LAWSYERING AND CLIENT DECISIONMAKING:
INFORMED CONSENT AND THE
LEGAL PROFESSION *

MARK SPIEGEL †

Contents

I. WHAT IS INFORMED CONSENT? ........................................ 44

II. THE LEGAL PROFESSION AND INFORMED CONSENT ............. 48
   A. Whose Decision—Lawyer or Client? .................................. 49
      1. The Cases .......................................................... 49
      2. The Code of Professional Responsibility ...................... 65
   B. The Lawyer's Obligation to Provide Information ............... 67
      1. The Cases .......................................................... 67
      2. The Code of Professional Responsibility ...................... 71

III. TOWARD A THEORY OF INFORMED CONSENT FOR LAWYER
     AND CLIENT .......................................................... 72
   A. The Prima Facie Case for Client Decisionmaking .............. 73
   B. Contract as Consent ................................................ 77
   C. The “Better Results” Argument .................................... 85
      1. Professional Disloyalty to the Client ......................... 87
      2. Superior Knowledge .............................................. 100
      3. Decisionmaking Under Informed Consent .................... 104
   D. The Problem of Cost ............................................... 110
   E. The Lawyer's Interests .......................................... 113
   F. The Public's Interests ........................................... 120

IV. APPLYING THE THEORY ............................................... 123
   B. Who Makes What Decisions: The Lawyer's and the
      Public's Interests ................................................ 126
   C. What Information Should Be Communicated? ................... 133
   D. Problems in Implementation ..................................... 136

CONCLUSION .......................................................... 140

* I wish to thank Howard Lesnick and Carrie Menkel-Meadow for their assistance in reviewing an earlier draft of this Article.
† Assistant Professor of Law, University of Pennsylvania. A.B. 1965, University of Michigan; J.D. 1968, University of Chicago.
Lawyers created the doctrine of informed consent for the medical profession. This Article examines the possibility and wisdom of turning that lawyers' creation back on the lawyers themselves.

Under informed consent, a doctor's failure to inform his patient adequately of the consequences of a course of treatment, prior to obtaining the patient's consent to such treatment, exposes the doctor to the risk of liability for damages. The development of the doctrine may be viewed simply as an outgrowth, albeit one long latent, of the law of battery; as stemming from the need to assert social control over the process of scientific (and particularly medical) experimentation; or as necessary to preserve the integrity of the doctor-patient relationship in the face of increased specialization and technological advance. From still another perspective, the doctrine of informed consent may be viewed as an expression of society's need to set limits on the domain of the professional.

It is this last view that gives rise to the question whether a similar development is needed in the legal profession. Several commentators have advocated such a step, and one major empirical study has attempted to show the benefits of increased client control.

1 This is not to say that lawyers were the sole cause of the development of informed consent, but that, at least in therapeutic situations, lawyers played a significant part in making the doctrine an issue in medical practice. See Meisel, The Expansion of Liability for Medical Accidents: From Negligence to Strict Liability by Way of Informed Consent, 56 Neb. L. Rev. 51, 76, 131-32 (1977). Traditional medical practice was and still is opposed to the basic assumptions underlying the informed-consent doctrine. See Katz, Informed Consent—A Fairy Tale? Law's Vision, 39 U. Pitt. L. Rev. 137, 141 (1977).


3 See notes 12-16 infra & accompanying text.


over lawyers. In addition, the volume of legal malpractice litigation has increased significantly over the last several years, fostering speculation that it is only a matter of time before the doctrines developed in medical malpractice litigation are used against lawyers.

Part I of this Article looks at the development of the informed-consent doctrine in the medical cases. Part II considers to what extent, in civil cases involving lawyers and their clients, current legal doctrines and professional norms incorporate the standard of informed consent. This part concludes that little attention has been given to the decisionmaking issues which informed consent raises and that the cases, by and large, focus on the lawyer’s power to bind his client vis-à-vis third parties. In these cases, a line is drawn that purportedly gives the lawyer control over procedure and tactics and gives the client control over the “subject matter” of the action. Part III argues that this line is inappropriate and advocates development of an informed-consent doctrine that would take account of the interests involved—the client’s, the lawyer’s and the public’s. Finally, part IV discusses both the application of this doctrine and the limitations on its implementation.

8 D. Rosenthal, supra note 6.


10 This Article is limited to civil cases for three reasons. First, the number of cases made treatment of both civil and criminal cases in one article unwieldy. Second, my own experience is primarily with civil cases. Third, the criminal cases involve constitutional and statutory (habeas corpus) considerations that are not present in the civil cases. See Wainwright v. Sykes, 433 U.S. 72 (1977); Faretta v. California, 422 U.S. 806 (1975); Chused, supra note 7.

The policies advocated here apply with at least equal force to criminal representation, but implementation in the criminal area presents somewhat different problems, particularly because of (1) the greater number of court-enforced marriages between lawyer and client in criminal representation, and (2) the possible relationship between the allocation of decisionmaking authority questions discussed here and the doctrines of waiver or forfeiture of constitutional rights which apply in habeas corpus cases. Other than Professor Chused’s article, all of the articles discussing the criminal area deal primarily with the latter question. See, e.g., Rosenberg, Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel, 68 Minn. L. Rev. 341 (1978); Spritzer, Criminal Waiver, Procedural Default and the Burger Court, 126 U. Pa. L. Rev. 473 (1978); Tigar, The Supreme Court 1969 Term, Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 Harv. L. Rev. 1, 18 (1970); White, Federal Habeas Corpus: The Impact of the Failure to Assert a Constitutional Claim at Trial, 58 Va. L. Rev. 67 (1972); Comment, Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest, 54 Cal. L. Rev. 1263 (1966). But see Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich. L. Rev. 1214 (1977) (arguing that the allocation of authority question is irrelevant to the habeas cases).
I. What Is Informed Consent?

The focus of the doctrine of informed consent is decision-making.\textsuperscript{11} The doctrine attempts to define the appropriate allocation of decisionmaking roles between doctor and patient.

The common law maxim that "every human being . . . has a right to determine what shall be done with his own body" \textsuperscript{12} initially led to the conclusion that an operation performed by a physician without the patient's consent gave rise to a cause of action for battery. The meaning of "consent" was generally not considered problematic. In the paradigm case, the patient went to the doctor, was told he needed an operation, and acquiesced, either explicitly or by not protesting. Prior to 1960, most courts viewed such a dialogue as sufficient. The adequacy of consent was scrutinized only if the patient lacked legal competence to consent, or if the doctor either misrepresented the nature of the operation or performed an operation different from that proposed.\textsuperscript{13} As long as the issue was framed this way, no conflict was perceived between the common law norm giving the patient control over his body and the professional norm giving the expert a dominant role. The legal norm was preserved in form; in actuality, the professional was in control.

Beginning about 1960, courts began to reexamine the consent doctrine. They began looking beyond the explicit or implicit signal from patient to doctor to examine the content of the "bargaining process." They began asking whether the doctor had communicated sufficient information to the patient about the proposed treatment and possible alternatives.\textsuperscript{14}

\textsuperscript{11} See Capron, Informed Decisionmaking in Genetic Counselling: A Dissent to the "Wrongful Life" Debate, 48 Ind. L.J. 531, 588 (1973); Goldstein, For Harold Laswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Flea Bargain, 84 Yale L.J. 683, 691 (1975); Katz, supra note 1 passim.

In their discussions of informed consent's applicability to lawyers, both Rosenthal and Chused fail to distinguish between participation and decisionmaking. They both discuss increased client performance of lawyering tasks, and then discuss informed consent as if it were equivalent to performance. See D. Rosenthal, supra note 6, at 30-34, 154-61; Chused, supra note 7, at 651-61, 668-72. Performance requires some decisionmaking, but one can be directed in almost all elements of one's performance; conversely, one can make decisions and delegate the performance to another. For the purpose of this Article, the issue is client decisionmaking, not client performance.

\textsuperscript{12} Schloendorff v. Soc'y of the N.Y. Hosp., 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914).

\textsuperscript{13} For a discussion of this history, see 1 F. Harper & F. James, The Law of Torts § 3.10 (1956); Meisel, supra note 1, at 77-80; Plante, An Analysis of "Informed Consent," 36 Fordham L. Rev. 639, 657-58 (1968).

The theory underlying this transformation seems simple and straightforward. Consent is not meaningful unless a person understands what he is consenting to; understanding requires information, and it is the doctor who must supply the necessary information because the patient lacks the expertise to procure and translate it himself. As evidenced both by the emergence of conflicts between cases and by the outpouring of commentary," however, this statement of the theory raises many questions: what information need be communicated; how much information is enough; who determines the "what" and the "how much"; does the information have to be understood by the particular patient; does the doctor retain power to decide in particular cases whether to forego communication of information because of the resulting harm to the patient; does the plaintiff-patient have to prove that treatment would have been refused if the information withheld had been disclosed. Resolution of these questions would greatly affect the extent of the law's commitment to patient decisionmaking.

In grappling with these questions, courts tended to substitute negligence principles for the older battery rules. Although "unconsented touching," the key element of common law battery, arguably was present in suits for lack of informed consent, battery cases did not seem to provide a way of determining how much information was enough. The choice seemed to be between a standard requiring "full disclosure" and one recognizing manifestations of consent except in cases of fraud or misrepresentation. Neither extreme was acceptable. "Full disclosure" seemed unnecessary, possibly confusing to the patient, and wasteful of the time and resources of the doctor, but a fraud or misrepresentation standard imposed no affirmative duty to disclose.

A more precise way of balancing the doctor's and the patient's interests seemed desirable. Once the problem was perceived in this way, many courts naturally looked to familiar ways of balancing.


16 See Capron, supra note 5, at 405-06.
interests—those of the law of negligence. Because the standard of reasonableness in medical malpractice cases traditionally was set by reference to the ordinary practitioner, not the reasonable man, courts merged the question of the extent of required disclosure with that of who sets the standard. Thus, during the first decade or so of the development of informed consent, plaintiffs alleging a failure to obtain informed consent were required to prove, with expert testimony, that the information they received fell below the professional standard.

The use of the professional standard created new tensions. Allowing physicians to determine what information reached the patient did not fully protect the new right to information adequate to make decisions concerning one's own body; the patient's right to decide was made dependent upon the extent to which the medical profession encouraged disclosure.

In a series of cases decided during the 1970s, courts recognized this tension and began to measure the appropriateness of disclosure against the "traditional" negligence standard. The test became "whether a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach


Although it has been argued that this standard does not require a sufficiently high standard of conduct because it is tailored to minimum skill rather than to a more normative standard, see Curran, Professional Negligence—Some General Comments, 12 Vand. L. Rev. 535, 538 (1959), the important point for present purposes is that the standard is determined by the profession's norms and behavior, not the public's.

18 For example, in Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, rehearing denied, 187 Kan. 186, 354 P.2d 670 (1960), one of the first informed-consent cases, the court stated that the degree of disclosure is "primarily a question of medical judgment," and the duty to disclose, therefore, "is limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances." Id. at 409, 350 P.2d at 1106. In denying a motion for rehearing, the court limited the need for expert testimony to those cases in which some disclosure was given. If no disclosure at all was made, then no expert testimony would be required. 187 Kan. at 189-90, 354 P.2d at 673 (1960).

19 If the need for disclosure were determined from the patient's perspective, this distinction would not be crucial. The medical norm, though, is that physicians should determine what disclosures are in the best interests of their patients. See Katz, supra note 1, at 141-42; Note, 79 Yale L.J., supra note 15, at 1536-38. Further, empirical evidence indicates that physicians underestimate their patients' desires for information. See McKinley, Who Is Really Ignorant: Physician or Patient?, J. Health & Soc. Behavior, Mar. 1975, at 3-11.

significance to the risk... in deciding whether or not to forego the proposed therapy." This test eliminated the professional standard's requirement of expert testimony and allowed a lay jury to rely on its own experience and judgment. A privilege of nondisclosure was retained, however, when the doctor decided that disclosure would harm the patient. Interpreted broadly enough, this privilege could eliminate any difference between the professional standard and the reasonable-person standard. In addition, these courts held that failure to disclose was not a compensable harm by itself; utilizing notions of proximate cause, they required the patient to prove that, if the required disclosures had been made, a reasonable person in the patient's position would not have undergone treatment.

As Professor Katz has shown, this history reveals less than a wholehearted commitment to patient self-determination. How-


22 By not using a subjective standard of materiality—that is, what a particular patient would deem material—the court potentially subordinates the particular patient's informational needs to efficiency concerns by allowing the jury to use the reasonable-person tort standard. See Capron, supra note 5, at 404-15. Still this potential divergence between the opinions of a lay jury and the needs of a particular patient seems less significant than the divergence between the professional standard and some form of lay standard.


24 See Katz, supra note 1, at 156-58; Riskin, supra note 15, at 588.


ever, a core to the concept of informed consent has developed over the last several decades. Physicians have been forced to consider whether they have an obligation to do more than obtain assent to their proposed treatment. They have had to consider the possibility that they must disclose to their patients the nature of the disease, the nature of proposed treatment, the risks of treatment, the probability of success, and possible alternatives. Lawyers at the least have an obligation to consider whether there is a need for a similar dialogue concerning disclosure within their own profession.

II. The Legal Profession and Informed Consent

The doctrine of informed consent, then, combines the patient's right to make a decision with a requirement that the physician pro-
of death, serious injuries, likelihood of success, alternative procedures); Iowa Code § 147.137 (Supp. 1979) (general terms of nature of procedures and the known risks of certain serious injuries); LA. REV. STAT. ANN. § 40:1290.40 (1977) (general terms of nature of procedures and known risks of certain serious injuries). Georgia simply requires that the course of treatment be described in general terms, GA. CODE ANN. § 88-2906 (Supp. 1979). Ohio has an informed-consent form appended to the statute, OHIO REV. STAT. ANN. § 2317.54 (Page Supp. 1978). Texas and Hawaii have delegated to outside boards the promulgation of standards for particular types of treatment, HAWAII REV. STAT. § 453 (Supp. 1978); TEx. REV. CIV. STAT. ANN. art. 4590; § 6.01 (Vernon Supp. 1978), and Rhode Island has made the question of informed consent a preliminary issue for the judge. R.I. GEN. LAWS § 9-19-32 (Supp. 1978).

Most of these statutes also deal with the questions of causation and therapeutic privilege, paralleling Canterbury's approach to these issues. Finally, 13 of these statutes make a written consent form either conclusive or presumptive proof of informed consent. To the extent this approach channels informed consent into ritualized exchanges of paper, it undercuts the values that informed consent is attempting to achieve.

