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The Experience of a Legal Career: Attorneys' Impact on the System and the System's Impact on Attorneys

Krystia Reed

Department of Psychology, The University of Texas at El Paso, El Paso, Texas 79902, USA; email: kmreed2@utep.edu

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Abstract

Because attorneys are essential to a fair legal process, it is important to understand the experience of a legal career. This article first reviews research on the influence of attorneys on the legal system, focusing on the effect on the influence of trial attorneys on (*a*) juries, with a particular focus on attorney skill, behavior, trial decisions (i.e., joinder/severance, jury selection, opening arguments, witness selection, questioning style, cross-examination, objections, closing arguments), and characteristics (gender, race/ethnicity, attractiveness), and (*b*) clients. The article then reviews the limited research on the role and impact of attorneys outside the litigation context, followed by the influence of the legal system on attorneys, with a focus on attorney distress (prevalence, causes, and consequences). The review concludes with a discussion of the overall relationship between attorneys and the legal system.

INTRODUCTION

The Sixth Amendment recognizes the importance of attorneys in the legal system by providing criminal defendants the right to counsel. In *Powell v. Alabama* (1932), the Supreme Court established that due process requires indigent defendants be appointed counsel to represent them free of charge. In *Powell* (1932, p. 6), Justice Sutherland emphasized the importance of attorneys by stating,

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Thus, the Supreme Court validates the Constitution's presumption that attorneys are fundamental to the criminal legal process. Moreover, wise words, often (likely erroneously) attributed to former president and attorney Abraham Lincoln, state, "He who represents himself has a fool for a client" (Ahtirski 2011), suggesting that even trained attorneys should be represented by a specialist in legal matters.

Given the asserted importance of attorneys to the legal process, one set of research questions arises about their actual impact. A companion question also arises: What is the experience of a legal career? Because there is obviously quite a bit of diversity in the legal profession, there is no single answer. Nevertheless, it is important to consider attorneys' common experiences in the legal system. Thus, this review focuses on research on attorneys in two areas: the influence of attorneys on legal system outcomes and the influence of the legal system on attorneys. Together, these two areas of research provide insight into the legal profession. The review concludes with a discussion of the overall relationship between attorneys and the legal system and the changes in the legal landscape.

THE INFLUENCE OF ATTORNEYS ON THE LEGAL SYSTEM

When trying to understand the experience of a legal career from a social scientific perspective, perhaps the first question that arises is *do* attorneys influence the legal process? And, if so, *how*? Merely having an attorney (as opposed to pro se representation) can benefit clients in jury decisions (Quintanilla et al. 2017), and representation in civil cases leads to better outcomes in most substantive areas (housing, governmental benefits, family law, employment law, small claims, tax, bankruptcy, and torts; Poppe & Rachlinski 2016, Sandefur 2015). Consistent with legal psychological research more generally (e.g., Reed et al. 2018, Wylie et al. 2018), most research on attorneys focuses on their influence on juror decisions, particularly in the criminal realm. This section reviews research examining the influence of attorneys primarily in the trial setting, where most of the research occurs, but also reviews the limited research on attorneys in non-trial settings.

Trial Attorneys

The majority of research on attorneys focuses on attorneys in a litigation or trial context. Moreover, much of this research examines the influence of criminal attorneys on juries. Thus, this section reviews the research on how attorneys influence juries as well as existing research on how attorneys influence their clients.

Juries. Many trial advocacy professionals promote the notion that attorneys have a powerful influence on trial outcomes (e.g., Trachtman 2013). Attorneys develop, organize, and present the evidence in a case that goes to the jury. Arguably, because attorneys are so integral to the evidentiary process, it is extremely difficult to distinguish between attorney skill and evidence strength. In fact, attorneys are often credited/blamed for the outcome of a trial. Consider, for example, the O.J. Simpson criminal trial. Journalists discussed the role of the defense "Dream Team" (e.g., Mydans 1995) and the effects of prosecutor Marcia Clark's decisions (e.g., Turow 1995) in Simpson's not-guilty verdict. Studies of jury deliberations indicate that attorneys are mentioned occasionally (Diamond et al. 1996). Juries may believe they are focused only on the evidence, without awareness of how the attorney who crafted the narrative impacts them.

Thus, several empirical studies have examined the role of attorneys, suggesting that, above and beyond the cases they present to juries, attorneys' skill, behavior, and characteristics have a modest impact on trial outcomes. It must be noted that these factors are examined almost entirely on an individual basis; however, in trial these decisions have to be made in combination. Thus, one limitation of this area of study is that empirical research offers little guidance on how these factors interact.

Attorney skill. Attorney skill has been defined as the attorney's capabilities that benefit the client independent of the strength of the case (Shinall 2010). There have been several attempts to quantify attorney skill, focusing on whether an attorney is hired or appointed (Smith 1919), how much an attorney is paid (Boylan 2004, Iyengar 2007), and how much experience the attorney has (Abrams & Yoon 2007, Shinall 2010). However, results are inconsistent; approximately half of the studies find positive correlations between the skill proxy and case outcomes, but the other half do not. Moreover, many of these studies do not account for attorney matching; higher-paid attorneys might have higher success rates at trial because they have the luxury of selecting only cases with strong evidence in favor of their clients (Abrams & Yoon 2007, Shinall 2010). In a review of 12 early studies, Feeney & Jackson (1991) concluded that attorneys are a heterogeneous group and that it is difficult to identify the true effect of attorney skill on trial outcomes.

