³⁴ Mosten (1994), p 423.

discovery, researching, drafting, negotiating, and representing.¹³⁴ In practical terms, the 'list' of potential tasks – to be allocated between producer and co-producer – is substantially longer. It includes items such as the evaluation of the client's self-diagnosis, simulated role playing with the client (in preparation for negotiations), troubleshooting during the trial, and procedural assistance with an appeal.¹³⁵ In making choices about what the client will do and what the lawyer will do, the expectation is that tasks that are more complex, or require a level of knowledge or skills beyond the capacity or experience of the client, will be undertaken by the expert.¹³⁶

The context of the unbundling debate, at least in the United States, is largely about ways of improving access to legal services through alternative delivery models.¹³⁷ It follows that a principal rationale offered for the practice is the reduction of the client's legal fees.¹³⁸ Other perceived advantages are client independence and empowerment, while from the lawyer's point of view unbundling may have economic benefits¹³⁹ and present opportunities to remain distant from aspects of the client's problem that are emotionally charged.¹⁴⁰

Nevertheless, questions about the efficacy of the practice remain, especially in relation to those 'unbundled' services that shift large amounts of responsibility to the client, and which really amount to self-help. There are also concerns about the ethics of limited legal assistance, together with possible malpractice consequences.¹⁴¹ On the other hand, the delivery of lawyers' services that involves less than the full service package may not be as unusual or novel as might have been assumed.¹⁴²

It is probable that unbundling-type arrangements are also part of Australian legal practice,¹⁴³ although empirical information on the extent of client participation in service delivery is scarce. The one, and possibly

¹³⁵ Anonymous (1997) 'Mosten's Model for Unbundling' 70 (9) *Wisconsin Lawyer*, <http://www.wisbar.org/wislawmag/1997/09/side1.html>. 4 December 2001.

¹³⁶ Mosten (1994), p 423.

¹³⁷ M McNeal (2001) 'Unbundling and Law School Clinics: Where's the Pedagogy?' 7 *Clinical Law Review* 341, pp 345-351.

¹³⁸ Micklewright (2000), p 6.

¹³⁹ Mosten (1994), p 425.

¹⁴⁰ McNeal (2001), p 352.

¹⁴¹ McNeal (2001), pp 353-357 and M McNeal (1997) 'Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients' 32 (2) *Wake Forest Law Review* 295, pp 311-330.

¹⁴² Micklewright (2001), p 6.

¹⁴³ Indeed, task differentiation is a core feature of a legal practice culture in which some practitioners are briefed by others, on behalf of their clients, to perform specified tasks (including those of representation). This is unbundling as between practitioners, or as between solicitor and barrister where the distinction persists. The 'unbundling' concept was also commented upon in Australian Law Reform Commission (2000) *Managing Justice: A review of the federal civil justice system*, ALRC p 89. As yet there appears to be no clear model of professional legal behavior in Australia that acknowledges and appropriately accommodates varying degrees of client co-productive input.

only, major study in the area indicates that unbundling does occur in the delivery of family legal services, even if the practice is not known by that name.¹⁴⁴ Some of the findings from this study have been referred to in the discussion of the empirical literature, above. In another survey it was found that many Australian lawyers engage clients on terms that do not conform to the full service package model.¹⁴⁵ A study of lawyers involved in legal aid work noted that clients were being required to take responsibility for some tasks because their lawyers saw the remuneration as inadequate.¹⁴⁶

The client as co-producer

(1) An index of client co-production

As already noted, the services literature characterizes legal services as complex and task-interactive, in which there is often a high degree of dependency on client input leading to the creation of a customized service.¹⁴⁷ The preceding analysis of the various perspectives on lawyers' services, from the point of view of client engagement in the 'production and delivery process',¹⁴⁸ reveals various types of client input. From these examples, coupled with insights on co-production from the services literature,¹⁴⁹ it is possible to distil a general summary of the kinds of client co-productive activity that might be present in legal services of this nature.¹⁵⁰ In essence, the legal client's co-productive role is about providing authority and information, stating goals and interests, making decisions and performing set tasks.¹⁵¹

¹⁴⁴ Hunter et al (2000), pp 200-204.