Although this statement cannot be proved, it is supported in the proliferation of statutes, see note 26 supra, and the outpouring of commentary in the medical journals, see, e.g., Annas, Informed Consent, 29 ANN. REV. MED. 9-14 (1978); Connors & Bianco, Comments on Informed Consent, 27 Md. St. Med. J. 46-47 (Sept. 1978); Feldman, Is Informed Consent Possible in Psychiatry?, 6(7) LEGAL ASPECTS MED. PRAC. 29-31 (July 1978); Flannery, Just sign here . . . , 31(5) S.D.J. MED. 33-37 (May 1978); Moore, Consent Forms—How, or Whether, They Should Be Used, 53 MAYO CLINIC PROG. 393-96 (June 1978); Morison, Informed Consent or Contractual Absolution?, 71 J. TENN. MED. A. 293-94 (Apr. 1978); Schwarz, The Use of a Checklist in Obtaining Informed Consent for Treatment with Medication, 29 HOSP. COMMUNITY PSYCH. 97-100 (1978); Sharpe, The Proper Format and Function of Consent Forms, 118 CAN. MED. A.J. 1001-04 (1978). Whether this attention produces significant change is an open question. See Katz, supra note 1. But such a dialogue is the first step toward change.

This assertion derives from two aspects of similarity between doctors and lawyers. First, the two have sufficiently similar roles as professionals to warrant this statement. See note 6 supra. Second, even if a client's interest in controlling decisionmaking is less "fundamental" than a patient's right to control decisions relating to his body, it is sufficiently basic to make the inquiry necessary. See notes 114-32 infra & accompanying text. But see Rueschemeyer, Lawyers and Doctors: A Comparison of Two Professions, in SOCIOLOGY OF LAW 267 (V. Aubert ed. 1969) (discussing differences between professions, particularly with regard to influence of clients).
vide sufficient information to make the exercise of that right meaningful. No similar general doctrine applies to the lawyer-client relationship. Neither the case law nor the Code of Professional Responsibility\(^\text{29}\) establishes a clear line between the lawyer's decisionmaking authority and the client's; even when the client is clearly given the decision, there is confusion over what information he must be given. This section will look at the case law and at the Code of Professional Responsibility in order to discuss both of these issues—the allocation of decisionmaking authority and the requirements that lawyers provide their clients with adequate information.

A. Whose Decision—Lawyer or Client?

1. The Cases

Because of the strong tradition of requiring consent to actions involving the body, patients have usually had at least formal control over the doctor's general treatment decisions.\(^\text{30}\) Thus, the question addressed in the medical cases is whether the doctor provided the patient with adequate information. In the lawyer-client cases, the issue of decisionmaking authority is discussed at a more basic level: whether the client has even formal control over the decisions in question.\(^\text{31}\) For example, suppose a client insists on calling a witness at trial. Does the lawyer have the right to say: "No, I have control over that decision. As long as I remain your lawyer you

\(^{29}\)The American Bar Association's Code of Professional Responsibility, ABA CODE OF PROFESSIONAL RESPONSIBILITY, although not legally binding on lawyers unless adopted by the appropriate state authorities, has been adopted, with some variations, in all jurisdictions. See A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 29 (1977).

\(^{30}\)See text accompanying notes 12-14 supra. Except in emergency situations or in cases involving refusals to accept treatment on religious grounds, see, e.g., Application of the President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964), the patient must at least give formal consent to the proposed treatment.

As the medical cases demonstrate, one can have decisionmaking power with no substantial right to information. See notes 1-25 supra & accompanying text. The opposite may also be true. For example, the ABA standards for criminal-defense lawyers require consultation with the client over tactical matters, but leave the decision to the lawyer. See ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: THE DEFENSE FUNCTION § 5.2 (1971). Consultation may influence decisionmaking, see Eisenberg, Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller, 92 HARV. L. REV. 410, 414-18 (1978), but it is not even a weak form of a decisionmaking right.

\(^{31}\)Perhaps this basic issue of who has decisionmaking authority is addressed at different levels in medicine and in law because in medicine, the patient has to "consent" in some sense in order for the doctor to perform treatment, unless the treatment is to be imposed by force; in contrast, much of what a lawyer does for a client is done outside the client's presence.
must do as I say on this question.” Or may the client assert: “You are my agent; you must follow my instructions.”

The answer to these questions depends upon which group of cases one consults. One line of cases states that the client has control over the subject matter of the action, but that the lawyer controls procedure and tactics. These cases suggest that the lawyer can proceed in some areas despite his client’s contrary instructions. The second line of cases—the instructions cases—require the lawyer to follow his client’s instructions and thus suggest that the client has ultimate authority.

The instructions rule was established in a line of nineteenth century debt-collection cases. Typically, the client would instruct the lawyer to file suit on a note, but the lawyer would do nothing beyond talking to the debtor about paying up. After the debtor went bankrupt or the client lost patience, the client would sue the lawyer, who would defend his decision not to sue as an exercise of judgment for the client’s benefit. The courts invariably rejected this defense.

Despite the courts’ continued adherence to the instructions rule, the rule may not apply to questions of procedure and

---

32 For the subject-matter/procedure rule, see 2 MECHAM ON AGENCY § 8160 (1914); 7 C.J.S. ATTORNEY AND CLIENT § 80(b) (1937) and cases cited therein. According to another formulation of this rule, the attorney has implied authority to do everything necessary and proper in the conduct of a case, provided his actions affect the remedy and not the cause of action. See W.A. Robinson, Inc. v. Burke, 327 Mass. 670, 674-75, 100 N.E.2d 368, 369 (1951). See also ROSCOE FOUND—AMERICAN TRIAL LAWYERS FOUNDATION, ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES: ETHICS AND ADVOCACY (Final Report) 14 (June 1978) [hereinafter cited as ETHICS AND ADVOCACY].

33 See cases cited in notes 34-37 infra. See also R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 218 (1977).

34 Wilson v. Coffin, 56 Mass. (2 Cush.) 316 (1848); Gilbert v. Williams, 8 Mass. 51 (1811); Cox v. Livingston, 2 Watts & Serg. 103 (Pa. 1841); Fox v. James, 14 S.W. 1007 (Tex. Ct. App. 1881); Crooker v. Hutchinson & Cushman, 1 Vt. 73 (1827).

35 See, e.g., Gilbert v. Williams, 8 Mass. 51 (1811); Cox v. Livingston, 2 Watts & Serg. 103 (Pa. 1841).

36 See cases cited in note 34 supra.

tactics. First, clients usually lose suits against attorneys for not carrying out the client's tactical instructions, although the typical reasons given are the client's failure to prove causation or damages. The only malpractice case involving procedure or tactics that directly discusses the authority question is Stricklan v. Koella, 546 S.W.2d 810 (Tenn. Ct. App. 1976), cert. denied, id. (1977). In that case, a client sued his lawyer for failing to follow the client's instructions to request a change of venue and to have a deposition transcribed. One of the grounds of the decision against the client was the absence of showing of damages. An alternative ground was that in Tennessee a lawyer has no obligation to follow the trial tactics his client demands.

The courts that have decided cases involving instructions with regard to procedure or tactics have based their decisions on other grounds. See Walker v. Kruse, 484 F.2d 802 (7th Cir. 1973) (instructions issue not discussed; no cause of action on any of several grounds); Martin v. Hall, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730 (1971) (client instructed attorney to file double-jeopardy claim; instructions issue was not discussed; issue was whether attorney was negligent); Trustees of Schools of Tp. 42 North, Cook County v. Schroeder, 2 Ill. App. 3d 1009, 278 N.E.2d 431 (1971) (failure to raise issue on appeal; no damages shown); Olson v. North, 276 Ill. App. 457 (1934) (client instructed lawyer to call alibi witnesses; client lost for failure to produce expert testimony); Nave v. Baird, 12 Ind. 318 (1859) (lawyer refused to put on witnesses or follow client's request for change of venue; no damages shown).

The cause of action for malpractice against a lawyer requires the client to prove all the elements of negligence: duty, breach of the standard of care, causation, and damages. The existence of a duty is established by showing an agreement for services between lawyer and client, although even gratuitous undertakings can create a duty of care. The standard of care for lawyers is similar to that for doctors—a lawyer must exercise the skill and knowledge ordinarily possessed by lawyers in good standing in the profession. As for causation and damages, if a plaintiff in a malpractice case complains that a lawyer's error resulted in the loss of a lawsuit, familiar notions of causality are said to require that the client show that he would have won the suit but for the lawyer's error. The plaintiff in the malpractice case must therefore relitigate the first case by presenting the evidence that was (or would have been) presented earlier and thereby prove that he would have won the first case. As with the medical cases, the causation and damages requirements can sharply reduce the possibility of successful informed-consent suits.

See note 32 supra & accompanying text.
The subject-matter/procedure rule has been applied in malpractice cases primarily to protect the client's authority to settle a case or to approve an agreement or contract. In deciding that lawyers have an affirmative obligation to bring those decisions to the client, the courts have remarked that the client controls the subject matter of the case. They have either implied or stated explicitly, however, that some matters remain under the lawyer's control. Yet these suggestions are neither binding nor very helpful in identifying the procedures or tactics that are controlled by the lawyer. And, aside from these statements and applications, this case law generally is of little assistance in determining which decisions are to be made by an attorney and which are reserved for his client.

42 See Burgraf v. Byrnes, 94 Minn. 418, 103 N.W. 215 (1905); Coopwood v. Baldwin, 25 Miss. 129 (1852); cf. Vooth v. McEachen, 181 N.Y. 25, 73 N.E. 488 (1905). Harrop v. Western Airlines, Inc., 550 F.2d 1143 (9th Cir. 1977), and Hayes v. Eagle-Dicher Industries, 513 F.2d 898 (10th Cir. 1975), represent refusals by two courts to enforce settlements not agreed to by the attorney's clients, or, in the latter case, by all of his clients. Two other cases involve the lawyer's liability for failure to communicate settlement offers when conflicts of interest were also present. See Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); Johnston v. Andrade, 54 S.W.2d 1029 (Tex. Civ. App. 1932). In Rubenstein & Rubenstein v. Papadakos, 31 A.D.2d 615, 295 N.Y.S.2d 876 (1968), attorneys sued their client for legal fees. The client alleged noncommunication of a settlement offer both as an affirmative defense and as a counterclaim. The defense and the counterclaim were rejected because the client conceded that she would not have accepted the settlement offer. In dictum, the court noted that, in "certain circumstances," noncommunication of such an offer could constitute a defense to an action for legal services, but did not afford a right to affirmative relief. Id. at 615, 295 N.Y.S.2d at 877. See also ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 326 (1970).

But see Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966). There, the court dismissed a negligence claim based on failure to communicate a settlement offer because of plaintiff's failure to produce an expert witness who would testify that communicating such offers was common practice within the profession. In Odom v. Hilton, 105 Ga. App. 286, 124 S.E.2d 415 (1962), the court expressly refused to decide whether a lawyer has a duty to transmit every settlement offer to his client. The claim of noncommunication was dismissed on the grounds that the settlement offer had been made not to the plaintiff in the malpractice case, but to a third party who was the named plaintiff in the original action. Id. at 291, 124 S.E.2d at 418. That distinction, however, does not take adequate account of the fact that the former complainant was also the real party in interest in the original action.

43 In Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968), the appellate court discussed the matter of client control over subject matter in the context of multiple representation. The California rule was summarized as requiring "that the attorney must disclose all facts and circumstances which in the judgment of a lawyer of ordinary skill and capacity are necessary to enable his client to make free and intelligent decisions regarding the subject matter of the representation." Id. at 147, 65 Cal. Rptr. at 414 (citation omitted).

44 A few malpractice cases hold a lawyer liable for agreeing to a dismissal or consenting to a judgment without authority from his client. See Walpole's Administrator v. Carlisle, 32 Ind. 415 (1869) (judgment against attorney-defendant's intestate for dismissing case without knowledge or consent of plaintiff); cf. Coon v.
A client's loss of a claim or defense may be the product of any of a nearly infinite variety of actions or omissions on the part of his attorney.\textsuperscript{45} Many of these actions or omissions could result from the lawyer's unilateral decision and not from a decision made by the client after consulting with his lawyer. The question here is whether a malpractice suit may be based upon the fact that these decisions were made unilaterally by the attorney. Except for the instructions decisions, no malpractice claims have been based on the fact that the attorney, rather than the client, made the decision.\textsuperscript{46}

The probable explanation for the failure to raise the issue of allocation of authority in many cases is simply that the attorneys' actions were the product of inadvertence rather than any deliberate decision. For instance, an attorney who filed after the deadline did not actually decide to do so, but simply neglected to keep track of

\textsuperscript{45} The attorney may fail to file an appearance, see Maryland Cas. Co. v. Price, 231 F. 397 (4th Cir. 1916), or an answer, see Masters v. Dunstam, 256 N.C. 250, 124 S.E.2d 574 (1962), or may fail to take certain procedural steps to protect his client's interests, see Case v. St. Paul Fire & Marine Ins. Co., 324 F. Supp. 352 (E.D. La. 1971) (failure to file timely suit); Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370 (1959) (rejection of allegation that attorney unnecessarily contested issue of client's liability at trial); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954) (improper service). He might file suit in the wrong court, see Meredith v. Woodward, 16 Wkly. Notes Cas. 146 (Pa. 1885) (lack of professional care where bill filed improperly in equity rather than at law); Hill v. Mynatt, 59 S.W. 163 (Tenn. Ch. App. 1900) (action should have been filed in federal rather than state court; no liability because good faith error); he might waive or fail to raise certain of the available legal claims or defenses, see Martin v. Burns, 103 Ariz. 341, 429 P.2d 660 (1967) (failure to raise defense on appeal); Kimen v. Ettelson, 303 Ill. App. 230, 24 N.E.2d 871 (1940) (failure to raise specific substantive distinction on appeal not actionable); Sikora v. Steinberg, 40 Misc. 2d 649, 243 N.Y.S.2d 766 (1963) (failure to sue appropriate parties); Patterson v. Powell, 31 Misc. 250, 64 N.Y.S. 43 (1900) (failure to specially plead statute of limitations not actionable where result in original action was radical change in law); or he might harm his client's case by stipulating to certain facts, see Duffy v. Griffith Co., 206 Cal. App. 2d 780, 24 Cal. Rptr. 161 (1962). The attorney might fail to call specific witnesses, see Woodruff v. Tomlin, 423 F. Supp. 1284 (W.D. Tenn. 1976), rev'd, 593 F.2d 33 (6th Cir. 1979); Johnson v. American Life Ins. Co., 237 Ala. 70, 185 So. 409 (1938), or might refrain from asking certain questions, see Woodruff v. Tomlin, 423 F. Supp. 1284 (W.D. Tenn. 1976) (failure to properly cross-examine witness), rev'd, 593 F.2d 33 (6th Cir. 1979). Finally, he might fail to introduce certain documents into evidence, see Case v. Ricketts, 41 A.2d 304 (D.C. Mun. App. 1945).


\textsuperscript{46} The malpractice cases that challenge errors like those described in note 45 \textit{supra} all involve contentions that the attorney's actions were negligent, not that they were made without authority. See Annot., 45 A.L.R.2d 5 (1956) for a review of such cases.
time. In such situations, it is misleading to argue that the attorney should have brought the decision to the client. Malpractice actions are used here as a check on an attorney's diligence and on the quality of his work; the issue of decisionmaking authority is beside the point.\(^4\) No conclusions regarding the proper allocation of decision-making authority may therefore be drawn from these cases. Yet, the imbalance in the case law is difficult to explain. Why has the issue of decisionmaking authority been so infrequently litigated? Is the rule that attorneys presumptively have control over procedure and tactics so well-settled that it has not been worth testing;\(^4\) or is the rule really less firm than the secondary sources indicate?