Legal psychologists Linz et al. (1986) attempted a more systematic investigation of attorney skill by having attorneys, jurors, and research assistants rate attorney skill in 50 cases. Research assistants consistently rated prosecutors higher than defense attorneys. Additionally, whereas the prosecutors' self-ratings tended to be consistent with the jurors' ratings, defense attorneys significantly overrated their courtroom skill. Nevertheless, there was no significant link between the ratings of attorney skill by any party and trial outcomes (Linz et al. 1986).

Given the inconsistent results across studies, it appears that attorney skill is difficult to quantify. Ratings are not always consistent, and evidence about the connection between measures of attorney skill and case outcomes is mixed.

Attorney behavior. One element that is related to attorney skill is the influence of attorney actions and strategic choice on the trial. An attorney's ability to put together the evidence in a convincing way is a key part of success at trial. Research on attorney behavior has focused on several areas, including (in trial order) requests for joinder/severance, voir dire, opening statements, witness selection, questioning style, objections, and closing arguments.

Joinder and severance. In cases involving multiple charges/claims or multiple parties, one of the first decisions attorneys must make is whether to request joinder or severance. Joinder is a process in which multiple cases (either parties, criminal charges, or civil claims) are consolidated and tried simultaneously; in severance, joined cases are split into individual cases. Joinder is a

relatively common phenomenon in trial, occurring in more than 60% of criminal cases (Leipold & Abbasi 2006) and permitted even more liberally in civil cases (Effron 2012). Courts stress that joinder is extremely important to the efficiency and economy of the system [*Parker v. United States* (1968)]. However, judges have discretion to sever cases if joinder creates actual prejudice against a party [*Zafiro v. United States* (1993)]. The Supreme Court has identified four potential sources of prejudice arising from joinder: confusion of evidence, accumulation of evidence, attributions of a culpable disposition, and defense strategy [*United States v. Foutz* (1976)]. Additionally, when parties are joined, there is a danger that jurors might make determinations of guilt or liability based on the defendant's association rather than on direct evidence (Leipold & Abbasi 2006).

Consistent with the court's concerns in *Foutz*, psycholegal research on joinder has demonstrated the potential to prejudice defendants. Research indicates that in joined cases, evidence is confused (Bordens & Horowitz 1985) and accumulates (Tanford & Penrod 1982). Defendants are judged more negatively when there are many charges against them (Bordens & Horowitz 1985, Greene & Loftus 1985, Horowitz et al. 1980, Kerr & Sawyers 1979, Tanford & Penrod 1982). These negative character perceptions predict unfavorable verdicts (Tanford 1985). In fact, Tanford & Penrod (1982) demonstrated that the probability of conviction is positively correlated with the number of charges.

There is also support for concerns about the influence of joinder on other judgments. Consider the findings from several mock civil jury studies about the influence of joinder on liability and damage award decisions. As the number of plaintiffs increases, so does the likelihood that the defendant will be found liable (Horowitz & Bordens 2000). Moreover, in the cases where liability is found, the overall damage award also increases (Horowitz & Bordens 1988). However, jurors appear to struggle in differentiating between plaintiffs of different injury levels. For example, one experiment compared less-injured and more-injured plaintiffs in individual trials or joined trials (Horowitz & Bordens 1988). In the joined trial, overall awards were higher than in the individual cases combined; however, the difference appeared to disproportionately benefit the less-injured plaintiff. The less-injured plaintiff received more in the joined trial than in an individual trial; the more-injured plaintiff received less in the joined trial than in the individual trial. Another study found that joinder of defendants (rather than plaintiffs) increased damage awards but did not influence liability decisions (Reed 2015, Reed & Bornstein 2015). Thus, joined parties likely are being judged on a group level rather than an individual level.

Consequently, determining whether to request joinder, or more likely whether to request severance when cases are already joined, is an important decision for attorneys in both civil and criminal cases. Attorneys must carefully weigh the potential costs and benefits of joinder, which likely vary based on the specifics of the cases being joined. Given the high bar for severance [i.e., actual prejudice; *Zafiro* (1993)], attorneys must make a very convincing argument that their client will face prejudice if the cases remained joined.

Voir dire. Once decisions have been made on joinder/severance and the case goes to trial, one of the next steps for the attorney is voir dire, or jury (de)selection. During voir dire, attorneys identify potentially unfavorable jurors to strike using either challenges for cause or peremptory challenges (Hans & Jehle 2003). The judge has substantial discretion in the conduct of voir dire (Hans & Jehle 2003), but attorneys have the ability (and arguably the professional responsibility) to challenge procedures they think will be unfair for their case. There is much folklore about what attorneys do not want in a juror (e.g., a particular race or gender; Fulero & Penrod 1990), but whether these myths are verified in real juries is unclear (Hastie 1991).

Studies of attorney effectiveness during voir dire are mixed. Surveys of real jurors indicate that approximately 10% of the variance in juror preferences can be accounted for by juror

characteristics such as gender, political affiliation, race, and age (e.g., Devine 2012). Yet, even if attorneys rely on these characteristics, there is concern that in practice attorneys are much less accurate than statistical models at identifying jurors favorable to their case (Hastie 1991). Empirical studies suggest that attorney strategies for excluding jurors based on these characteristics are generally ineffective (e.g., Fulero & Penrod 1990). And an observational study of 20 actual voir dire processes concluded that attorneys are "grossly ineffective" at identifying unfavorable jurors (Broeder 1964, p. 503). Furthermore, relying on factors such as race or gender as the basis of a challenge is unconstitutional [e.g., see *Batson v. Kentucky* (1986) on race and *J.E.B. v. Alabama ex rel. T. B.* (1994) on gender].