¹⁴⁵ C Cameron (2000) 'Willingness to Unbundle – A partner analysis', unpublished report of a survey conducted at the School of Law, Griffith University, Australia. Responses were sought to seven questions in an email survey directed to 100 Australian lawyers in four states (South Australia, Victoria, New South Wales and Queensland). The response rate was 31% with the highest from Victoria (50%). The central question was whether the practitioner had previously unbundled services (and a definition of this form of delivery was provided). 76% claimed to have done so in a variety of fields, including family law, immigration and property services.

¹⁴⁶ J Giddings, J Dewar & S Parker (1999) 'Being Expected to do More with Less: Criminal Law Legal Aid in Queensland', 23 *Criminal Law Journal* 69.

¹⁴⁷ See above at footnotes 26-27.

¹⁴⁸ Kelley et al (1990), p 315.

¹⁴⁹ Such as the type of consumer effort (physical, emotional, intellectual), the nature of task involvement (information supply, completion of set tasks) and the degree of involvement.

¹⁵⁰ That is, personal services legal work, which has been the focus of this article. However, in most respects the index may also be applicable to work done for organizational clients.

¹⁵¹ To this list could be added, at the beginning, the service specification function in which the client communicates the need for and type of service required. This function has been mentioned (above, and Normann (1991), pp 80-81) but not explored in this article.

1. The client provides the formal authority and directions necessary to empower the lawyer to act;¹⁵²
2. The client communicates and provides all relevant information of a factual nature, including documentary information; both at the commencement of the service relationship and as necessary for its duration;¹⁵³
3. The client communicates her or his goals and interests in the matter, including preferences, perceptions, and concerns; both at the outset and for the duration of the relationship;¹⁵⁴
4. The client makes and communicates decisions at various stages of the legal service process, sometimes but not always in response to requests, options or suggestions generated by the lawyer;¹⁵⁵
5. Through negotiation and arrangement with the lawyer, the client carries out particular tasks (that might otherwise have been performed by the lawyer) that facilitate completion of the service.¹⁵⁶

It is important to acknowledge that this is an index of *potential* client participation,¹⁵⁷ and therefore an ideal rather than a description of actual practice. It suggests what clients might do as co-producers, rather than what they actually do or always do. It does not, however, reveal the unavoidable complexities and uncertainties associated with the communication of all kinds of information between clients and lawyers.¹⁵⁸ Nor does it reveal that (1) in reality, client participation will vary enormously as between services, lawyers, and clients and (2) the potential for and quality of client involvement is always mediated through and by questions of power and control in the relationship between lawyer and client. These matters are considered next.

(2) Variations in client co-production

Some client participation seems inevitable (or 'mandatory' as the services

¹⁵² This is the agency mandate, or other contractual authority to perform non-representational work. This aspect of the index emerges most clearly in the traditional and doctrinal accounts of lawyers' work.

¹⁵³ Information supply is a key feature of all the lawyer-client perspectives considered above.

¹⁵⁴ This aspect is evident from the sociological studies and in work on client-centred lawyering (for example, Binder, Bergman and Price (1991), p 248).

¹⁵⁵ The (disputed) role of the client in decision-making is a particularly strong theme in the literature on power and control, and in client-centred lawyering. For an account of lawyers giving clients 'options' see Hunter et al (2000), p 319.

¹⁵⁶ The assignment of tasks to the client is at the core of the concept of unbundled legal services; it also appears in the empirical study by Felstiner and Sarat (1992), for example.

¹⁵⁷ See also Rosenthal's index of participation for personal injury clients: Rosenthal (1974), p 31, which is somewhat different.

¹⁵⁸ See above, at footnotes 81-83.

¹⁵⁹ Bitner et al (1997), p 194.

literature asserts)¹⁵⁹, such as when the client provides the 'instructions' without which there would be no legal service. However, the accounts of lawyers and their clients discussed in this article suggest that client involvement in lawyers' services is inconsistent in terms of types, the timing and the degree of involvement. Client participation depends on many factors that are integral to the particular service setting, and these vary considerably.