The subject-matter/procedure rule has been cited most often in cases involving third parties. When a lawyer-agent acts without the authority of his client-principal, the issue of third-party benefit may arise. Must a third party who profitted from the lawyer's actions

\(^4\) The allocation of decisionmaking power and the problem of improving the quality of lawyers' work are linked, however, in two ways. First, as a matter of litigation strategy, a client seeking to avoid the consequences of his lawyer's decisions will argue (1) that the lawyer was incompetent or negligent because he did not consider the issue in question, and (2) that, if he did think about the issue, he should have reserved decision for the client. In the past, at least in criminal habeas cases, complainants have been more successful in making the latter argument. See Fay v. Noia, 372 U.S. 391 (1963); sources cited in note 10 supra. Recent cases, such as Wainwright v. Sykes, 433 U.S. 72 (1977), indicate, however, that this second ground may be foreclosed. See note 50 infra. Commentators have speculated, therefore, that courts will be forced to confront more seriously the competency issues raised by such lawyer dereliction. See Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1083-86 (1977); Rosenberg, supra note 10, at 430-39. Second, to the extent that informed consent performs a monitoring function, see text accompanying notes 263-66 infra, mistakes grounded on inadvertence may become less frequent.

\(^4\) If this is the reason, a better explanation of the theory behind the subject-matter/procedure dichotomy is still necessary. The test for distinguishing subject matter and procedure could be a literal one, giving clients control only over actions that by themselves constitute dismissal of a claim or defense, but not over those actions that result in dismissal. If this is the test, why use such a narrow construction of "compromise of the subject matter?" The rationale cannot be the effect of the action on the client's case. From the client's perspective, both types of actions may be equally important. If, then, the line is not one of importance to the client, is it one of competence? Perhaps the attorney should decide certain matters because they are uniquely within his "technical" competence, while other matters are suitable for decision by the client. See text accompanying notes 229-39 infra. Yet, if this is the rationale, questions of relative competence should be addressed directly, not by defining "compromise of the subject matter."

The subject-matter/procedure dichotomy may be viewed, thirdly, as resting on some implicit probability judgment. Whenever a claim is settled or compromised, a client is deprived of the "subject matter" of the action. Procedural or tactical decisions are less likely to have such an effect. Hence, the rule addresses the ordinary case, eschewing the finer or more difficult discriminations involved in determining when an action results in loss of the subject matter. The rejoinder to this abstention is, of course, that similarly fine discriminations are made all the time. This instance, no more difficult than the others, can be distinguished only by the involvement of the legal profession.
disgorge his benefit, or is the client bound by his attorney's actions? Courts have grappled with this issue by trying to determine the limits of the lawyer's authority to act in behalf of his client. They have failed, however, to specify whether the issues of allocation of authority and withdrawal of third-party benefit are separable, and, if they are, how the two are interrelated. Although these cases frequently state that the client may be bound as against a third party because the client had given the lawyer express or implied authority to act as he did, the cases are more consistent with the theory that considerations of fairness and efficiency require binding the client regardless of the lawyer's authority.


The lawyer's role as his client's representative in dealings with third parties is significantly different from the doctor's role in servicing his patient. Hanna Pitkin points out that, although political theorists have used the doctor-patient relationship as an analogue for the politician who represents his constituents in dealings with third parties, the analogy is really extremely limited. H. Pitkin, The Concept of Representation (1967). She states that

generally specialists and professional people (other than lawyers) do not represent their clients. Their actions are not to be attributed to the client. Theorists may tell us a physician "is the agent of the patient," but do we ever have cause to say, "The patient cured himself by the agency of Dr. Smith?"

Id. 139.

50 Many state statutes identify the circumstances in which an attorney can bind his client. Most of these statutes bind the client to agreements made on the record of the court. See, e.g., Alaska STAT. § 22.20.050 (1962); Cal. CIV. PROC. CODE § 283 (West Supp. 1978); Idaho CODE § 3-202 (1979); Ind. CODE ANN. § 34-1-60-5 (Burns Supp. 1978); Mont. Rev. CODE ANN. § 37-61-403 (1978); Utah Code ANN. § 78-51-33(2) (1977). Some statutes also bind the client to written agreements. See, e.g., Ariz. R. CIV. PROC. 80(d); Ga. CODE ANN. § 9-605 (1973); Minn. STAT. ANN. 481.08 (West 1971); Wash. Rev. CODE § 2.44.010(1) (1961). A third group of statutes binds the client to agreements within the scope of the powers and duties of the attorney. See, e.g., Iowa Code ANN. § 610.16(2) (West 1975); Neb. Rev. Stat. § 7-107(2) (1977); N.M. Stat. ANN. § 36-2-11 (1978); N.D. CENT. CODE § 27-13-02(2) (1974); S.D. COMP. LAWS ANN. § 16-18-11 (1967). This last group incorporate the common law standard. Their principal effect, therefore, is to specify the evidence acceptable for proof of the existence of the attorney-client relationship. See, e.g., Neb. Rev. Stat. § 7-107(2) (1977) (accepting the "statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court"). The other groups of statutes have, by and large, been interpreted similarly. For example, in Preston v. Hill, 50 Cal. 43 (1875), the court stated that the statute "is only declaratory of the common law rule . . . . It was not intended to enlarge or abridge the authority of the attorney; but only to prescribe the manner of its exercise, by requiring the agreement to be filed with the clerk or entered upon the minutes." Id. 53. See also Nelson v. Nelson, 111 Minn. 183, 128 N.W. 731 (1910). Even if these statutes did depart from the common law, however, they still would address only the attorney's power to bind his client. The presence of considerations such as judicial economy and fairness to third parties distinguishes this question from that of the proper allocation of decisionmaking authority.

These issues have been discussed extensively in the context of criminal habeas actions. See sources cited in note 10 supra. For example, they were raised in
Most of the third-party cases involve one of three situations: settlement, tactics at trial, or the attorney’s default or misconduct. With regard to settlement, it is said, in keeping with the malpractice cases: “[i]t is fundamental that an attorney does not by reason of his employment have authority to compromise his client’s cause of action absent an emergency requiring prompt action.” 51 As applied, the rule is subject to other exceptions as well. The client will be bound when his actions have given his attorney apparent authority. 52 In some jurisdictions, he will have to overcome a presumption that his attorney had authority. 53 Further, if sufficient time has elapsed so that reversal would prejudice the other party, the settlement may not be repudiated. 54 Finally, if an attorney has reached a settlement without authority and has then absconded with the proceeds, his client may be able to seek recovery of the proceeds only in an action against the attorney. 55 These deviations illustrate

Wainwright v. Sykes, 433 U.S. 72 (1977), in which a criminal defendant’s attorney failed to file pre-trial motions and to make contemporaneous objections to the admission into evidence of inculpatory statements made by the defendant to police. The Supreme Court, reversing the Fifth Circuit Court of Appeals, determined that the defendant was barred from challenging the admissibility of the statements in a federal habeas action. Justice Rehnquist’s majority opinion held that the failure of defendant’s counsel to raise the issue forfeited the defendant’s right to object to the admissibility of the statement. Under this view, whether the lawyer or the client has the authority to make the decision is irrelevant. Chief Justice Burger, in a concurring opinion, strongly implied that, regardless of whether the client had wanted to raise the confession issue, decisions such as these are “necessarily entrusted to the defendant’s attorney, who must make on-the-spot decisions at virtually all stages of the criminal trial.” Id. 93 (Burger, C.J., concurring). Justice Stevens’ opinion is more cryptic. In a footnote, he states that a decision by counsel may not be binding if made over the overt objection of the defendant. Id. 94-95 n.1 (Stevens, J., concurring). But see Brookhart v. Janis, 384 U.S. 1, 8 (1966) (Harlan, J., concurring) (“I believe a lawyer may properly make a tactical determination of how to run a trial even in the face of his client’s incomprehension or even explicit disapproval.”).


that authority is not the sole issue; justifiable reliance by the other party may cause the client to be bound even when the attorney lacked authority.

The second set of cases, those involving trial tactics and procedure, present similar considerations. Two pairs of cases, each pair involving similar factual patterns, illustrate how considerations of reliance and efficiency lead courts to manipulate the subject-matter/procedure rule. In the first pair of cases—Duffy v. Griffith Co. and Harness v. Pacific Curtainwall Co.—an attorney stipulated, without his client's consent, to withdrawal of an issue from consideration by the trier of fact. The withdrawn issue in each of the cases was one on which the client might have prevailed. Each client, appealing from an adverse judgment, asserted his attorney's lack of authority to make the stipulation.

In Duffy, the California District Court of Appeals affirmed, stating that counsel had the right, without consulting his client, to


In Duffy v. Griffith Co., 206 Cal. App. 2d 780, 24 Cal. Rptr. 161 (1963), the attorney for Griffith Company, at the close of the evidence, stated that, on the basis of research completed during the weekend, he believed that the co-defendant, the driver of a truck involved in a fatal accident, had been within the scope of his employment with Griffith at the time of the accident. Id. at 785, 24 Cal. Rptr. at 163. He then stipulated to that conclusion. Closing arguments and jury instructions were based on this concession. The jury returned a verdict against Griffith. The company then filed a post-trial motion, stating that no authority had been given or requested for the concession and, had such authority been requested by the attorney, it would have been refused. The motion for a new trial was denied and the Griffith Company appealed, arguing that the driver was not within the scope of his employment at the time of the accident and that the company should not be bound by the attorney's unauthorized stipulation.

In Harness v. Pacific Curtainwall Co., 235 Cal. App. 2d 485, 45 Cal. Rptr. 454 (1965), one issue in the original litigation was whether the employer's workmen's compensation insurer was entitled to a lien against any judgment recovered by the plaintiff-employee. This question had two sub-issues: (1) whether the primary employer had failed to provide a safe place to work, and (2) whether the unsafe condition was a concurrent cause of plaintiff's injuries. If either of these questions were answered in the negative, the insurance company would have its statutory lien. Originally these issues were submitted to the jury, but, to avoid requiring the jury to return for another day of deliberation, both attorneys stipulated that the judge decide the lien question. Plaintiff's attorney, who was also retained by the insurance company to protect its lien interest, then stipulated that the court could make a finding that "at the time of the accident [the place of primary employment] was an unsafe place to work." Id. at 488, 45 Cal. Rptr. at 455-56. Rejecting the insurer's petition that the stipulation on the safety question be set aside as entered into without proper authority, the trial court upheld the validity of the stipulation and on the basis of that stipulation denied the insurer's application for a lien against the employee's judgment. The insurer, on appeal, argued once again that the findings were the result of a stipulation which, as construed by the court, was one that the attorney had no authority to make.
withdraw the defense that an employee had acted beyond the scope of his employment: "The trial attorney is in full charge of his client's cause or defense. . . . Specifically his is the prerogative of withdrawing one of two defenses when he concludes that it cannot be sustained and that its fruitless pursuit may prejudice the other sound defense." In Harness, the court reversed, basing its decision in part on a finding that the attorney's stipulation was unauthorized. The attorney had no authority, the court concluded, to stipulate away the client's interest in the litigation.

Considerations of prejudice and judicial economy offer the best explanation for the discrepancy between the two cases. First, the possibility of prejudice (or unfair advantage), that was present in Duffy because the case was tried before a jury, was absent in Harness, a decision by a judge. To the extent that an attorney in a jury case is dissatisfied with the trier of fact, he might gain an unfair advantage by stipulating an issue away as a means of obtaining a new trial—and a new trier of fact—on grounds of lack of authority. The same ploy will not work when a case is tried before a judge, because the same judge will normally decide the case on remand. In order to deter such conduct, courts will not allow lack of authority to be a sufficient reason for reversal.

Second, a reversal in Duffy would have required that the case be retried in its entirety before a new jury, whereas Harness did not involve the costs of empanelling a new jury. The decision was made by a judge on a record, and the case was to be remanded, in any event, on other grounds. The costs of releasing the insurer from its attorney's unauthorized stipulation were therefore minimal.

---

59 206 Cal. App. 2d at 787, 24 Cal. Rptr. at 165. Although the quoted statement might be read as implying that the withdrawn defense was frivolous, the later part of the opinion notes that the agency issue was one not previously decided by the courts and so offered "room for difference of opinion." Id. at 795, 24 Cal. Rptr. at 169. This case illustrates the potential impact of an informed-consent rule. The court genuflected to the possibility that a malpractice suit would lie against the attorney if he were negligent in the matter. Yet, as long as the issue to which the attorney stipulated is unclear as a matter of law, the attorney remains protected because he has the prerogative of deciding whether to present the issue. See notes 99 & 189 infra. On the other hand, if the lawyer must obtain his client's consent before withdrawing the issue, the legal uncertainty will no longer relieve the attorney of liability. If the withdrawn issue ultimately would have been decided in his client's favor, by however close a margin, the attorney would be liable under a theory of informed consent.

60 The appellate court's reversal was also grounded in its conclusion that the trial judge's finding of concurrent negligence on the part of the insured was insufficient.

61 See note 58 supra & accompanying text.

62 Other cases involving stipulations also suggest that the analysis offered here has more explanatory capability than the subject-matter/procedure line. In Dia-
These conclusions find additional support in the second pair of cases. *Gasior v. Wentz*, an action to cancel mineral deeds, was tried before a judge, who died before rendering a decision. Both attorneys stipulated that a new judge could decide the case on the basis of the existing record. After dismissal of the action and denial by the second judge of a motion for a new trial, the plaintiff appealed, contending that the stipulation had prejudiced certain of his substantial rights. The North Dakota Supreme Court rejected this argument, stating that the stipulation referred only to the remedy and procedure at trial and therefore was within the attorney's authority.