Evidence supporting scientific jury selection based on demographic information is limited; however, juror attitudes are better predictors of verdicts than demographics characteristics (Saks 1997). Scholars have therefore begun recommending "expansive voir dire" techniques, which permit a wider range of questioning (both open- and close-ended) to assess juror attitudes (Hans & Jehle 2003). Usually, expansive voir dire also includes techniques that allow for more detailed, thoughtful, and private responses, such as jury questionnaires or individual/sequestered voir dire. Proponents of expansive voir dire suggest that when attorneys have more information, they are less likely to rely on inaccurate assumptions about demographically based stereotypes (Hans & Jehle 2003). In fact, researchers have found that limited voir dire prevents attorneys from identifying clear biases (e.g., Johnson & Haney 1994), whereas expansive voir dire permits attorneys to obtain more information regarding bias and results in more successful jury selection (Nietzel & Dillehay 1982).

Thus, to be successful in voir dire, attorneys need sufficient, accurate information, which can be extremely challenging to obtain. The challenge is particularly concerning given the emphasis some scholars place on jury selection. Indeed, some scholars suggest a trial is won (or lost) as soon as the jury is seated (Mogill & Nixon 1986). This importance has likely led attorneys to supplement the information they gather, often by hiring trial consultants. Reliance on expensive trial consultants is especially common in high-stakes, high-dollar civil cases. Trial consultants often engage in in-depth juror research, such as investigating potential jurors in public record and legal databases, as well as on social media (Frederick 2018). Some trial consultants rely on empirical research to guide their suggestions, but empirical research on the effectiveness of trial consultants is lacking. Consequently, voir dire is another process that puts a lot of pressure on attorneys without much guidance or control over a successful outcome.

Opening statements. After the jury is selected, the attorneys begin opening statements—the first official opportunity to present their case to the jury. Scholars recommend that attorneys give jurors a clear, simple opening statement that develops the themes, theory, and story of the case (Melilli 2006). One study asked participants to provide judgments after the opening statement and found the post-opening judgments to be fairly consistent with final verdicts (Weld & Danzig 1940). Another study manipulated the amount of information provided in the opening statements and found that the first party to present an extensive opening statement had the more favorable verdict (Pyszczynski & Wrightsman 1981). Some scholars argue that opening statements always favor the prosecution and that the defense should not even make an opening statement because the prosecution has the burden of proof (Greenberg & Ruback 1982). There is partial support for this position, as a study of actual opening statements found that observers rated the prosecuting attorneys' opening statements as more organized, factual, and legally informative than defense attorneys' openings (Linz et al. 1986). Other scholars suggest that defendants be given the opportunity to capitalize on this primacy effect by having the option to present the first opening statement (Shirkey 2010).

Witness selection. Following opening statements comes presentation of the case through witnesses. There is a spectrum in terms of how much control attorneys have in selecting witnesses. For example, attorneys have quite a bit of control in selecting an expert witness; in most cases, several options are available. Attorneys have less control over selection of eyewitnesses and other fact witnesses personally involved in the case—they cannot choose which people were involved in an event, but they may be able to decide whether or not to present the evidence. Attorneys have the least discretion with defendants because it is ultimately the defendant's decision whether to testify, though attorneys might be able to influence the defendant's decision.

Research indicates that witness selection (when possible) is important. The extensive research on expert witnesses demonstrates that a variety of factors influence expert witness effectiveness (e.g., Bornstein 2004). There is also extensive research on the influence of eyewitnesses on juries, including factors such as confidence that make eyewitnesses more credible (e.g., Lindsay & Wells 1983). Defendant testimony, or lack thereof, can also influence juror decisions (e.g., Antonio & Arone 2005, Hendry et al. 1989). Several Annual Reviews articles review research on the impact of witness testimony [see, for example, those by Murrie & Boccaccini (2015) on experts and Wells & Olson (2003) on eyewitnesses]. Suffice it to say that the witnesses attorneys choose to put on can and do influence juror decisions.

Questioning style. Once the attorneys determine which witnesses to use, they must decide how to question their own witnesses and the opposing witnesses. Questioning witnesses is a complex balance of eliciting desired information without eliciting unwanted evidence/answers that violate evidentiary rules. Question phrasing can also be important. Attorneys who use complex legalese tend to confuse witnesses, leading to errors in responses (Perry et al. 1995). Compared with prosecutors, defense attorneys tend to ask more complex questions (Zajac & Hayne 2003), which can backfire and result in more convictions (Evans et al. 2009). Thus, attorneys must be extremely cautious in questioning the witnesses they put on the stand.

Questioning opposing witnesses can be even more complicated. Cross-examination is a fundamental part of the adversarial system that allows attorneys to challenge presented evidence (Mauet et al. 1989). Attorneys tend to ask complicated, confusing, close-ended questions on cross-examination; however, witnesses rarely ask for clarification, even when they are confused (Zajac & Cannan 2009). Instead, most witnesses comply with the attorney's leading questions, and possibly provide inaccurate information (Zajac & Cannan 2009).

