

Lawyers v. Businessmen: Where Are the Bad Men?

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Christine Parker, Robert Rosen & Vibeke Lehmann Nielsen, *The Two Faces of Lawyers: Professional Ethics and Business Compliance With Regulation*, 22 **Georgetown Journal of Legal Ethics** 201-248 (2009), available at [SSRN](#).

In the glamorous/murky/elite/financially rewarding world of commercial law is it clients or lawyers who are the bad guys? Put another way, does business corrupt law or do lawyers corrupt business? This is the question that lies at the heart of Parker, Rosen and Nielsen's [paper](#). Since the Savings and Loan scandals via WorldCom, Enron and latterly UK's own [Hackgate](#), corporate wrongdoing is often accompanied by the question, *Where were the lawyers?* And as Big Law turns increasingly, well, 'big', the "is law a business or a profession" question is posed increasingly nostalgically, usually with deliberate exaggeration and answered only with speculation rather than evidence. It is refreshing, therefore, to report on a study which deals with the relationship between law and business empirically and with imagination which also deals with conceptually important questions.

Indeed, it is a central premise of professionalism that lawyers that they apply their specialist knowledge in the public interest. That is lawyers should act to encourage lawfulness on the part of their clients. They should encourage compliance. Professional ethics courses tend to concentrate on the idea that it is a [Holmesian 'bad man'](#) client that pushes lawyers into ethically grey areas. In particular that client (usually a businessman or criminal defendant—sometimes both) exploits a lawyer's duty to zealously defend their client's interests. Corporate clients, as sophisticated players, with deep pockets and repeat business on offer, are able, so the theory goes, to corrupt their lawyer's into finding ways of playing the system to the client's advantage. In simple terms the theory is lawyers good/clients + markets bad. And, of course, markets win. Parker and her colleagues ask the question: Is this an empirically testable proposition? And, once tested, is it an accurate proposition which is borne out by the evidence? For those of you with short attention spans the answers are yes it's testable and no, it's not an accurate proposition.

Ingeniously, the study separates out lawyer attitudes to compliance and business client attitudes to compliance and then looks at how those businesses use those lawyers. Do those who use lawyers value compliance more or do they, "exhibit a more resistant or game-playing approach to compliance?" The answer is both: "Some businesses that use lawyers more value compliance more, while others exhibit a more resistant or game-playing approach to compliance." It is the latter part of the study which is particularly interesting. It seeks to determine what influences clients towards one strategy or the other. To a degree it is client choice: "clients generally pick lawyers who are aligned with the client's commitments to compliance, but that some lawyers also influence their clients to take a legalistic, game-playing approach to law. Clients who are committed to compliance hire lawyers to help promote compliance in their organizations, and those who are committed to resistance hire lawyers to resist compliance."

So there is some truth in the claim that a number of clients are Holmesian bad-men who then pick lawyers who will be likely to adopt their strategy of resisting or avoiding compliance with the law. Clients + markets pick (or lead to) lawyers who are bad (if one accepts that resisting and avoiding compliance is bad, a topic much debated by adherents to zealous advocacy theses in corporate contexts). Crucially, however, they go on to consider the extent to which lawyers contribute to, or ameliorate, the extent of the problem: taken as a whole do they tend to nudge clients towards compliance or avoidance? Parker et al indicate, "Our data suggest that to the extent lawyers influence clients, it is towards game-playing, not commitment to compliance or resistance to compliance."

Thus, to the extent that lawyers exert any moral agency they seem to be tending towards an unethical rather than an ethical position: "lawyers supply services that incline clients to increasingly accept legal risk and adopt a gamester

approach to law and regulation.” This is only one study, of course, and it is confined to Australian firms’ compliance with consumer and competition regulation, but it throws important and critical light on a key assumption behind the professionalization thesis. In the UK, the debate manifests around [Alternative Business Structures](#) and assumes that lawyers are more ethical than external owners. This looks more questionable after this study. In the US, and elsewhere, lawyers are seen as potential regulators of business as ‘gatekeepers’—virtuous proponents of probity. Parker, Rosen and Nielsen remind us of the possibility that sometimes clients want their lawyers to be good, and (worryingly) sometimes their lawyers talk them out of it.

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