*Linsk v. Linsk*, a divorce proceeding, was heard by a judge who became disabled before he could render a decision. A mistrial was declared, and the attorneys stipulated, over the plaintiff's objection, that the case could be decided by another judge on the record made at the previous trial. The plaintiff was denied a divorce and, on appeal, argued that the stipulation against her directions was ground for reversal. The California Supreme Court agreed, holding that the right to a hearing before the trier of fact

---

63 89 N.W.2d 886 (N.D. 1958).
64 Id. 889.
66 The husband was granted a divorce on his cross-complaint. Id.
who makes the decision is a substantial right which cannot be stipulated away by the attorney over his client's objection. Once again, the question arises why the same stipulation should be said to involve a substantial right in only one of the two cases.67

A significant difference between the cases is the timing of the client's objection. In Gasior, the objection to the attorney's stipulation was not made known until after a decision had been rendered; in Linsk, the client refused to sign the stipulation even before the case had been assigned to another judge. Yet why should this difference matter? If "tactical or incidental" matters are within the scope of the attorney's authority regardless of the client's instructions, an explanation for the different results is still lacking.68 If, however, the critical factors are the degree of potential prejudice to the other party and the need for finality and judicial efficiency, timing does provide an explanation. As in Duffy, allowing a party to object to an unauthorized stipulation after a decision has been reached raises the possibility of manipulation, of withholding an objection unless and until an unfavorable decision is announced. In contrast, the adverse party in Linsk knew of the client's objection to the stipulation, but elected to proceed.69 In this situation, the opposing party fairly may be said to have assumed the risk of a new trial. Additionally, the presiding judge who reassigned the case was aware of the client's refusal to sign the stipulation. He had the opportunity, therefore, to correct the alleged error early enough to save the expense of retrial. If the objection had been withheld pending the decision, there would have been no opportunity to correct the error at minimal expense, and the costs of delay would have been attributable solely to the client's inaction.70

67 The right to have the evidence heard by the trier of fact who decides the case arguably becomes substantial only when credibility is at issue. Whether or not a distinction based on the significance of credibility could be drawn between a divorce proceeding and an action to cancel mineral deeds claimed to have been obtained from the plaintiff through fraud, other difficulties with this approach arise. Leaving aside the objection that neither court viewed its decision as dependent on this distinction, acceptance of it would largely undermine the subject-matter/procedure division.

68 The initial question would remain, of course, whether the particular right was substantial or procedural. Justice Mosk's opinion for the California Supreme Court in Linsk v. Linsk, 70 Cal. 2d 272, 277, 449 P.2d 760, 763, 74 Cal. Rptr. 544, 547 (1969), assumes that, if the right were incidental or affected only procedure or remedy, the client's objection would carry no weight.

69 Id. at 276, 449 P.2d at 762, 74 Cal. Rptr. at 546.

70 Two other general types of cases may be analyzed under both the analysis offered here and the subject-matter/procedure rule: choice-of-decisionmaker cases and cases involving failures to object to errors at trial. In the former, a client argues that he should be awarded a new trial because his attorney without authority waived the client's right to jury trial or agreed to referral to a master or auditor.
The results in the settlement and trial-tactics cases thus seem more easily explained by a theory focusing on the interests of affected third parties—the court and the adverse party—than by the supposed subject-matter/procedure distinction. The former theory finds additional support in the attorney default cases. The attorneys in these cases failed to file an answer or appear for trial, failed to file a suit within the applicable statute of limitations, or failed to take action in the case for such a long time that it was dismissed for want of prosecution.\(^7\) In determining that the client should be bound in these instances by his attorney's default, courts have not focused on the question of client authorization.\(^7\) Rather, considerations of judicial economy and fairness to third parties once again govern.\(^7\)

Courts have rejected as impractical a system in

---

\(^7\) These cases are collected in Mazor, supra note 49, at 1121-27.

\(^7\) The leading case is Link v. Wabash R.R. Co., 370 U.S. 626 (1962). See note 73 infra. One court has gone so far as to label "wholly frivolous" the contention that the client's lack of consent to his attorney's failure to appear at a hearing on a summary judgment motion justified vacating the judgment entered against the client. The client had asked that the judgment be set aside under Rule 60(b)(1) of the Federal Rules of Civil Procedure for "mistake, inadvertence, surprise or excusable neglect." Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc., 301 F.2d 114, 115 (2d Cir. 1962).

\(^7\) An examination of two cases decided one hundred fifty years apart indicates the durability and substantiality of these considerations. The first case, Denton v. Noyes, 6 Johns. 287 (N.Y. Sup. Ct. 1810), contains an early discussion of these issues by Chief Judge Kent. In Denton, a defendant moved to vacate a confessed judgment on the grounds that the attorney had no authority to act on his behalf. Judge Kent sought a compromise between the interests of the defendant-client, wronged by the attorney, and the plaintiffs, who were "as innocent as the defendant," 6 Johns. at 300, and who were in danger of losing their preference over other
which principals can totally disavow the acts of their agents.\textsuperscript{74} It is not contradictory, however, to require both that principals be bound by their agents' actions and that the agents follow their principals' directions. Indeed, the ability to control the agent's conduct is a necessary condition for tort liability.\textsuperscript{75}

creditors if the judgment were vacated. Kent also was concerned that "if the opposite party, who has concerns with an attorney, in the business of a suit, must always, at his peril, look beyond the attorney, to his authority, it would be productive of great public inconvenience." 6 Johns. at 301. Kent characterized his solution as a liberalization of the previous English rule, which left the client only with an action against the attorney. The Chief Judge refused to open the judgment (hence preserving the plaintiff's priority as to the debt), but afforded the defendant an opportunity to plead to the merits, presumably with the intention of vacating the judgment if the defense proved meritorious.

Over one hundred fifty years later, the United States Supreme Court addressed similar considerations in Link v. Wabash R.R. Co., 370 U.S. 626 (1962). The trial judge in Link dismissed a diversity negligence action under Federal Rule of Civil Procedure 41(b) for lack of prosecution when plaintiff's counsel failed to appear at a pretrial conference. Justice Harlan, writing for the Court, stated:

"Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." 370 U.S. at 633-34 (citation omitted). In a footnote he remarked that "[K]eeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant." 370 U.S. at 634 n.10 (emphasis in original). In both of these cases, then, judicial economy and fairness to third parties displace the attorney's authority to act unilaterally as the governing considerations.

Many cases involve the issue of relief from attorneys' defaults. As Professor Mazor has pointed out, an examination of trial court records must be undertaken before an accurate appraisal of these cases can be made. See Mazor, supra note 49, at 1123. In Link, for instance, the Supreme Court noted that the lower courts had evaluated the attorney's failure to attend the pretrial conference in light of several earlier postponements and "the drawn-out history of the litigation." 370 U.S. at 633, 635. It would be imprudent therefore to consider the above a definitive picture of this type of case.

Finally, a recent note argues that the concern about not penalizing the other side may go too far. Note, Negligent Litigation and Relief from Judgment: The Case for a Second Chance, 50 S. Cal. L. Rev. 1027, 1225-26 (1977). Fairness may require that the cost of an attorney's negligent action be assigned to the party hiring the attorney, but it does not answer the question of what the cost should be. Frequently fairness to an opposing party can be achieved by awarding costs, rather than by giving the party a judgment the size of which may bear no relation to the "costs" of the error. Id.

\textsuperscript{74} But see Justice Black's dissent in Link v. Wabash R.R. Co., 370 U.S. 626 (1962), in which he contended that a client properly may be penalized for his lawyer's mistake only when the client has been notified that the court is contemplating dismissal. 370 U.S. at 648 (Black, J., dissenting). Compare Chief Justice Burger's rejection, on grounds of impracticality and inconsistency with the adversary system, of the suggestion that a trial judge be required to ask whether a prisoner desired to be tried in jail clothes. Estelle v. Williams, 425 U.S. 501, 512 (1976).

\textsuperscript{75} See RESTATEMENT (SECOND) OF AGENCY §§ 219, 220 (1958); Harper & Kime, The Duty to Control the Conduct of Another, 43 Yale L.J. 886 (1934). As Professor Anderson has noted, agency relationships are usually analyzed from
The theory presented here does not fit all the cases. In *Nahhas v. Pacific Greyhound Lines*, the request of one of the plaintiffs to testify at trial was overridden by his attorney. Upholding the attorney's decision on appeal, the court stated that “[i]t is the prerogative of counsel, if not his duty, where he is of the opinion it would be detrimental to the best interests of the case he is presenting to have a certain witness testify, to refuse to call such witness ...” The *Nahhas* opinion thus seems an application of the rule that the attorney, perhaps because of his special skills and knowledge, can unilaterally control procedural matters. Yet the subject-matter/procedure dichotomy proves too much. As has been demonstrated, a theory based upon considerations of judicial efficiency and fairness to third parties is not only consistent with most of the case law, but also explanatory of many of the inconsistencies. This theory is also more consistent with general principles of agency law than those subject-matter/procedure decisions that allow an agent to ignore his principal's instructions.

---

the point of view of the principal's liability for the agent's acts. But there has been little analysis of the control implied by such liability. Anderson, *Conflicts of Interest: Efficiency, Fairness and the Corporate Structure*, 25 U.C.L.A. L. Rev. 738, 765 (1978).


77 *Id.* at 146, 13 Cal. Rptr. at 300.

78 See also Chief Justice Burger's concurring opinion in Wainwright v. Sykes, 433 U.S. 72, 93 (1977), for a discussion of similar considerations in the determination whether habeas relief should be granted. The difficulties implicit in such an assumption of professional competence are surveyed in the text accompanying notes 152-268 infra.

79 Coexistent with the malpractice standards of conduct is a line of authority that examines the lawyer's role as agent. See F. MECHEN, OUTLINES OF THE LAW OF AGENCY 371 (P. Mechem 4th ed. 1952). As an agent a lawyer has a duty to follow his principal's instructions. See *Restatement (Second) of Agency* § 385 (1958). The commentary and illustrations state that, absent special agreement, a lawyer is in charge of the "minutiae of court proceedings" and can withdraw if he is not allowed to act as he thinks best. *Id.* § 385, Comment a, Illustration 2. Thus, although the client is given something less than total control through instructions, the lawyer cannot act contrary to explicit instructions.

Furthermore, although the rules of agency are most often relied upon to bind the principal when the agent's actions are within the latter's express, implied, or apparent authority, see *id.* §§ 7, 8, the *Restatement* also acknowledges that the principal may be bound because of inherent agency powers "derived not from authority, apparent authority or estoppel, but solely from the agency relation and existing for the protection of persons harmed by or dealing with a servant or other agent." *Id.* § 8A. With regard to the types of issues considered here, the *Restatement* does limit the application of § 8A to general agents, *id.* §§ 8A, 161, Comments, but cases and commentators have taken the principles of § 8A beyond this limitation. See Kidd v. Thomas A. Edison, Inc., 239 F. 405 (S.D.N.Y. 1917); Means, *Vicarious Liability for Agency Contracts*, 48 VA. L. Rev. 50 (1962); Munro, *The Agent's Status: The Kidd Case*, 20 U. Pitt. L. Rev. 33 (1958). In choosing between a third party and a principal whose conduct has not contributed to his liability, these "inherent power" agency cases raise the same conflict noted by Justice Harlan in Link v. Wabash R.R. Co., 370 U.S. 626 (1962). See note 73 supra.
The cases, therefore, do not establish the decisionmaking authority of the lawyer over the client. Rather, they address the power of the lawyer to bind his client. The subject-matter/procedure line does, however, have significance. It helps identify those situations in which the lawyer does have an affirmative obligation to obtain his client's consent. The Code of Professional Responsibility and a few cases also establish that, in situations involving conflicts of interest, the lawyer has an affirmative obligation to obtain his client's consent to continue representation. Absent such circumstances,
the burden of initiating consultation between attorney and client falls upon the client. In most instances, therefore, the lawyer may act upon his own judgment unless the client instructs otherwise.

2. The Code of Professional Responsibility

The Code of Professional Responsibility \(^{81}\) seems to envision that the client's role in decisionmaking extends beyond making settlement decisions and deciding matters directly affecting the subject matter of the action. Unfortunately, however, both the meaning of the governing provision and its relationship to other sections of the Code are unclear.

The primary Code section that deals with the allocation of decisionmaking authority is Ethical Consideration (EC) 7-7, \(^{82}\) which states:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.

The important phrase is "affecting the merits of the cause." Limiting lawyer decisionmaking to matters not "affecting the merits of the cause," if the clause is read broadly, could grant clients control over almost every step taken in litigation. Almost any question, any objection, any tactical decision could affect the merits of the cause. It seems highly unlikely, however, that the Code meant to go that far, given that this reading would work a drastic change in determination. He argues that, because the impairment of professional judgment is being evaluated, the decisionmaker must understand that judgment process. Does the client possess the expertise to undertake such an evaluation? \(^{83}\) See Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 MINN. L. REV. 119, 154 & n.136 (1978); Gibson, ABA Code Canon 5 Professional Judgment, 48 TEX. L. REV. 351, 363 (1970). The client's competence to make such decisions is considered in notes 265-83 infra & accompanying text.

\(^{81}\) The Code of Professional Responsibility, as adopted in 1969, comprises nine sections, each consisting of a canon, ethical considerations, and disciplinary rules. The canons set forth standards of conduct in general terms; the ethical considerations are "aspirational," and the disciplinary rules are mandatory, stating the "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." ABA CODE OF PROFESSIONAL RESPONSIBILITY, PREAMBLE AND PRELIMINARY STATEMENT at 1.

\(^{82}\) Although the ethical considerations are merely aspirational, they have been used by courts as authority for imposing standards of conduct. See, e.g., Estate of Weinstock, 40 N.Y.2d 1, 6, 351 N.E.2d 647, 649, 386 N.Y.S.2d 1, 3 (1976).
past practices. In addition, the examples given in EC 7-7 of decisions that should be made by the client are whether to accept a settlement offer and whether to waive an affirmative defense. The latter may go beyond the case law, but neither of these illustrations supports an expansive reading.

Moreover, EC 7-9 states: "In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client." This provision rebuts the notion that EC 7-7 was meant to limit the lawyer's decisionmaking role to purely ministerial tasks.

The problem, then, is to find a more limited reading of "affecting the merits of the cause." This language might be read as promulgating a retrospective test—did the particular decision in fact affect the merits of the cause? Such a reading makes no sense, however, if the purpose of the section is to give lawyers guidance in allocating decisions before they are made.

Perhaps the language should be interpreted as reflecting the case law. If so, why did the draftsmen not use the terminology most often used by the courts—the "subject matter of the action"? Further, the case law itself is less than clear, and other sections of the Code grant a broader decisionmaking power to the client than that suggested in the cases. EC 7-26, for instance, states that a lawyer should "present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured." Although EC 7-26 is not necessarily inconsistent with a more limited reading of "affecting the merits of the cause," it is difficult to discern an overall policy to guide the interpretation of this vague language.

The phrase "substantially prejudicing the rights of the client" introduces additional problems. Aside from the difficulty of interpreting "substantially," the term "rights" is ambiguous. In this context, "rights" could mean legal rights in situations outside of
litigation, in view of the fact that the preceding phrase—"affecting the merits of the cause"—covers rights involved in litigation; or "rights" could refer to important interests of a client that are affected by litigation but that are not directly part of its outcome; or it could refer to both of these. In its broadest reading, "rights" could refer to important interests of a client, regardless of whether those interests are labelled "legal rights" or are involved in litigation.

Disciplinary Rule 7-101(B)(1) creates further confusion by providing that a lawyer may, "[w]here permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." Even a narrow reading of EC 7-7 would allow such waiver only when the client agrees; if the client must agree, the phrase "where permissible" is superfluous.

One possible explanation lies in the distinction between disciplinary rules and ethical considerations. Because the latter are merely aspirational, they may extend further than the disciplinary rules. Even so, nothing in the disciplinary rules explains when the lawyer may choose to exercise his judgment to waive his client's right.