The effectiveness of cross-examination depends on several factors, including the type of attorney and the type of witness. For example, hostile attorneys have been found to be more effective when asking non-leading questions, whereas nonhostile attorneys are more effective when asking leading questions (Gibbs et al. 1989). Moreover, implying the witness has a negative reputation during questioning negatively impacted ratings of expert witness credibility but not victim credibility (Kassin et al. 1990).

An important purpose of cross-examination of expert witnesses is to help jurors accurately evaluate evidence. When tested, attorneys are able to identify evidentiary issues, such as biased eyewitness lineup procedures (Stinson et al. 1996). However, questions arise regarding whether attorneys can convey these concerns through cross-examination in a way that helps jurors accurately understand these issues (Stinson et al. 1997). Several studies have found that cross-examination can help jurors make more valid evaluations of expert testimony (e.g., Krauss & Sales 2001, Lieberman et al. 2008) and identify flaws in scientific methodology (Austin & Kovera 2015, Salerno & McCauley 2009). Others have found that even scientifically informed cross-examination does not sensitize jurors or help them override natural heuristics (Devenport et al. 2002, Kovera et al. 1999).

Objections. Throughout the trial, attorneys must also decide whether or not to object to possible rule violations. This decision requires balancing the need to preserve the record or block unfavorable evidence with the potential of upsetting or biasing the jury (e.g., Reed & Bornstein 2018). Most empirical research on objections has used objections as a means of manipulating inadmissible evidence, finding that objections can backfire and draw more attention to the unwanted evidence, resulting in more guilty verdicts (e.g., Steblay et al. 2006, Wilson 2004). However, two studies that isolated objections (without inadmissible evidence) found that the objections alone do not influence memory of evidence, attorney ratings, or verdicts (Reed 2019). Even though the decision about objecting is an important one for attorneys that can result in much concern about the consequences, we do not yet understand empirically how objections influence jurors.

Closing arguments. Attorneys end the trial with closing arguments. Closing arguments are another area in which attorneys have an opportunity to influence the jury and another area in which empirical research is lacking. Some scholars suggest that closing arguments are an extremely influential part of the case and require a skilled attorney who is able to treat the jury with candor and respect (Caldwell et al. 2002). Empirical research suggests that closing arguments can be used to debias jurors against hindsight bias (Stallard & Worthington 1998). However, the impact of the attorney's strategy likely depends on the case. For example, in a criminal trial involving the assault of a police officer, use of conventional moral reasoning (i.e., law must be obeyed for a functional society) in a closing argument was more effective than use of postconventional reasoning (Bernard et al. 1985). In a civil breach-of-contract trial, use of a law-based closing argument was more effective than use of a narrative-based closing argument (Spiecker & Worthington 2003). The limited empirical research suggests that closing arguments can be influential. But most of the existing advice for attorneys is based on personal experience or reviews of successful orators (e.g., Hobbs 2003), not on systematic experimentation of different approaches. More research should be done to empirically test this advice.

Attorney characteristics. The general assumption of the legal system is that jurors make rational decisions based only on evidence presented during trial (i.e., that justice is blind). What about the personal characteristics of the attorneys? In one study, approximately 7% of juries mentioned personal attributes and attorney style in their deliberations (Diamond et al. 1996). That likely understates the impact of an attorney's personal characteristics. Research has found that an attorney's gender and race/ethnicity can influence juror decisions, even if jurors do not recognize or admit the influence of these characteristics.

Gender. Many attorneys report that White male attorneys experience advantages in the courtroom (Seron et al. 1997). In a survey of potential Arkansas jurors, nearly half (45.2%) of respondents believed that male attorneys are taken more seriously than female attorneys, and the other half (44.8%) believed there was no difference (Brown & Campbell 1997). Similarly, 88% of female attorneys and 57% of male attorneys in North Dakota believed that gender influences jury decisions (Levine & Herman 1996). Moreover, there have been major reports of gender bias favoring male attorneys in the courtroom (Warshawsky 1993–1994). Thus, it is clear that male and female attorneys have different experiences in the courtroom, raising the question of whether male and female attorneys have differential effects on jurors.

Experimental research using mock-jury paradigms has investigated the relationship between attorney gender and juror decisions (Nelson 2004). The results have been mixed. Some studies have found no effects of attorney gender (e.g., Barge et al. 1989, Cohen & Peterson 1981, Sigal et al. 1985). Others have found that a female attorney is at a disadvantage compared with her

male counterpart, with participants rating her more negatively, deciding against her side more often, and saying they were less confident about hiring her in the future (Hahn & Clayton 1996, Hodgson & Pryor 1984, Reed 2010). Yet, the influence of attorney gender might depend on the type of case. For example, one mock-jury study found that female defense attorneys received more not-guilty verdicts for their male clients accused of rape than male defense attorneys did (Villemur & Hyde 1983).

In addition to trial type, the effect of gender might depend on other attorney characteristics. For example, male attorneys are more successful when using powerful speech, whereas female attorneys are more successful when using powerless speech (Baer 2008). Hahn & Clayton (1996) found that aggressive attorneys, especially aggressive male attorneys, received better results. Salerno and colleagues (2018) manipulated an attorney's gender and the expression of anger in the attorney's arguments in a mock-juror study. Results indicated that attorney gender alone was not predictive of verdicts; however, there was a significant interaction between attorney gender and expressions of anger. Expressions of anger were beneficial for male attorneys but harmful for female attorneys (Salerno et al. 2018).