What are the factors that are likely to have a bearing on – that is, increase or inhibit – client co-production in lawyers' services? Again, the services literature provides a general background account of the likely reasons for variations in consumer involvement in service transactions. Variations are likely to occur according to the nature of the service, the qualities and preferences of the provider, and the qualities and preferences of the consumer.¹⁶⁰

As has been shown above, questions of control and influence in the service encounter are significant for service theorists. A degree of control over clients is seen to be important in the service delivery setting.¹⁶¹ So, too, in the legal service setting. Lawyers' services are conducted in the lawyer's world¹⁶² and in many settings the lawyer has a propensity to assume a large degree of control over the work.¹⁶³ In these situations the relative powerlessness and vulnerability of the client will militate against participation, particularly in decision-making. However, the lawyer's influence may also be used to avoid responsibility for certain tasks, by assigning responsibility to the client. Incidents of lawyer-power at the relevant moment, therefore, have much bearing on the allocation of responsibility as between lawyer and client.¹⁶⁴

However, not all clients are powerless, at least partly because of the mutual dependency to keep the service moving: the lawyer is 'never solely in control' of the production of the legal service, and 'the client is never simply a timid consumer'.¹⁶⁵ Assuming this to be the case, it would seem to follow that the potential for more or less co-productive activity by the client will be as uncertain and unpredictable as relationship power itself. In other words, where client participation is not 'mandatory' the question or degree of client co-productive activity will depend largely on the influence that one or both parties possess at the time. And even

¹⁶⁰ See above, at footnotes 28 to 37.

¹⁶¹ Bateson (1985).

¹⁶² Felstiner and Sarat (1992), p 1457.

¹⁶³ See above and for example L Mather, R J Maiman and C A McEwan (1995) "'The Passenger Decides on the Destination and I Decide on the Route': Are Divorce Lawyers 'Expensive Cab Drivers?'" 9 *International Journal of Law and the Family* 286; and Uphoff and Wood (1998).

¹⁶⁴ Felstiner and Sarat (1992), p 1487.

¹⁶⁵ Sarat and Felstiner (1995), p 23. See also S Wheeler (1991) *Reservation of Title Clauses: Impact and implications*, Oxford University Press, pp 188-9.

¹⁶⁶ Hunter et al (2000), pp 202-203.

when participation is or should be 'mandatory' – such as with information supply or crucial decision-making (items two and four of the participation index) – the degree and quality of this involvement will also be mediated by matters of control and influence.

It is to be supposed that lawyers, who adopt participatory styles of lawyering, rather than 'lawyer-in-charge' ones, are more likely to encourage enhanced client co-productive activity. However, even these practitioners may feel constrained by perceptions of their clients' inability, for whatever reason,¹⁶⁶ to handle tasks responsibly, even though those perceptions might not be valid. Rightly or wrongly, lawyers might also perceive a risk to the quality of the service, and therefore to their own reputations.¹⁶⁷ More generally, lawyers may prefer to keep tight control over service production because they believe it is unprofessional not to do so, particularly when there are real ethical concerns associated with a loss of control together with the threat of liability for negligence (or contractual breach) if matters go wrong.¹⁶⁸

There could be some advantages to lawyers in encouraging their clients to participate more actively as co-producers. Presumably, only a cynical practitioner would discourage conscientious and accurate information supply (as envisaged in item 2 of the participation index). And some lawyers might genuinely welcome the benefits of having their clients feel more involved and more in control.¹⁶⁹ In some circumstances having clients perform tasks could be a cost saving strategy for the lawyer (particularly when a matter is being handled for a set fee¹⁷⁰). In others, having clients take responsibility for certain tasks could allow the lawyer to maintain a distance from emotionally charged activities, and thus avoid awkward and unwanted responsibility.¹⁷¹

The services literature suggests that from the point of view of the client the factors of skills, motivation, cost, time, effectiveness, control and perceptions of lawyer expertise are relevant to co-production.¹⁷² Many, if not all, of these appear to be relevant to legal client co-production. For example, cost reduction to the client is a major advantage at a time when access to legal services remains an issue fraught with difficulty.¹⁷³ But some (many?) clients may prefer not to be involved more than is absolutely necessary, and are content to know that their case is being handled effectively.¹⁷⁴ Involvement imposes burdens, even if participating clients can expect to achieve better outcomes.¹⁷⁵ Other clients may seek greater

¹⁶⁷ Hunter et al (2000), p 203.

¹⁶⁸ See, for example, the discussion of unbundled legal services above.

¹⁶⁹ Hunter et al (2000), p 202.

¹⁷⁰ Giddings et al (1999) and Hunter et al (2000), p 202.

¹⁷¹ McNeal (2001), p 352.

¹⁷² See above, at footnotes 31-37.

¹⁷³ McNeal (2001), pp 350-351.