In summary, the Code contains language that goes beyond the case law, but the exact contours of that language cannot be determined because no overall policy is discernible to guide its interpretation.

B. The Lawyers Obligation to Provide Information

1. The Cases

Hornbook agency law states that the agent has a duty to disclose all material information to his client. In applying this law to lawyers, courts have faced two problems. The first is similar to the one discussed above: concerning what issues must a lawyer disclose information to his client? The second was faced in the medical cases: assuming a duty to disclose, how is "material" defined? Should the standard of materiality be that of the profession, the lay public, the particular client, or the court?

---

89 ABA Code of Professional Responsibility, Disciplinary Rule 7-101(B) (1).

90 F. Mechel, supra note 79, at § 541. Cf. Restatement (Second) of Agency § 381 ("agent is subject to a duty . . . to give his principal information which is relevant to affairs entrusted to him"). The comments on § 381, however, use "material" interchangeably with "relevant." See id. § 381, Comment b.

The duty to disclose material information can also be derived from the lawyer's fiduciary obligations. See R. Mallen & V. Levit, supra note 33, at § 96.

91 See text accompanying notes 18-22 supra. A court could attempt to define the components of adequate disclosure with a set of more precise rules. See Note, 79 Yale L.J. 1533, 1561 (1970).
The issues about which the lawyer must inform his client are the same as those which the lawyer must allow the client to decide—that is, the lawyer must disclose information related to the subject matter of the action and to conflicts of interest. This answer reintroduces the problem of distinguishing subject matter from procedure and tactics. In addition, some courts have confused the question of determining the subject matter of the action with the question of degree of disclosure. If a particular disclosure was not explicitly required by the agreement between the lawyer and client, the courts have imposed on the lawyer no duty of disclosure. For example, one court dismissed the contention that an attorney had any obligation to disclose to his client the right to appeal by finding that the contract between the attorney and client did not require the attorney to appeal the case. The court never asked itself whether a client may reasonably expect an attorney to reveal options for pursuing the case even though the attorney has no intention of continuing representation. The court’s approach puts an affirmative burden on the client to know enough law to require certain disclosures in his contract with the attorney. As discussed later, this is a poor way of approaching the problem.

The second question—the standard of materiality—has not been answered consistently in the cases. In Spector v. Mermelstein, the court defined “material facts,” which an attorney must reveal to his client, as those “which, if known to the client, might well have caused him, acting as a reasonable man, to alter his proposed course

---

92 R. MALLEN & V. LEVIT, supra note 33, at 140 (client must be informed of any acts or events concerning the subject matter of the retention as to which the client has right to exercise discretion or control). Regarding conflicts of interest, see id. 139-40.


94 Young v. Birdwell, 20 Utah 2d 332, 437 P.2d 686 (1968). The court did say that, if the ruling was “manifestly against the general law on the subject,” a duty to advise might conceivably arise, 437 P.2d at 690, but not when, as in that case, the law was uncertain. The court thus confused the reasonableness of the lawyer’s judgment about the desirability of an appeal with the issue of duty to disclose.

95 Compare the cases which have held that an attorney has an obligation to notify his client of his withdrawal from a case, e.g., Zitower v. Holdsworth, 200 F. Supp. 490 (E.D. Pa. 1961); Central Cab Co. v. Clarke, 259 Md. 542, 270 A.2d 662 (1970); Rice v. Forestier, 415 S.W.2d 711 (Tex. Ct. App. 1967).

96 See text accompanying notes 394-96 infra.

of conduct.” This standard is similar to that stated in *Canterbury v. Spence*, the leading medical informed-consent case.100

Directly contrary to *Spector* are two cases that require expert testimony to prove that the alleged failure to disclose information to the client fell below the ordinary standards of the profession.101 In one case, the attorney allegedly failed to disclose a settlement offer; in the other, the lawyer failed to explain the meaning of a clause in a purchase contract.103 Although one can explain these cases by looking more closely at their facts, acceptance of the standard they adopt would eviscerate any meaningful informed-consent requirement. Certainly, the existence of a settlement offer or the meaning of a proposed agreement is the minimum information a client needs.

Other than in this smattering of cases, courts have not focused on the question of what standard governs disclosure. Because recovery in most cases is based on a theory of negligence, the profes-

98 Id. 40. The facts in *Spector* suggest the possibility of a conflict of interest between the lawyer and his client, a factor which may have influenced the court. Two other cases appear to adopt client-oriented standards similar to that set forth in *Spector* in order to avoid statute of limitation problems. See Hendrickson v. Sears, 365 Mass. 83, 90, 310 N.E.2d 131, 135 (1974) (dictum); Passanante v. Yormark, 138 N.J. Super. 233, 350 A.2d 497 (1975).


100 See text accompanying note 21 supra.

101 Whether expert testimony is required for a prima facie case of lawyer malpractice is not settled. Although at one time the rule appeared to be that it was not required, see Wade, supra note 40, at 776, except in Illinois, see Olsen v. North, 276 Ill. App. 457 (1934), recent decisions have moved toward a rule that distinguishes between cases in which the claimed malpractice is within the understanding of laymen and those cases in which the alleged complexity of the situation requires an expert to educate the jury. See Baker v. Beal, 225 N.W.2d 106, 112 (Iowa 1975) (dictum); Central Cab Co. v. Clarke, 270 A.2d 662, 667 (Md. 1970); Hill v. Okay Construction Co., 252 N.W.2d 107, 116 (Minn. 1977); Stewart v. Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (1976); Hanson v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (1975). One California case has held required expert testimony in cases involving a legal specialty. Wright v. Williams, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975) (admiralty). Finally, some cases still adhere to the old rule that expert testimony is not necessary because the trial judge's knowledge can substitute for the expert's. See Muse v. St. Paul Fire & Marine Ins. Co., 328 So. 2d 698 (La. 1976).

102 Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966).

103 Wright v. Williams, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975).

104 For example, the court in Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966), obviously did not believe the plaintiff, remarking:

If a judgment against an attorney, on a record such as is before us, can be justified the legal profession could be more hazardous than the law contemplates. An attorney can hardly afford to take the chance of communicating with his client by any means other than in writing or by having a record made of every conversation between them.

Id. 494.
sional standard is used, and the question of an alternative standard neither raised nor discussed.

This lack of attention to the issue of disclosure raises particularly significant problems with regard to cases involving the lawyer's exercise of judgment. In these, courts generally do not impose an obligation on the attorney to tell a client of the uncertainty of the results of a particular course of action. Rather, as long as the attorney has researched the issue and has found the law uncertain, he has the discretion to weigh the costs and benefits of alternative courses of action. To some extent, these cases are related to the previously discussed problem of who should make a given decision. If the decision belongs to the attorney, one could argue that he need not inform the client. Even in cases of settlement or agreements, however, no clear-cut obligation has emerged to inform the client of any uncertainty in the attorney's recommendations.

The general rule is that a lawyer is not liable for errors in judgment unless the error results from a failure to exercise ordinary skill and knowledge. R. Mal-

len & V. Levi, supra note 33, at § 212; Wade, supra note 40, at 764-65. The exception for failure to exercise ordinary skill and knowledge applies mainly to a failure to do adequate research. See Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975). But very few cases even discuss whether an attorney, once he decides "correctly" that a decision is in the area of "judgment," has an obligation to inform his client that such a judgment is involved. See cases cited in notes 106 & 107 infra. Perhaps the absence of such a duty is justified when no competing considerations are involved in choosing between alternative readings of the law. In most situations there are such considerations—for example, the uncertain cost of pursuing a matter, see Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370 (1959), or the possibility of taking additional steps to avoid a risk, see Smith v. St. Paul Fire & Marine Ins. Co., 366 F. Supp. 1283 (M.D. La. 1973), aff'd, 500 F.2d 1131 (5th Cir. 1975); Baker v. Beal, 225 N.W.2d 106 (Iowa 1975).

In many of the judgment cases that involve tactical decisions, the court does not reach the question whether the client should be informed of the uncertainty of the lawyer's judgment, presumably because nobody questions the propriety of the attorney's making the decision. The only issue is thought to be whether the decision was made correctly. See Mazer v. Security Ins. Group, 507 F.2d 1338 (3d Cir. 1975), aff'd on other grounds, 368 F. Supp. 418 (E.D. Pa. 1974) (decision regarding joining a third party); Sprague v. Morgan, 185 Cal. App. 409, 8 Cal. Rptr. 347 (1960) (decision regarding timing of filing claim before Industrial Accident Commission); Baker v. Beal, 225 N.W.2d 106, 112-13 (Iowa 1975) (decision regarding what statutes to file claim under); Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370 (1959) (decision regarding defending lawsuit); Hill v. Mynatt, 59 S.W. 163 (Tenn. Ch. App. 1900) (decision regarding what court to file in).

Where the law is unsettled, cases have held the client has no malpractice action for incorrect advice even when no evidence indicates that the lawyer explained the risks of uncertainty to the client. See Gimbel v. Waldman, 84 N.Y.S.2d 888, 889 (Sup. Ct. 1948). When liability has been found, it has been based on either the lawyer's failure to advise his client with regard to a clear point of law, see Ramp v. St. Paul Fire & Marine Ins. Co., 254 So. 2d 79 (La. Ct. App.), amended, 263 La. 774, 269 So. 2d 239 (1971); Ward v. Arnold, 52 Wash. 2d 561, 328 P.2d 164 (1958), or on the lawyer's failure to read the agreement about which he advised his client, see Dillard Smith Constr. Co. v. Greene, 337 So. 2d 841 (Fla. Dist. Ct. App. 1976). But see cases holding that a lawyer has a duty to advise his client of the risks of failure to take a lien, Rhine v. Haley, 239 Ark. 72, 378
2. The Code of Professional Responsibility

The Code is more helpful in specifying what information the attorney must disclose to his client. EC 7-8 states:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. . . . A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. . . . In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.108

This provision is a good general statement of what a lawyer's obligation under informed consent might be. It clearly puts the burden on the lawyer to initiate discussion. Of course, in order for this provision to be meaningful, closer analysis is needed of what disclosure is required in specific situations.109 But this is a secondary consideration. The main problem is that, until rules are developed for deciding what decisions belong to the client, lawyers will not know in what situations EC 7-8 is meant to apply.

This excursion into the cases and the Code has shown that no explicit doctrine of informed consent applies to lawyers. The subject-matter/procedure line of cases defines the lawyer's obligation to seek the client's consent and to provide his client with information. This division between subject matter and procedure is confusing, however, and recreates the problems faced by similar attempts to


108 ABA Code of Professional Responsibility, Ethical Consideration 7-8.

109 See text accompanying notes 386-402 infra. The few cases citing EC 7-8 all involve third-party situations, not actions against the attorney. See Clarion Corp. v. American Home Products Corp., 494 F.2d 860 (7th Cir.), cert. denied, 419 U.S. 870 (1974); McDonald v. Hutto, 414 F. Supp. 532 (E.D. Ark. 1976); People v. Mason, 29 Ill. App. 3d 121, 329 N.E.2d 794 (1975). Although there have been disciplinary proceedings against attorneys for failure to communicate with their clients, these involve flagrant failures to contact clients about their cases, not questions of what information must be communicated. See Annot. 80 A.L.R.3d 1240 (1977).
divide substance from procedure in other areas of the law.110 More important, the general lack of explicit attention to the issue of allocation of authority between lawyer and client leaves open the question of what theory explains this distinction. Absent some justification, the question arises whether additional affirmative obligations should be placed upon the lawyer to seek his client's consent. In the medical area, the informed-consent cases proceeded from the assumption that a right to control decisions was meaningless in the absence of some affirmative obligation on the physician to disclose information.111 The next section discusses whether similar considerations call for placing general affirmative obligations on lawyers to obtain the consent of clients.

III. TOWARD A THEORY OF INFORMED CONSENT FOR LAWYER AND CLIENT

This section begins by arguing for a presumption that all decisions belong to the client. It then examines the argument that clients consent to professional control, concluding that this argument does not support the delegation of control to professionals, but rather supports the requirement of informed consent. Just as in the medical cases, the value of the right to decide is questionable if the client is not told when decisions must be made and that he has the power to make them.112 The next several subsections look at two major arguments against the presumption in favor of client decisionmaking: that professional control results in better decisions for the client, and that informed consent is too costly. These argu-

110 The problem of dividing procedure from substance has a long history in the conflict of laws, see, e.g., W. Cook, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 154-83 (1942), and in federal diversity cases, in which the question whether federal or state law applied, depends, at least in part, upon how one draws the procedure-substance line, see, e.g., Hanna v. Plumer, 380 U.S. 460 (1965); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). This history demonstrates the difficulty involved in drawing that line and the need for a theory to guide such attempts. See, e.g., Chayes, The Bead Game, 87 Harv. L. Rev. 741 (1974); Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693 (1974); Ely, The Necklace, 87 Harv. L. Rev. 753 (1974). Subject matter may not be identical to substance, but the problems do seem analogous.

111 See text accompanying notes 14-22 supra.

112 One aspect of decisionmaking power is the client's (principal's) ability to direct the actions of the lawyer (agent). A second dimension involves what might be called agenda control—the client's power to have a decision submitted to him. See P. BACHRACH & M. BARATZ, POWER AND POVERTY: THEORY AND PRACTICE ch. 1 (1970). This control could be treated as a requirement that the lawyer transmit to the client the information that a decision must be made. The less likely the client is to have independent knowledge of what decisions must be made, the more important his right to have decisions submitted to him.
ments do not indicate that client decisionmaking should be abandoned, but do suggest that the presumption be modified: a lawyer should be affirmatively required to obtain informed consent when client values or lawyer conflicts of interest are involved. This requirement would maximize the scope of client decisionmaking without imposing its costs in cases in which such decisionmaking would not likely be desired. Clients who wanted more or less decisionmaking control in particular cases would still be able to accommodate their interests. Finally, this section examines the interests of the lawyer and the public and finds significant ones that must be taken into account. Discussion of ways in which the various interests might be accommodated is deferred until the next section of the Article.

A. The Prima Facie Case for Client Decisionmaking

Unless the client chooses to delegate decisionmaking authority to the lawyer, the client should be presumed to have control over all aspects of his case. The very label "his case" is suggestive. A claim, a case, or a problem belongs to the client; this claim of ownership gives the client a presumptive right of control.114 By itself, however, this claim of ownership establishes only a weak presumption in favor of client decisionmaking. In the medical cases, control was linked to a fundamental aspect of personal integrity—control over one's body.115 In considering the application

113 This approach, then, lies somewhere between a strong rights-based argument, see, e.g., R. Dworkin, Taking Rights Seriously 90-100 (1977); C. Fried, Right and Wrong (1978), and a simple balancing of the interests. It requires that strong, affirmative reasons be shown for abandoning the presumption of client decisionmaking. Compare Buchanan, Medical Paternalism, 7 Phil. & Pub. Aff. 370 (1978).