Similarly, attractiveness might interact with gender to influence jury decisions. Reed (2010) found that attractiveness was beneficial for male attorneys but harmful for female attorneys. Attractive male attorneys got more favorable ratings and verdicts than unattractive male attorneys; attractive female attorneys got less favorable ratings and verdicts than unattractive female attorneys (Reed 2010).

Consequently, it appears that in the rare circumstance of a sexual assault trial, female attorneys might have an advantage. In general, though, female attorneys may be at a disadvantage. But their real disadvantage comes from not being able to capitalize on the same factors male attorneys can use for success (e.g., aggression, anger, or attractiveness).

Race/ethnicity. Consistent with findings about gender bias in the courtroom, minority attorneys also report significant disadvantages compared with their White male counterparts (Seron et al. 1997). Empirical research on attorney race and ethnicity is more limited but indicates that White attorneys receive more favorable outcomes than Black attorneys (Cohen & Peterson 1981) or Mexican American attorneys (Espinoza & Willis-Esqueda 2008). Research suggests the effect of attorney race and ethnicity partially depends on juror race and ethnicity, with jurors being more favorable to attorneys of their own race (Boliver 1999). The ethnicity of the defendant might also be important, as Mexican American attorneys received particularly unfavorable results when representing a low-socioeconomic-status Mexican American defendant (Espinoza & Willis-Esqueda 2008). Thus, it appears that minority attorneys face more challenges with the jury than do White attorneys.

Clients. Attorneys influence not only the jury at trial but also their client throughout the legal process. This section focuses on how attorneys influence their clients' perceptions of procedural justice, plea bargaining decisions, and alternative dispute resolution (ADR) decisions.

Procedural justice. Attorneys may also play an important role in a client's perceptions of procedural justice, that is, whether the legal process is just. Procedural justice is built on four pillars: (*a*) The process should be fair; (*b*) the client has a voice or a chance to participate; (*c*) actions are trustworthy and transparent; and (*d*) the decision maker is neutral and impartial (Tyler 2003). Client perceptions of procedural justice are important to the legal system and predict law-abiding behavior and legal attitudes (e.g., Black 1983, Tyler 1987). In one evaluation, program evaluators surveyed juvenile offenders about their legal knowledge and their perceptions of procedural justice (Reed et al.

2018). Although many juveniles were confused about some fundamental legal concepts, such as confidentiality, their legal knowledge was positively correlated with favorable perceptions of all four procedural justice components. Additionally, they found that knowing their attorney's name was related to higher levels of legal knowledge; however, knowing the attorney's name was not significantly related to procedural justice (Reed et al. 2018). Thus, an attorney's relationship with a client (in this case, a juvenile client) may indirectly relate to perceptions of procedural justice through increased legal knowledge, but more research is necessary to investigate the link.

Plea bargaining. Attorneys can also influence their client's decision to accept a plea. In the modern justice system, more than 95% of criminal and civil cases are solved not through jury trials but through pleas or negotiations (US Sentencing Comm. 2018). Attorneys on both sides are essential to the plea system. Prosecutors have substantial discretion in offering plea bargains; defense attorneys must present the offer to the client and provide professional advice and direction (Hessick & Saujani 2002). Some scholars have argued that effective defense attorney representation is so essential, but also so threatened by attorney self-interest, that society needs to reconsider the plea system entirely (Alschuler 1975, Easterbrook 1992). Thus, it is important to empirically understand how defense attorneys influence their clients' decisions.

Several studies on the influence of attorneys on plea bargaining decisions of juvenile clients suggest that the attorney can be influential. Although most juveniles do not report feeling pressured by their attorney to admit guilt, some juveniles do report their attorney deceived, threatened, or befriended them to influence their decision to accept the plea (Malloy et al. 2014). Consequently, research has also demonstrated that attorney advice is an important predictor of the plea decision (Viljoen et al. 2005). However, clients report limited time during which to make a plea decision and infrequent contact with their attorneys (Zottoli et al. 2016).

Perhaps in recognition of the importance of their influence, attorneys report some confusion about their role in the plea process (Helm et al. 2018). Attorneys are more likely to advise clients to accept a plea than to go to trial (Alschuler 1975, Helm et al. 2018). Compounding this issue is the "meet and plead" system, in which a guilty plea is offered, accepted, and entered in the attorney's first meeting with the client (usually at the courthouse; Bibas 2013). A survey of attorneys suggests that even innocent clients routinely plead guilty, and under certain circumstances, an attorney would encourage an innocent client to plead guilty (Helm et al. 2018). Experimental research shows that attorneys are primarily influenced by evidence strength in their recommendations (Kramer et al. 2007, McAllister & Bregman 1986). However, several other factors influence attorney recommendations, including potential sentences (Kramer et al. 2007), client proclamations of guilt/innocence (Helm et al. 2018), client preferences (Kramer et al. 2007), and client race (Edkins 2011). It is possible, however, that the value attorneys place on these considerations (especially guilt/innocence) differs from the value that the client places on them. This is particularly problematic given that attorneys are at risk for claims of ineffective assistance of counsel in the plea bargaining process [e.g., *Lafler v. Cooper* (2012)].