¹⁷⁴ For example, Boon (1995), p 265; Simon (1991), p 216; Rosenthal (1974), p 28.

¹⁷⁵ Rosenthal (1974), pp 170-173.

involvement and the senses of independence, control, empowerment and fulfillment that this may bring.¹⁷⁶ But some clients lack the technical or language skills required to perform even basic tasks,¹⁷⁷ while the abilities of others are compromised by stress or emotional vulnerability brought about by the same circumstances that warrant legal intervention.¹⁷⁸ Other client-specific factors include issues of client gender¹⁷⁹ and whether the client is an organization.¹⁸⁰

Services involving personal interaction between provider and consumer often involve higher client involvement,¹⁸¹ but participation is more difficult in complex, knowledge-based transactions.¹⁸² In legal services, complexity is often readily assumed, making the prospect of greater client participation appear to be difficult or even impossible. But some seemingly complex legal work is susceptible to task unbundling, providing the potential for more co-productive activity.¹⁸³ Some legal services are in fact more routine than is commonly assumed, which is precisely why do-it-yourself consumer packages – such as in conveyancing transactions – are available in the market.¹⁸⁴ Complex or not, in some legal services the opportunities for client involvement, such as in strategic decision-making, may be limited.¹⁸⁵ Furthermore, in the delivery of certain types of services the degree of dependency between the parties may be small, such as in a routine, one-off transaction. In such services, client participation is minimal. But, in others, such as the family law dispute, there is potential for complex interactions and multiple client inputs within a dynamic scenario over a protracted period.¹⁸⁶

Conclusion

This article has focussed on client co-production in legal services. The primary aim has been to bring the client's role in the service production process into the foreground and to make more transparent the fact that

¹⁷⁶ An acceptance of this lies at the core of participatory lawyering styles and the practice of unbundling.

¹⁷⁷ Kritzer (1998), p 798.

¹⁷⁸ Hunter et al (2000), pp 202-3.

¹⁷⁹ For example, are female clients in as good a position as male clients at co-producing in the essentially male domain of legal practice and the courts?

¹⁸⁰ Studies suggest that relationships between lawyers and organizational clients are likely to differ from those with individual clients around questions of influence and control. See, for example Southworth (1999); Hanlon and Jackson (2000); and these clients may have a more pronounced participatory role than personal services clients.

¹⁸¹ Mills and Morris (1986), pp 727-728.

¹⁸² Mills and Moshavi (1999).

¹⁸³ Mosten (1994), p 423.

¹⁸⁴ Giddings and Robertson (2001).

¹⁸⁵ Boon (1995), pp 263-264.

¹⁸⁶ Felstiner and Sarat (1992), pp 1472-1495.

legal clients are often co-producers of their own services. A secondary aim has been to provide a generalized account of what client co-production in legal services means and to highlight factors that encourage or inhibit client involvement in service delivery. Thirdly, this has involved an attempt to demonstrate that client co-production is a theme of much literature on lawyers and their clients, even if the concept of co-production is not clearly articulated. Fourthly, this article has sought to make some connections between two seemingly unconnected disciplinary areas, by exploring an important theme that is common to both.

The part the client actually plays in legal service delivery does not receive sufficient attention in the language and culture of traditional practice. Lawyers have tended to emphasize their own knowledge, skills and productive capacity as the epitome of legal work. Hence, we are generally encouraged to think about legal solutions as lawyers' products, rather than the efforts of both lawyers and their clients. An approach to legal services that focuses primarily on the client, rather than the lawyer, provides a different perspective on legal work involving professionals.

A focus on the legal client's role in legal service delivery may become increasingly relevant in the changing legal services marketplace. The high cost of professional legal work coupled with dwindling legal aid services means that, for these reasons alone, the matter of access to legal services remains pertinent and pressing. There are no access to justice solutions, or even partial solutions, on the horizon. At the same time, and precisely because access to law is becoming more a marketplace issue than a public policy one, we are witnessing the rise of legal clients who wish, or are required, to exercise consumer-type choices and control. It is tempting to see in this climate an opportunity to harness legal consumers' own productive capacity as a way to ease some of the blockages in access to legal services. In other words, there may be a growing perception that more people can get access to legal services by making them more active co-producers. If this is true, there is a very real need to gain a better understanding of both the possibilities *and* limitations of greater client participation in lawyers' services. This article has endeavored to contribute to that understanding.