114 Although legal claims are not treated the same as property rights, see Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1404-05 n.73 (1976) (plaintiff's legal claims are not "property" in the constitutional sense unless underlying claim is a "vested" right), they are sufficiently analogous to property to warrant the statement in the text. Indeed, the reasons for not allowing a market in legal claims relate more to questions of propriety and to fears of stirring up litigation than to problems related to "ownership." See Reder, Contingent Fees in Litigation with Special Reference to Medical Malpractice in The Economics of Medical Malpractice 211, 225 & n.40 (S. Rottenberg ed. 1978).

115 See note 12 supra & accompanying text. Decisions related to one's body have generally received more protection from state interference than ordinary property rights. See generally L. Tribe, American Constitutional Law §§ 15-9 to -11 (1978). See also Cantor, A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life, 26 Rutgers L. Rev. 228, 238-39 (1973). Compare Professor Epstein's statement regarding the informed consent doctrine in medicine: "[t]he patient is entitled to the exclusive control over what is done to his own body. That is the fundamental property right which each of us has in himself." Epstein, Medical Malpractice: The Case for Contract 1976 Am. B. Found. Res. J. 87, 126.
of informed-consent doctrine to lawyer-client relations, the question arises whether the client's interests similarly justify client control.\textsuperscript{116} As discussed below, strongly held values related to the operation of the legal system and to the relationship between lawyer and client do support the presumption of client control.

First, the legal system is a representational system for the substantive claims of clients. The system assumes that a client's claim is his, just as the political system assumes that a citizen's vote is his.\textsuperscript{117} Indeed, access to the legal system is an a priori assumption of the proper functioning of economic\textsuperscript{118} and political institu-

\textsuperscript{116} Bodily integrity is not the only justification for the patient's claim to autonomy in the informed-consent medical cases. There is a second and more expressive aspect to the claim for patient control: making and accepting responsibility for decisions affirms one's humanity. Professor Capron, in discussing doctor-patient relationships, has described this second aspect of autonomy as protecting the patient's status as a human being. See Capron, supra note 5, at 346-47. Charles Fried, discussing medical experimentation, has termed this "lucidity"—"the patient's rights to know all relevant details about the situation he finds himself in . . . [because] it is crucial to a fully human process . . . of choosing what kind of person one will be." C. Fried, MEDICAL EXPERIMENTATION: PERSONAL INTEGRITY AND SOCIAL POLICY 101 (1974).

Neither Fried nor Capron makes explicit whether this second aspect of autonomy relates to all decisions that affect individuals, or just to decisions involving important human concerns. They are not likely asserting a strong autonomy interest in all decisions, however, for such an interest would be equivalent to a generalized interest in decisionmaking and would thus run the risk of dilution. See Wilkinson & White, Constitutional Protection for Personal Lifestyles, 62 CORNELL L. REV. 563, 615-16 (1977). This generalized interest would be no more than an assertion of the values underlying freedom of contract. Without diminishing the importance of contractual autonomy, Capron and Fried seem to be making a more particularized and stronger autonomy claim.

This more particularized claim could be related to the likelihood of serious consequences. If so, some legal matters—particularly in criminal cases—involve consequences as serious as those in medical cases. The presence of this strong autonomy interest would then be dependent upon the type of case. Since neither Capron nor Fried distinguishes between types of cases in discussing their claim for patient autonomy, it seems more plausible to assume they are arguing not on the basis of the importance of the particular medical case to the individual, but rather from the significance which medical care itself has for individuals and for society.

Part A of the text argues that a client's participation in the legal system is important enough to justify client decisionmaking.


\textsuperscript{118} This statement seems correct in two ways. First, parties who bargain presumably assume that, if a significant enough dispute occurs, they will have access to some dispute-resolution system. Tullock, On the Efficient Organization of Trials, 28 KYKLOS 745 (1975). If cost or other factors stifled this expectation, concern that our system was defective would appear to be justified. See generally Nader, Disputing Without the Force of Law, 88 YALE L.J. 998 (1979). Second, legal rules made by courts shape the economic bargaining that occurs. See R. Posner, ECONOMIC ANALYSIS OF LAW passim (2d ed. 1977); cf. Mnookin and Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 968 (1979) (legal rules create bargaining endowments for divorcing parents). Therefore, equal access to the system that makes these rules would seem to be a
tions. If the legal system is intended to facilitate client autonomy and self-determination in spheres outside that system, it would be anomalous if choosing a representative in order to gain access to the legal system entailed surrender of control.

Second, the principles of party presentation and party prosecution which underlie the adversary system embody the notion that "parties should be master of their own rights." These principles are valued because they increase the moral force and acceptability of the decisions made by the system, in that each party has had the opportunity "to choose his strategy, plot his fate, and rise or fall by his own choices." Whether this conclusion reflects some empirical guess regarding commonly held values in our society, or some moral imperative, its acceptance in the legal system gives autonomy interests special weight, which is denied if the minimum requirement of fairness.


121 F. James & G. Hazard, CIVIL PROCEDURE § 1.2 at 4 (2d ed. 1977).

122 Id. § 1.2 at 5. Another justification for these principles is the familiar argument that "truth is more likely to emerge from bilateral investigation and presentation, motivated by the strong pull of self-interest, than from judicial investigation motivated only by official duty." Id. This justification is fundamental and depends, in part, upon the assumptions that the advocates are well trained, approximately equal in resources and ability, and motivated to act in the client's best interest. Transferring decisionmaking power to the client may further this goal, but only because of the arguments discussed below relating to conflicts of interest, not because of any interests linked to autonomy.

123 Saltzburg, The Unnecessarily Expanding Role of the American Trial Judge, 64 VA. L. REV. 1, 17 (1978).

The other major reason for greater acceptability is that party presentation and prosecution help insure that the parties perceive the decisionmaker as neutral. Id.


125 See L. Fuller, supra note 120, at 162:

[Legal morality] cannot be neutral in its view of man himself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.

126 Some commentators have argued that these statements about party control and autonomy are ideological trappings, and that the reality of the system is exposed by what it does—give control to the professionals. See Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. REV. 29; Abel, From the Editor, 12 LAW & SOC'y. REV. 189, 197-98 (1978). Abel argues that the ideology of the legal system may be accepted only by the privileged classes, who
attorney is allowed to make decisions for the client without the client's consent.

Finally, the client has an autonomy interest that derives from his relationship with the lawyer. In most lawyer-client relationships, the lawyer's role is to stand in for the client—to represent him before the courts and in his dealings with other parties. When a lawyer, as representative, acts without authority, he violates the client's integrity by presenting the client falsely to others. In addition to portraying the client inaccurately, the lawyer may also be using the client as a means, a harm which is most obvious (and most criticized) when a "public interest" lawyer uses his client for ends that serve the lawyer's personal interests or that represent the lawyer's conception of the public good. This harm also occurs need such an ideology to justify their position. He argues that people in the lower classes understand the reality and therefore opt out of the legal system, if possible. Abel and Simon may be right. To some extent this Article is based on the perception of a "gap" between some perceived ideal and reality.

See Abel, A Comparative Theory of Dispute Institutions in Society, 8 Law & Soc'y. Rev. 217, 273 (1973) ("[R]epresentation by a professional . . . increases the control of the [dispute] institution over the dispute.").

As Professor Epstein has noted, the complicated notice provisions in the class action rules make sense if party control and autonomy must, in the first instance, be exercised by the party; if attorney representation would suffice, the rules seem mere impediments to the efficient administration of justice. Epstein, Privacy, Property Rights, and Misrepresentations, 12 GA. L. Rev. 455, 459 (1978). But see note 131 infra.

Interests other than those presented here may also favor client decision-making. The rituals of the legal system, particularly a trial, are arguably an important expression of self. Involvement in the legal process can be both another source of acceptance of the process and a connection between the community and the litigants. The more the professionals' control separates the parties from the process, the less these ritualistic needs are met. See generally Ball, The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater, 28 STAN. L. Rev. 81 (1975); Tribe, Trial by Mathematics: Precision & Ritual in the Legal Process, 84 HARV. L. Rev. 1329, 1370-71, 1376, 1391-92 (1971). But see Simon, supra note 126, at 94-99.

In contrast, the patient's autonomy interest in the doctor-patient relationship prevents the physician from doing something to the patient without his consent. An unauthorized touching directly violates the patient's physical and personal integrity. See note 116 supra. These harms are more tangible than those caused by an attorney's unauthorized actions, see accompanying text, but this difference is not dispositive of the question raised at the beginning of this section. The client's interests in controlling decisions may still justify client decisionmaking, even if those interests are not as strong as the interest in controlling one's body.

See Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470, 493-515 (1976); Stewart, The Reformation of American Administrative Law, 88 HARV. L. Rev. 1667, 1762-70 (1975). If it is the use of the client, rather than the use of litigation for political ends, that is objectionable, then perhaps the legal system should stop insisting on using a nominal client as the "public interest" attorney's key to the courthouse door. Why not acknowledge that attorneys have designated themselves private attorneys
in other cases if a lawyer advances his own interests while acting in the client's name.\textsuperscript{132}

B. Contract As Consent

The traditional model of professional-client relationships does not explicitly deny that clients have the presumptive right to make decisions, but argues instead that clients consent to professional decisionmaking. By choosing a lawyer (or a physician), this argument goes, clients elect to delegate the authority to make decisions on their cases or problems.\textsuperscript{133}

general, for economic or other reasons, see generally \textit{Public Interest Law} (B. Weisbrot, S. Handler & N. Komesar eds. 1978), and then grapple openly with the problems this type of representation presents. See R. Posner, supra note 118, at 450, 462-67; cf. Chayes, \textit{The Role of the Judge in Public Law Litigation}, 89 \textit{Harv. L. Rev.} 1281 (1976) (legitimizing the expanding role of the judiciary in public-interest litigation).

As Chayes points out, once the legal system breaks out of the traditional modes of litigation, it should expand the scope of the interests represented, particularly at the remedial stage. \textit{Id.} 1310-13. See also Eisenberg, supra note 30, at 426-31. Maintaining the fiction of an attorney who is controlled by his nominal client and who represents the affected interests may impede this expansion.

The difficulties of nominal representation have been faced in class actions. Under the majority rule, the attorney cannot be the class representative because of the allegedly inherent conflict of interest between the two roles. Susman v. Lincoln Am. Corp., 561 F.2d 86, 90-91 (7th Cir. 1977) (and cases cited therein). But a conflict of interest between the attorney and the class is possible whether or not the attorney is the named plaintiff. See Pettway v. Amer. Cast Iron Pipe Co., 576 F.2d 1187, 1177 (5th Cir. 1978), cert. denied, 99 S. Ct. 1020 (1979); Saylor v. Lindsley, 456 F.2d 896, 900-01 (2d Cir. 1972); Dam, \textit{Class Actions, Efficiency, Compensation, Deterrence, and Conflict of Interest}, 4 J. Lec. Stud. 47, 56-61 (1975).

Some courts, perhaps recognizing this dilemma, have tried to determine whether the named plaintiffs have sufficient competence to supervise their attorney. See, e.g., Seiden v. Nicholson, 69 F.R.D. 681, 688-89, \textit{settlement approved}, 72 F.R.D. 201 (N.D. Ill. 1974); \textit{In re Goldship Funding Co.}, 61 F.R.D. 592, 594-95 (M.D. Pa. 1974). Cases inevitably will arise in which the action cannot be brought if the named plaintiffs must possess enough knowledge to control the whole class action, but in which the public interest requires at least a hearing on the merits. See Hernandez v. United Fire Ins. Co., 79 F.R.D. 419, 426-28 (N.D. Ill. 1978). Moreover, named plaintiffs may have conflicts with the class. See McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 420-23 (7th Cir. 1977). Again, recognizing the difference between these kinds of cases and ordinary litigation might prove a better resolution of these problems. See Pettway v. American Cast Iron Pipe Co., 576 F.2d at 1176-78; \textit{Developments in the Law—Class Actions}, 89 \textit{Harv. L. Rev.} 1318, 1592-1604 (1976). Compare the proposal of the Justice Department's Office for Improvements in Justice for splitting class actions into "public" and "class compensatory" actions. Meador, \textit{Proposed Revision of Class Damage Procedures}, 65 ABA J. 48 (1979).

\textsuperscript{132} Obviously, in some sense, the attorney acts for his own ends much of the time in any exchange relationship, but it is the unauthorized "use" of the client that is objectionable here.

\textsuperscript{133} The foremost proponent of this point of view is Talcott Parsons. See, e.g., Parsons, \textit{Research With Human Subjects and the "Professional Complex"}, 98 \textit{Daedalus} 325, 341-345 (1969); cf. Wainwright v. Sykes, 433 U.S. 73, 93-94 (1977) (Burger, C.J., concurring) (decisions whether to make constitutionally based objections during a criminal trial are of necessity entrusted to the defendant's attorney).
Richard Epstein, writing about physicians, recently offered a variant of this view. He argues that, in general, medical malpractice problems should be approached as questions of contract: 134 "[T]he basic rules governing the relationship between physician and patient are then best understood as approximations of the rules which the parties themselves would choose to govern their own relationship." 135 A doctrine such as informed consent should be rejected, 136 Epstein says, because it is "at war with the mutual expectations of the parties." 137

If these views about clients' demands for informed consent are correct, then it would not only be justifiable for lawyers to make decisions on behalf of their clients, but silly and wasteful to impose, in the name of autonomy, a requirement that clients do not want. Particular clients wishing to exercise greater decisionmaking authority would be free to contract with those lawyers willing to submit to that authority. The role of legal rules would be to enforce the parties' bargain and to facilitate the contracting process. The law would not impose rules specifying who controlled whom.

Epstein's assertion that informed-consent doctrine may be at war with the expectations of the parties is not based on any empirical data. 138 His conclusion seems to follow from the fact that the custom of the profession is narrower than the legal obligation to obtain informed consent. He assumes that, if consumers desired deviations from these customs, they would have demanded such changes, and market forces eventually would have produced them. 139

This reasoning reflects more faith in the market than most commentators on professional-client relationships have expressed. 140

134 Epstein, supra note 115. See also Epstein, Medical Malpractice: Its Cause and Cure, in The Economics of Medical Malpractice 254-257 (S. Rottenberg ed. 1978).
135 Epstein, supra note 115, at 95.
136 Epstein also rejects the informed-consent doctrine because of the difficulties involved in its application, particularly with regard to the problems of causation. Id. 125.
137 Id. 127.
138 There is little data on the agreements that lawyers make with their clients; the information existing must be extrapolated either from practical "advice" sources, see, e.g., E. Ent, D. Doar & L. Perlweig, Lawyer-Client Employment Agreements (1967), or studies of lawyers' behavior made for other purposes, see, e.g., J. Carlin, Lawyers on Their Own (1962); H. O'Gorman, Lawyers and Matrimonial Cases (1963); D. Rosenthal, supra note 6.
139 Epstein, supra note 115, at 127.
Beside the general objections to the economic argument that the status quo reflects people's desires, such reasoning is not descriptive of professional-client relationships, even if acceptable in other contexts.