Alternative dispute resolution. In addition to the increase of plea bargaining, there has also been an increase in the use of ADR to address legal conflict. Although ADR is by definition not a trial, the research on how attorneys influence their clients in ADR contexts is included here because it is related to avoiding litigation. Moreover, this section focuses on the role of attorneys in the ADR context (for a more comprehensive review of ADR in general, see Albiston et al. 2014).

In the ADR context, attorneys are the mediators between the law and clients, not only helping clients understand their legal rights but also helping set client expectations (Albiston et al. 2014, Erlanger et al. 1987). For example, Sarat & Felstiner (1989) examined divorce attorneys and found

that attorneys played an important role in reducing client expectations about the outcome of their case. In fact, attorneys have been viewed as agents of transformation who can influence the way clients fundamentally perceive conflict (Felstiner et al. 1980–1981).

Lawyers Beyond Litigation

Outside the trial context, there is less understanding of how attorneys influence the legal process. In fact, most research outside the typical trial context still focuses on areas of law in which attorneys are engaged in hearings and more adversarial proceedings (i.e., trial-adjacent areas). One review found that in many trial-adjacent areas (housing, administrative hearings, government benefits, employment law, family law, tax, and bankruptcy), having representation is beneficial (Poppe & Rachlinski 2016). One of the few randomized control trials of the legal system found that having lawyers during a bail hearing can have massive positive impacts for defendants, including higher release rates, system respect, compliance with orders, likelihood of keeping jobs and housing, and ability to prepare a meaningful defense (Colbert et al. 2002). Additionally, the system benefits from lower court congestion, prison overcrowding, and costs (Colbert et al. 2002).

Nevertheless, there is concern that lawyers only have minimal impact outside of the litigation context. For example, in immigration court, even though lawyers are active in the process (e.g., submitting documents, presenting arguments), represented people are no more likely to win immigration hearings than unrepresented people (Ryo 2018). In fact, then-Justice William Rehnquist concluded that attorneys were not necessary in Veterans Administration disability hearings, as he considered the process to be nonadversarial [*Walters v. Radiation Survivors* (1985)]. Even more concerning, some scholars suggest that attorneys can actually cause harm by lengthening the process and not improving outcomes. For example, when people received assistance from the Harvard Law Housing Clinic for their administrative appeals of unemployment benefit determination, they were not significantly more likely to win their appeal, but the process was extended by two weeks (Greiner et al. 2012).

One potential reason for the lack of understanding of the role of attorneys outside of the trial context is the group nature of much legal practice. The complexity of the organization of the law firm can make research difficult and prevents understanding of the role and impact of individual attorneys (Kluegel 2016). Thus, scholars call for a better understanding of organizational theory to fully understand lawyers in corporate and other group practice settings (Kluegel 2016). As law firms increase in size, resulting in changes in relationships between lawyers and clients (Am. Bar Found. 2014), it becomes more important to understand the role of attorneys within the large firms.

There has been some work on the role of transactional lawyers. Scholars have discussed the role of attorneys in contract negotiations and suggest that rather than representing a single party, the lawyer should act as a middleman who drafts the contract, saving both parties money (Paul 1976). Similarly, other scholars have studied cause lawyers who are focused more on social change (Marshall & Hale 2014) or legal change (Rubin & Bailey 1994) rather than on their specific clients. Scholars are concerned that cause lawyers face difficulty balancing their interests with the client's autonomy (Marisco 1995), and there is fear that the law will therefore begin to favor attorney interests (Rubin & Bailey 1994). Scholars have suggested that the response is facilitative lawyering, in which the attorney does not work fully collaboratively with the client but instead provides specific legal assistance that the client requests (Marisco 1995). Thus, scholars in both contract negotiations and cause lawyering have suggested limiting the role of attorneys in the legal process (Marisco 1995, Paul 1976); however, there is little understanding of how that will influence the system, the client, or the individual attorney.

THE INFLUENCE OF THE LEGAL SYSTEM ON ATTORNEYS

Beyond understanding what role attorneys play in the system, to fully understand the experience of a legal career, we must also consider the consequences for attorneys of being in the system. In general, research has found that many attorneys are satisfied with their careers. In fact, in a 2013 survey of attorneys by the American Bar Foundation, 76% of attorneys who participated reported being moderately or extremely satisfied with their career after 12 years (Am. Bar Found. 2014). Yet, there are also many negative consequences of being part of the legal system, including high rates of distress, which have been the focus of many studies.

The same study that found many attorneys were satisfied with their career also found that, on average, attorneys work 47 hours per week (7 hours more than a traditional full-time job), with private practice attorneys working closer to 60 hours weekly (Am. Bar Found. 2014). Despite the results of the American Bar Foundation survey, other surveys have found attorneys report high levels of dissatisfaction, mental health problems (e.g., depression, stress, substance abuse), marital/family problems, and job burnout, which together are referred to as distress (Reed & Bornstein 2013). The American Bar Association (ABA) has identified distress in the legal system as a significant threat to the well-being of lawyers and the legal system broadly (Am. Bar Assoc. 1991). This section reviews research on the prevalence, causes, and consequences of attorney distress.

Distress Prevalence

Starting in the 1980s, the legal community has recognized a decline in job satisfaction among attorneys, partly attributed to increasing levels of distress (Daicoff 2004). Studies have indicated that a large proportion of attorneys suffer from some form of mental illness, such as depression, anxiety, stress, or substance abuse (Benjamin et al. 1990), at rates significantly higher than the national average.

Depression, anxiety, and stress. Research on a wide range of psychological distress symptoms indicates that attorneys are significantly more distressed than the general population (Beck et al. 1995). For example, approximately 18–20% of attorneys report clinical rates of depression, compared with estimates of 3–9% of the general population (Daicoff 2004, Krill et al. 2016, Weiss 2007). Attorneys scored significantly higher than the general population in rates of depression, anxiety, obsessive-compulsiveness, social alienation and isolation, anger, stress, insecurity, paranoia, self-consciousness, and marital dissatisfaction (i.e., all but one of the examined disorders; Beck et al. 1995). Moreover, attorneys report much more severe symptoms than the general population in many of these categories. Between 15% and 30% of attorneys score more than two standard deviations above the population mean for depression, anxiety, obsessive-compulsiveness, and social alienation and isolation; statistically, only 2.27% should have scores that high (Beck et al. 1995). Attorneys are 70% more likely than other professionals to report clinical levels of depression; most professionals experience lower depression rates than the general population (Elwork 2007).

Substance use. Alcoholism and substance abuse are two other disorders common to the legal profession. Research has shown that 21% of lawyers abuse alcohol, compared with 6% of the general population; however, rates vary based on type of law (lowest: judiciary at 16%; highest: private practice at 23%) and gender (male: 25%; female: 16%) (Krill et al. 2016). Research on the effect of years of practice varies, with some saying younger lawyers are hit the hardest (Krill et al. 2016) and others saying alcohol abuse increases over time (Benjamin et al. 1990). A 1990 ABA study of attorneys found that 13% reported binge drinking (consuming five or more drinks)

daily. Alcohol abuse also appears to begin during law school, with 25% of students demonstrating problematic alcohol consumption (Organ et al. 2016). In another sample of law students, 51% reported binge drinking regularly, and 18% reported driving while intoxicated (Reed et al. 2016).

In addition to alcohol use, there are concerns that attorneys use other drugs at high rates. Attorneys report experimenting with several categories of drugs at a higher rate than the general population (Burman 1997). A national sample of attorneys was asked about drug use in the past year; many reported using drugs (stimulants: 74.1%; sedatives: 51.3%; tobacco: 46.8%: marijuana: 31.0%; opioids: 21.6%) on a weekly basis (Krill et al. 2016). Law students also reported using drugs at a higher rate than other graduate students for marijuana (25% versus 14%), cocaine (6% versus 2%), and ecstasy (4% versus 1%) (Organ et al. 2016). Moreover, 14% of law students reported using prescription drugs without a prescription in the past year; the majority (79%) reported using Adderall (Organ et al. 2016). Substance use rates are particularly concerning regarding not only the implications for mental health but also the potential consequences of the illegality of most of these substances. Therefore, the people who are meant to be upholding the law (attorneys) are regularly violating the law by using illegal drugs.

Distress Causes

Given the high rates of distress that appear to be unique to the legal profession, it is important to consider the causes of such distress. One possible explanation is that there is a self-selection bias: People who enter the law have certain characteristics that predispose them to distress (Daicoff 2004, Reed & Bornstein 2013). In fact, certain traits characteristic of attorneys, such as competitiveness, perfectionism, achievement orientation, and materialism, might result in more distress (Daicoff 2004, Reed & Bornstein 2013). However, one study indicated that although entering law students reported rates of distress similar to the general population, scores spiked dramatically at the end of the first year (Benjamin et al. 1986).

Thus, something about the legal education process may cause distress. One study on law students demonstrated that first-, second-, and third-year law students tend to have similar levels of stress, depression, anxiety, and substance abuse—all hovering around 10–13% (Reed et al. 2016). First-year students did have significantly more distress as measured by social readjustment, but this might be due to second- and third-year students better coping with academic and personal stressors. Nevertheless, in a longitudinal assessment, during the first year of law school, students became significantly more depressed and showed significantly less positive affect (Reed et al. 2016). A comparison of law students and psychology graduate students demonstrated that law students reported significantly more distress; however, law students also showed stronger correlations between exercise and positive mental health (Skead & Rogers 2016).

Although not necessarily a cause of original distress, another possible explanation for such high levels of distress is deterrence from seeking treatment (Reed & Bornstein 2013, Rothstein 2008). Often, lawyers do not realize there is a problem, as distress has been normalized in the legal profession (Krill et al. 2016, Organ et al. 2016, Reed & Bornstein 2013, Reed et al. 2016). Given the hours lawyers work, it is not surprising that they also report not having time to seek help (Krill et al. 2016). In law school, students report barriers such as lack of time, unawareness of resources, inability to pay for treatment, or concerns that treatment will have to be disclosed when applying to the bar (Organ et al. 2016, Reed et al. 2016). This last concern is worth highlighting as erroneous. The Department of Justice has formally stated that questions about mental health violate the Americans with Disabilities Act and has encouraged states to focus on the conduct specifically (Neil 2014). Although some state bar associations (and law schools) have not yet changed their questionnaires, treatment for mental health disorders is not supposed to be the basis for denial

of admission; in fact, untreated mental health issues that result in misconduct are much more problematic (Neil 2014, Reed & Bornstein 2013, Rothstein 2008).

Distress Consequences

Distress can have extremely negative consequences for attorneys and the legal profession as a whole. Distress impacts both professional and personal domains.