The major difficulty is that the lawyer and client do not have equal information about the possible structuring of the relationship and about the decisions that are involved. Indeed, a client often comes to a lawyer because he lacks such information. At least at the beginning of the relationship, therefore, the buyer-client cannot realistically be expected to tell the seller-lawyer what decisions he wants to control. But, by Epstein's reasoning, failure to do so indicates acceptance of the customs of the profession.

Second, clients may not perceive the issue of allocation of decisionmaking authority to be a legitimate item on the agenda for discussion. Today's "customs" regarding that agenda are to some extent a result of laws and expectations created in the past. If, as appears likely, professionals have exerted disproportionate control over these past laws and expectations, then clients' "true expectations" cannot be ascertained until the past set of laws, customs, and expectations has been changed.

Third, even when clients perceive control to be an issue, status and power differences between themselves and their lawyers may lead them to accept less information and control than they might like.

---


142 See Arrow, supra note 140, at 946; Mechanic, supra note 140, at 353-53.

143 See Arrow, supra note 140, at 946.

144 Cf. RESTATEMENT (SECOND) OF CONTRACTS § 247 (Tent. Draft No. 5, 1970): "A reasonable usage with respect to a type of agreement supplements or qualifies an agreement of that type if each party knows or has reason to know of the usage . . . ." See also Parnsworth, Disputes Over Omissions in Contracts, 68 COLUM. L. REV. 860 (1968).

145 Allocation of decisionmaking authority may be a background "fact," inappropriate for discussion, similar to physicians wearing white coats or judges wearing black robes. For a general discussion of the importance of the agenda of issues, see P. BACHARACH & M. BARATZ, supra note 112, at 3-16.

146 Baker, The Ideology of the Economic Analysis of Law, 5 PHIL. & PUB. AFF. 3, at 37-38 (1975). Compare the writings of Lawrence Tribe, who argues that the choices made today inevitably restrict the way we and future generations perceive the world and, therefore, restrict the range of choices that can be thought about in the future. See, e.g., Tribe, Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality, 46 S. CAL. L. REV. 617, 650-51 (1973).


148 A recent American Bar Foundation survey reported that 50% of those responding agreed that "[l]awyers are generally not very good at keeping their
To the extent this is true, the status quo may in some sense reflect the "expectations" of the parties, but those expectations should not be controlling.

This critique of Epstein's market approach explains why clients might not initiate requests for more control. Epstein argues further, however, that, if consumers truly desired more information and control, lawyers would supply it on their own in an effort to attract more customers. The argument concludes that, because lawyers do not offer such information and control, clients must not want it.

This version of the market argument is no stronger than the first. Given their lack of knowledge, clients will have difficulty valuing decisionmaking authority. Even assuming good faith on the lawyer's part, it may be impossible, at the onset of the relationship, to "educate" the client sufficiently to allow him to understand the "true" value of decisionmaking. Alternatively, the transaction costs involved in educating the client may be too high.\textsuperscript{149} Striking an appropriate bargain may thus be impossible. Moreover, the formal and informal constraints on advertising\textsuperscript{150} and price-setting,\textsuperscript{151} as

\begin{itemize}
  \item clients informed of progress on their cases'; 36\% agreed with the statement that "[l]awyers do not care whether their clients fully understand what needs to be done and why." \textit{B. Curran, The Legal Needs of the Public} 230 (1977).
  \item The results remained relatively constant when these data were sub-divided according to the frequency with which the respondents had used lawyers. Assessments of the most recent consultation with a lawyer were more favorable, however. Seventy-nine percent of the respondents rated their most recent lawyers excellent or good at keeping them informed of progress. \textit{Id.} 210. The explanation for the discrepancy is unclear.
  \item Even if the client can be educated at the beginning of the relationship, giving him sufficient knowledge at that time may be too costly. By breaking down decisionmaking issues into smaller units and allowing the possibility of education over time, informed consent may reduce these transaction costs. \textit{See Williamson, Governance Structures and Contractual Relations} (Discussion Paper No. 37, Center for the Study of Organizational Innovation 1979); \textit{See also Comment, Guidelines for Extending Implied Warranties to Services Markets, 125 U. Pa. L. Rev. 365, 382 n.49 (1976) (efficiencies may also result because the professional's ability to communicate with a particular client improves over time).}
  \item \textit{But see Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (striking down a complete prohibition of advertising).} \textit{Bates}, however, left open the question of regulating information on the quality of services. \textit{Id.} 366. Further, it will take time for the lifting of the ban to have any substantial effect; in the short run, at least, the profession's expectations about the inappropriateness of advertising, derived from past history, will inhibit advertising. \textit{See N.Y. Times, Feb. 10, 1979 at 12, col. 3 (Report of ABA Comm'n—only three percent of lawyers have done any advertising).}
  \item \textit{But see Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (striking down rigid minimum-fee schedules).}
  \item The \textit{Goldfarb} Court did not consider the legality of a purely advisory fee schedule. \textit{Id.} 781. Moreover, the Court's decision may not have much impact on the legal profession for some time. \textit{See note 150 supra} (survey on lawyers' advertising).
\end{itemize}
well as the lawyer’s incentives to distort the valuation process, make such bargaining even less plausible.

Finally, the market argument ignores the professional’s own expectations. Expectations about the definition and role of a professional influence the lawyer, as well as the client, and may foreclose thinking, and therefore bargaining, about an alternative world.

Perhaps, though, I have been taking Epstein too literally. Regardless of whether the client’s silence indicates agreement with traditional decisionmaking roles, Epstein’s insight that the parties contract over decisionmaking may be useful. Epstein ends his discussion of informed consent by suggesting that the burden should be placed on the professional to make explicit the terms of the agreement. This proposal has the virtue of requiring the more knowledgeable party to place decisionmaking on the agenda, but it does not by itself solve the information and transaction-cost problems. Absent a more demanding rule, professionals would likely draft form contracts in order to fulfill the requirement of making explicit the issue of decisionmaking authority. These forms would reduce the costs of individualized negotiation but would usually retain for the professional control over the terms. Only in

---

152 See D. Rosenthal, supra note 6, at 170-172, for a discussion of lawyers’ manipulation of client’s perceptions of valuation of cases. See also Alschuler, The Defense Attorney’s Role in Plea Bargaining, 84 YALE L.J. 1179, 1191-92, 1194-95 (1975) (describing techniques some lawyers use to get their clients to plead guilty).

153 In contrast, one of the arguments in favor of informed consent is that it makes the parties aware of the possibilities for structuring their relationship, thus allowing development of alternative conceptions of decisionmaking. Cf. Tribe, The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 HARV. L. REV. 1, 12-13 & n.70 (1973) (criticizing the Supreme Court’s decision in Lochner v. New York, 198 U.S. 45 (1905), on the grounds that it allocated roles between private and public spheres according to immutable, outdated doctrine).

154 Epstein, supra note 115, at 128.

155 R. Posner, supra note 118; cf. Kronman, Mistake, Disclosure, Information, and the Law of Contracts, 7 J. LEGAL STUD. 1, 32 (1978) (reconciling diverging lines of cases with principle that imposes risk of mistake on contracting party who acquires knowledge of the mistake as a matter of course).

156 Epstein seems to assume the creation of forms. Epstein, supra note 115, at 128.

Forms would likely emerge for two reasons: first, they are cheaper than individualized bargaining, and, second, they enable the lawyer to retain control over the relationship by implicitly communicating that these are “take it or go elsewhere” terms. The one “text” I have found that is devoted to lawyer-client agreements strongly suggests lawyers should prepare their own form contracts for just the latter reason. See E. Ent, D. Doar, & L. Perlswieg, supra note 138, at 5. Compare the emergence in the medical field of prepared “informed consent” contracts. See, e.g., the forms produced by In-Forms, Inc., of Albuquerque, New Mexico (copy of order form on file with author).
those cases in which the form itself induced a dialogue about decisionmaking authority would this solution seem to solve the contractual problems discussed above. In all other cases, the absence of a dialogue about the terms of the agreement would be ambiguous—meaning either client agreement or lack of knowledge. Epstein's solution of making terms explicit therefore seems designed more to enhance efficiency than to achieve the objectives of contractual autonomy.

If, however, individualized bargaining is required regarding some or all decisionmaking issues, the solution begins to resemble a contractual version of the informed-consent doctrine. Indeed, as long as both parties are free to choose whether to enter the relationship, and as long as the client's right to make decisions can be waived, the informed-consent solution seems to mirror Epstein's contractual bargaining. Yet a significant difference remains. Epstein seems to assume that decisionmaking authority will be allocated at the beginning of the relationship, whereas informed-consent doctrine postpones this dialogue until particular decisions become necessary. The latter does not permit blanket waivers of the right to make decisions; any waiver must be substantially contemporaneous with the relevant decision.

---


158 See note 160 infra & accompanying text.

160 In addition to the difference discussed in the text, there is a possible symbolic difference compared to contract doctrine. Informed-consent doctrine makes a stronger "statement" that the decision to relinquish decisionmaking authority is the client's. If the goal is to ensure that clients' decisions to relinquish authority are truly consensual, then, given the history of professional-client relations, see note 147 supra, this symbolic effect is important. Indeed, the question is whether, even with informed consent, the client's control of decisionmaking would remain merely symbolic. See M. Edelman, The Symbolic Uses of Politics (1964); S. Scheingold, The Politics of Rights (1974). See also Baker, Posner's Privacy Mystery and the Failure of Economic Analysis of Law, 12 Ga. L. Rev. 475, 487-88 (1978).

160 A patient can waive his right to informed consent. See Cobbs v. Grant, 8 Cal. 3d 229, 245, 502 P.2d 1, 12, 104 Cal. Rptr. 505, 516 (1972); Putersen v. Clay Adams, Inc., 12 Cal. App. 3d 1062, 1083-84, 91 Cal. Rptr. 319, 333 (1970). A blanket waiver of decisionmaking authority made upon entry into a hospital would not likely be valid. See C. Fried, supra note 116, at 24. Similarly, blanket waivers of decisionmaking authority made by the client at the beginning of the lawyer-client relationship should be void. At least at the beginning of the relationship, the client possesses insufficient information to relinquish knowingly decisionmaking authority. See text accompanying notes 53 & 54 supra. This prohibition of blanket waivers is only a minor infringement on client autonomy. See text following note 165 infra; cf. Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis, 55 Tex. L. Rev. 193, 205 & n.37 (1977) (criminal defendant's waiver should be substantially contemporaneous with infringement of right waived); Anderson, supra note 75, at 755-56 (waiver between merchants allowed where rule is devised for efficiency reasons but prohibited where rule is devised for equity reasons).
Postponement of the decision about decisions is more likely to facilitate realistic client decisionmaking. The client is least able to evaluate the right to decide certain issues at the beginning of the relationship. Instead of concrete terms, the client may be left to weigh only the vague proposition that the lawyer can do his best if left alone. Indeed, the professional himself may lack sufficient knowledge at that time to predict the future with any accuracy. Postponement of the decision enables the client to learn more about the significance of decisionmaking and about the extent to which the particular professional is worthy of his trust.

In contrast, a one-time contractual solution compresses the burden of information transmittal and evaluation into one short time span. It thereby minimizes the client's chances of making informed choices. This solution also seems to assume, as Ian

If informational disparities prohibit inferring consent at the start of the relationship, would they not also prohibit fee arrangements made at that time? For practical and theoretical reasons, however, setting a fee and allocating decisionmaking authority are distinguishable. The practical reason is that lawyers and clients are less likely to enter into their relationship without knowing the fee arrangement than they are to enter the relationship not knowing who will make a particular decision. The theoretical rationale stems from the notion that fee regulation can serve as a protective device in lieu of informed consent. At least in theory, fees in lawyer-client relationships are more closely regulated than are those in general commercial matters. A lawyer's fee must be reasonable. See ABA Code of Professional Responsibility, DR 2-106(A) & (B). The price of commercial transactions with consumers, on the other hand, is regulated by an unconscionability standard that is looser than "reasonableness." See J. White & R. Summers, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 4-5 (1972) (suggesting prima facie case of excessive price under U.C.C. § 2-302 requires showing markup of two to three times wholesale price, id. 124). In addition, the lawyer has a duty to disclose material facts that go to the basis of the compensation. R. Malven & V. Levy, supra note 33, at 156. The potential effect of DR 2-106, however, is lessened by its requirement that the showing of unreasonableness leave a "lawyer of ordinary prudence . . . a definite and firm conviction" that the fee is not reasonable. DR 2-106(B). The laxity of enforcement of the disciplinary rules also undercuts the rules' impact. See notes 219-22 infra.

Cf. Sen, Rational Fools: A Critique of the Behavioral Foundations of Economic Theory, 6 PHIL. & PUB. AFF. 317, 322 n.9 (1976) ("In general, there is no reason to presume that the future interests [of a person] as assessed today will coincide with those interests as assessed in the future.").

See Buchanan, supra note 113, at 384-85.

Overload of information can be a major impediment to understanding. See Miller, The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information, 63 PSYCH. REV. 81 (1956); H. Schroeder, M. Driver, & S. Streufert, HUMAN INFORMATION PROCESSING (1967); Jacoby, Speller & Kohn, Brand Choice Behavior as a Function of Information Load, 11 J. MKTG. RESEARCH 63 (1974). But see Schwartz & Wilde, Interpreting in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis, 127 U. PA. L. REV. 630, 675-76 n.100 (1979) (arguing these studies do not prove that overload is a significant problem). Any lawyer seriously trying to involve his client in decisionmaking has difficulty avoiding giving either too little or too much information. See generally G. Bellow & B. Moulton, THE LAWYERING PROCESS 1033-42 (1978).
Macneil has written with regard to classical contract doctrine, that the whole future of the relationship can be expressed in the first meeting.\textsuperscript{164} If client involvement in decisionmaking is to be anything more than ratification of decisions already made, or the signing of prepared forms, it must be part of the continuing relationship between professional and client.\textsuperscript{165}

On the other hand, postponement of the decision about decisionmaking also creates difficulties. First, a forced postponement rule would deprive some clients of the ability simply to drop their problems off with their attorney and say, "Don't bother me." This seems a minimal interference with client autonomy, requiring at most that the lawyer periodically ask the client whether he still wanted to delegate authority to make all decisions.

Second, postponement of the decision about decisions might deprive both the lawyer and client of information about the other's expectations. Negotiating over decisionmaking authority at the start of the relationship would, in theory, enable clients and lawyers to mesh their expectations in a more realistic manner. Given that withdrawal from the relationship later may be costly,\textsuperscript{166} and perhaps even prohibited,\textsuperscript{167} the parties should be encouraged to communicate their expectations as early in the relationship as possible. 'To the extent that clients' expectations change as information becomes more meaningful, however, mutual expectations exchanged at the beginning of the relationship may be misleading. Furthermore, nothing about informed consent prohibits an early exchange of

\textsuperscript{164} The epitome of discrete contract transactions: two strangers come into town from opposite directions, one walking and one riding a horse. The walker offers to buy the horse, and after brief dickering a deal is struck in which delivery of the horse is to be made at sundown upon the handing over of $10. The two strangers expect to have nothing to do with each other between now and sundown, they expect never to see each other again thereafter, and each has as much feeling for the other as has a Viking trading with a Saxon.