Professionally, lawyers tend to have high rates of attrition and burnout. Research indicates that 25% of associates leave law firms after two years on the job (Elwork 2008). High rates of turnover are problematic for law firms and their clients, as it takes a substantial amount of time and resources to train an associate, both generally and on a specific case (Reed & Bornstein 2013). Burnout and emotional exhaustion are becoming more common as technology is increasing the expectation that attorneys are always available. They can result in decreased productivity or can lead to attorneys leaving the profession entirely (Elwork 2008, Reed & Bornstein 2013).

Distress can result in inappropriate coping responses and professional violations, including neglect of cases or clients (Daicoff 2004, Reed & Bornstein 2013). Attorney distress clearly implicates professional responsibilities, including competence (Model Rules of Professional Responsibility 1.1), supervision (Model Rules of Professional Responsibility 5.1–5.3), and misconduct (Model Rules of Professional Responsibility 8.3). The majority of disciplinary proceedings against attorneys are linked to substance abuse (Daicoff 2004). Moreover, not all misconduct is even reported or investigated; many other distress-induced violations of an attorney's professional responsibility are likely unidentified or unreported. In a study of 600 lawyers, more than 40% reported that they made avoidable mistakes due to work pressure (Press 1999). These distress-based violations can be extremely costly for the entire legal system: Clients might lose their cases (Reed & Bornstein 2013), attorneys might be disbarred and lose their livelihoods (Daicoff 2004), law firms might be subject to high malpractice fines (Ramos 1995–1996), and the legal system as a whole may pay the cost of the disciplinary investigations (Daicoff 2004) and the overall decrease in societal confidence in the system.

Attorneys also report difficulties balancing their personal and professional lives (Daicoff 2004). This difficulty may cause relationship issues, which are reflected in the high divorce and marriage abstention rates for attorneys (Weiss 2007). Moreover, distress can result in the high cost of suicide, with 11–19% of attorneys considering suicide (Benjamin et al. 1990, Krill et al. 2016) and attorneys having significantly higher suicide rates than other professionals (Gatland 1997).

OVERALL ATTORNEY–LEGAL SYSTEM RELATIONSHIP

As Justice Sutherland recognized in *Powell v. Alabama* (1932), attorneys are essential to the fairness of the legal process under the Sixth Amendment. Yet this conclusion is based on attorneys benefitting their clients. Research supports the view that representation results in better outcomes. However, trial attorneys can have both positive and negative influences on case outcomes through their behaviors, characteristics, and potentially their overall skill. Attorneys must make many decisions throughout the trial, including whether to request joinder/severance, how to conduct voir dire, how to construct their opening statements or closing arguments, which witnesses to put on and how to question or cross-examine them, and whether to object. In some areas, empirical research exists to guide attorneys, but existing research mostly leads to more questions. Moreover, these factors are almost entirely examined in isolation, although in trial these decisions have to be made in combination—empirical research offers little guidance on how these factors interact. Attorneys' unchangeable characteristics (such as gender, race/ethnicity, and attractiveness) also can have a major impact.

Although the research on trial attorneys has room for improvement, research on non-trial attorneys is even more lacking. There is very little understanding of how non-trial attorneys influence the legal process. A growing number of attorneys are taking non-trial roles, such as in-house counsel and other roles in the business sector (Am. Bar Found. 2014). Thus, more research is necessary to understand what role these attorneys play in influencing their clients and the legal process more generally. As plea bargaining and ADR become more common, research has begun to understand the role of attorneys outside the courtroom. But much of this research still focuses on how attorneys influence their clients in avoiding litigation once conflict already exists. Understanding the role of attorneys in negotiating contracts, advising clients' legal behavior and communication, engaging in mediation, advocating in arbitration, and engaging in other legal behavior outside of the trial domain gives a broader picture of the lawyer's role within the legal system.

The extreme pressure to make the "right" decisions, in combination with the long hours and additional job stressors, likely has a major impact on the high levels of attorney distress. Although some of the research on attorney distress is dated, more recent research indicates very few reductions in levels of distress. Thus, rather than calling for updated statistics, the profession would benefit much more from investigating solutions to increase attorney well-being. Lawyer assistance programs have tried to help by highlighting potential symptoms and making attorneys aware of resources (Elwork 2007), and law schools are starting to develop wellness programs (Austin 2015). Although encouraging treatment is a start, discussions about preventing distress in the first place are necessary. A wide range of options have been discussed. Some scholars encourage increasing exercise (Skead & Rogers 2016) or using findings from neuroscience to engage in neural self-hacking that optimizes cognitive performance (Austin 2015). Other scholars recommend reducing conflict in the adversarial process through incorporating the comprehensive law movement, therapeutic jurisprudence, preventive law, or religious lawyering (Reed & Bornstein 2013). Additionally, investigating solutions to the potential stressors mentioned in the first part of this review could help mitigate distress. Ultimately, more research needs to be done to identify potential solutions.

This review of research on lawyers identifies many open questions requiring more research. The most necessary areas of research call for looking at the system as a whole. It is important to begin understanding how factors such as attorney skill, behavior, and characteristics work together to influence legal factfinders. It is also important to begin understanding the role of attorneys in the system in areas beyond trial to get a more complete understanding of the legal profession. Additionally, it is important to understand the causes of attorney distress in order to find solutions. Limiting distress also should help improve attorney performance and reduce malpractice. Ultimately, research needs to reflect the interrelationship between the attorney and the legal system. To improve the legal system, we need a bigger-picture understanding of the experience of a legal profession.

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