\textsuperscript{165} In contrast, informed consent emphasizes the relational aspects of the lawyer-client relationship. \textit{See generally} Macneil, \textit{The Many Futures of Contracts}, supra note 164, at 763 n.209 ("Services are inherently relational, and inherently less subject to exact prior planning.").

\textsuperscript{166} See text accompanying notes 364-66 \textit{infra}.

\textsuperscript{167} See notes 361-63 \textit{infra} & accompanying text.
expectations. Indeed, because informed-consent doctrine requires that the lawyer be concerned with his client's expectations, an early dialogue may be encouraged.

Epstein's contractual solution makes clear that much more can and should be done to make explicit the mutual expectations of lawyers and clients. By emphasizing that an important criterion should be the parties' expectations, this solution helps focus the search for a decisionmaking rule. Epstein's theory erroneously assumes, however, that a one-time contract, made at the beginning of the relationship, will accurately reflect those expectations. Informed consent, by postponing the allocation of decisionmaking authority until necessary, rejects this assumption and therefore seems more likely to foster an accurate exchange of expectations.

C. The "Better Results" Argument

Another major justification for professional decisionmaking is that it produces better results for the client. From the clients'
perspective, if delegation of decisions to lawyers produces better results, the assumption that clients consent to professional control becomes more reasonable. 172 From the lawyer's and society's perspectives, proof of better results introduces the possibility of justifying professional decisionmaking on paternalistic grounds. 173 Although paternalism can be attacked directly, 174 this Article will not attempt that task. Instead, it will explore whether delegation of all or most decisions to the professional actually does produce better results. If the answer to that question is negative or unclear, then, given the arguments in the preceding sections, decisionmaking authority should be allocated to the client.

Whether the lawyer or the client is the better decisionmaker depends on who has superior information and who can better use that information to make decisions. 175 The lawyer presumably has superior legal knowledge, and his training and experience may give him superior competence to make decisions about a particular case.

For two reasons, however, these professional skills might not lead to better results for the client. First, although the professional is better equipped to use the relevant information, one who is not completely loyal to his client might not use that information for the client's benefit. 176 Second, the client has superior knowledge of the facts of his case and of the relation between his values and objectives and those facts. 177

172 One might argue that the important criterion is not whether professional decisionmaking actually produces better results but whether clients think it does. If a client's perceptions are sufficiently unrealistic, however, intervention may be necessary on protective grounds.

173 In addition to its interest in the client's welfare, the public has independent interests in the results of cases. See note 339 infra & accompanying text. See Grano, The Right to Counsel: Collateral Issues Affecting Due Process, 54 Minn. L. Rev. 1175, 1196-97 (1970) (arguing that the public's interests should override a criminal defendant's decision to proceed pro se). (This argument was rejected in Faretta v. California, 422 U.S. 806 (1975).) To the extent that good results increase a lawyer's sense of self-worth or better his reputation, he may also have an independent interest in the results of cases.

174 Even if one accepts the premise that professional decisionmaking produces better results for the client, one could construct a theory of rights which argues that a client has a right to make certain decisions regardless of the results. See generally J.S. Mill, On Liberty (Fontance Library ed. 1962). See J. Rawls, A Theory of Justice, 143 n.14, 248-49 (1971) (for arguments against paternalism which are more limited than Mills'); Dworkin, Paternalism, 56 Monist 64 (1972).

175 See Schmeyer, supra note 5, at 129-30.

176 Id. 130, 136-41.

177 Id. 132-33. See also Buchanan, supra note 113, at 381-82.
This section will first discuss the extent to which professional disloyalty and superior client knowledge exist and then the extent to which they qualify the view that the professional is the better decisionmaker.

1. Professional Disloyalty to the Client

Although professionals are presumed to be loyal, that presumption is cast aside when a particular professional faces a conflict of interest. The requirement that settlement decisions be made by the client may be rooted in fears of professional disloyalty and potential conflicts of interest. In a contingent-fee case, the lawyer's prediction of the verdict may make a trial seem beneficial for either the lawyer or the client, but not necessarily both. In a

---

178 The problem of disloyalty arises whenever the lawyer sacrifices one client's interests for his own interests or for those of another client. "Self-interest" describes the former situation; "conflict of interest" describes the latter (when a lawyer favors one client over another, however, he may also be favoring himself).

179 Fear of professional disloyalty is the most obvious explanation for the Code's provisions on conflict of interest. See ABA Code of Professional Responsibility, Canon 5. For an excellent theoretical analysis of conflicts of interest and fiduciary duties, see Anderson, supra note 75, at 738-61.

180 The cases do not explain why settlement decisions are different from other decisions. One possibility is the importance of the decision, but others—for instance, the decision whether to call a particular witness—may be equally important. See note 48 supra. Another explanation might be the client's expectations. But the English rule, at least in cases involving the lawyer's ability to bind his client as against third parties, has been said to give the lawyer authority to make settlement decisions. See Denton v. Noyes, 6 Johns. 297 (N.Y. 1810); Whipple v. Whitman, 13 R.I. 512 (1882). The American rule may have arisen from the greater distrust of lawyers in the United States, see, e.g., R. Pound, The Lawyer from Antiquity to Modern Times 135-36 (1953); Gawalt, Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840, 14 Am. J. Legal Hist. 283 (1970); or perhaps American judges were simply more willing to react to the unfairness of the situation, see note 73 supra (discussion of Denton v. Noyes, 6 Johns. 297 (N.Y. 1810)). In any event, no court has cited conflict of interest as the reason for giving clients the authority to make settlement decisions, except in class actions, see cases cited in note 131 supra. See also text accompanying note 282 infra for discussion of administrative ease as another possible rationale for this dividing line.

181 The lawyer's decision turns on his estimate of the expected recovery if the case proceeds to trial, the amount of additional lawyer time necessary to prepare for and conduct a trial, the alternative uses of his time, and his valuation of risk. Assuming that the lawyer is risk-neutral and that the alternative use of his time is worth $50, his economic interest is to proceed to trial if the number of hours necessary to achieve a particular result multiplied by $50 is less than the difference between the expected recovery at trial (the likelihood of winning times recovery) and the settlement figure. If the difference between trial value and settlement is less than the cost of his time, his interest lies in settlement. The client's interest in settlement may well diverge from the lawyer's. For example, if the expected recovery at trial is $1,800, if the settlement offer is $1,000, and if the additional expenses associated with trial are less than $800, then, assuming risk-neutrality, the client would elect to proceed to trial. The lawyer hired for a contingent fee of 1/3 will realize an additional $277 from trial. If preparing for and doing a trial exceeds five and one-
criminal case, in which the lawyer works for a fixed fee, the economic temptation to plea-bargain is strong, notwithstanding the client's interest.\textsuperscript{182} In legal-services work, with its usually heavy case load, the lawyer may place a much greater value than does the client on expeditious disposition of a case.\textsuperscript{183} Even in corporate practice, lawyers' and clients' incentives for settlement may diverge.\textsuperscript{184}

Problems of professional disloyalty are not limited to the settlement context. In many of the decisions a lawyer makes on behalf of his client, there is a potential divergence of the lawyer's and client's interests.\textsuperscript{185} For example, the decision not to seek out a half hours, the lawyer would prefer to settle. For fuller discussions of this argument, see Clermont \& Currivan, Improving on the Contingent Fee, 63 CORNELL L. REV. 529 (1978). See also Schwartz \& Mitchell, An Economic Analysis of the Contingent Fee in Personal-Injury Litigation, 22 STAN. L. REV. 1125 (1970).

The model above is overly simplistic, of course. The lawyer probably cannot calculate expected recovery too precisely. Even if he can, there is probably a range of expected recoveries. The choices are not always binary—they may include settle, attempt further negotiations, or go to trial. The timing of the settlement offer is important. The question of associated costs is more complex. Furthermore, the client's and the lawyer's valuations of risk are likely to diverge. The client is a one-shot player in a lottery, while the lawyer has a portfolio of claims. Most likely, therefore, the client will be more risk-averse than the lawyer. Thus, the client might want to accept a smaller settlement, while the lawyer might want to gamble on a larger recovery at trial. See Reder, Medical Malpractice: An Economist's View, 1976 AM. B. FOUND. RESEARCH J. 511, 553-55.

But these complexities do not change the basic point—the lawyer's and the client's economic incentives to settle do not necessarily converge. Clermont and Currivan propose a combination contingent-fee/hourly fee schedule, which they argue will change this situation. See Clermont \& Currivan, supra, at 546-50, 578-83.

\textsuperscript{182} See, e.g., Alschuler, supra note 152, at 1181-206; Skolnick, Social Control in the Adversary System, 11 J. CONFLICT RESOLUTION 52, 61 (1967). See generally A. Blumberg, CRIMINAL JUSTICE (1967). A criminal lawyer who has a portfolio of cases may also have incentives to trade a more favorable disposition in one case for a less favorable one in another. See D. Rosenthal, supra note 6, at 103; Alschuler, supra note 152, at 1210-24. There may be nothing more sinister about this behavior than a desire to split the difference to resolve conflict. See T. Schelling, THE STRATEGY OF CONFLICT 67-68, 71-73 (1960). But here, rather than split the difference for one client, the lawyer is choosing between clients.

\textsuperscript{183} See Bellow, Turning Solutions into Problems: The Legal Aid Experience, 34 NAT'L LEGAL AID \& DEFENDER A. BRIEFCASE 106, 118 (1977).

\textsuperscript{184} The hourly fee, although it removes the financial incentive for the lawyer to select a particular settlement that diverges from the client's interests, does not guarantee that the lawyer will put the appropriate time and effort into a case. See Clermont \& Currivan, supra note 181, at 540-43. In addition, anecdotal evidence suggests that corporate lawyers tend to over-deliver services relative to the client's interests. See note 220 infra.

\textsuperscript{185} See Anderson, supra note 75, at 739-53, 758, for development of the thesis that all exchange transactions inherently involve problems of disloyalty because one side can take advantage of the other by providing lower quality work than bargained
witness may involve a trade-off between the lawyer's use of his time and the client's desire for that witness's testimony. The choice of the forum may involve a trade-off between the lawyer's convenience and the client's. The lawyer's decision to present a novel legal argument or his decision not to offer a foolish one also may involve a trade-off between the lawyer's and client's needs.

All this would merely be interesting footnote material if society could control disloyal behavior through its usual mechanisms—the market, legal regulation, and systems of norms. Both theoretical and empirical evidence suggests, however, that these mechanisms do not effectively control the behavior of lawyers.

for by doing less work (shirking), or by doing unneeded work. These problems are particularly prevalent in service transactions in which expertise is an integral part of the service.

The analysis offered here is not limited to economically motivated disloyalty, although such disloyalty constitutes a large part of the problem. See Patterson, The Lawyer and The Potential Client, in Professional Responsibility 19 (D. Ream ed. 1978); “[The] dilemma between service and profit is unavoidable.” Disloyalty may also arise because of differing ideological views, see Bell, supra note 131; because of differing needs to deal with the legal system on an ongoing basis, see D. Rosenthal, supra note 6, at 103; Alschuler, supra note 152, at 1210-24; Crowe, Complainant Reactions to the Massachusetts Commission Against Discrimination, 12 Law & Soc'y Rev. 217, 228-29 (1978); Fitzgerald, The Contract Buyers League and the Courts: A Case Study of Poverty Litigation, 9 Law & Soc'y Rev. 165, 175-79 (1975); because control is a potential conflict issue, see generally E. Freidson, Doctoring Together (1975); E. Freidson, Profession of Medicine (1970); E. Freidson, Professional Dominance (1970); and because the professional and client possess different systems of values which influence the way they view the world. Cf. G. Hazard, Ethics in the Practice of Law 8 (1978) (relationship between lawyer and client, like any other human relationship, is shot through with conflict; the sensitive handling of such conflict requires more and less disclosure).

One might argue that certification requirements, such as graduating from law school or passing the bar exam, are also guarantors of quality. But even assuming that these requirements are correlated with the skills necessary for good lawyering (an assumption that has not been proven, see, e.g., Gee & Jackson, Bridging the Gap: Legal Education and Lawyer Competency, 1977 B.Y.U. L. Rev. 695, 712 n.15 (1977)), the certification requirements cannot begin to guarantee loyal behavior if likelihood of loyalty to clients is not a criterion for certification. There is no reason to believe that law school or bar exams do this. To the extent law school inculcates the professional norms of client service, it appears to have only a small effect on students. See Eron & Redmount, The Effect of Legal Education on Attitudes, 9 J. Legal Educ. 431 (1957) (third-year law students scored slightly higher on the humanitarian scale of a personality inventory test); Thielens, The Influence of the Law School Experience on the Professional Ethics of Law Students, 21 J. Legal Educ. 587 (1969) (small change during law school toward agreement with ethical norms). See also Erlanger & Klegon, Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns, 13 Law & Soc'y Rev. 11, 20-21 (1978) (decline in interest in doing pro bono work between entry into law school and graduation).

a. Market Controls

In theory, market controls work if consumers can accurately evaluate what they get for their money and can adjust their decisions accordingly. If consumers are being "cheated," they will either switch suppliers or demand lower prices. Suppliers will then modify their behavior so that, at equilibrium, the price of a product will reflect its value. To the extent this theory describes reality, the problems of professional disloyalty will be of no significance.

As argued earlier, however, market principles may not be applicable to lawyer-client exchanges. The information disparities between lawyer and client negate the usual market assumption that, at the beginning of a transaction, the buyer can tell the seller exactly what he wants and thereby "control" the seller. Moreover, even if the client could specify his desires, prior valuation of the services to be provided would be extremely difficult because of the uncertainty of the results of these services. And legal services, like most other services, cannot be tested or inspected before purchase, so this means of consumer control is also lacking in the market for legal services.

Consumers might resort to a more general kind of information—reputation—to correct these deficiencies. Most clients, however, cannot evaluate the quality of the legal services they receive. Lawyers' incentive and ability to build reputations as providers of high-quality services are thus weak.

188 "Being cheated" means receiving a substandard product or service, paying too much for an acceptable one, or receiving and paying for above-average goods or services when average quality would suffice. See Anderson, supra note 75, at 745-53.

189 See text accompanying notes 140-53 supra. Furthermore, there is reason to doubt the market paradigm itself. See Baker, supra note 146; Leff, supra note 141.

190 See Arrow, supra note 140, at 951; Mechanic, supra note 140, at 354.


192 See notes 142 & 190 supra & accompanying text; Anderson, supra note 75, at 752 ("the buyer cannot readily determine whether poor results were caused by the fiduciary's cheating, by good faith errors or judgment, or by external factors beyond the fiduciary's control").

The focus here is on quality rather than disloyalty because reputations are more likely to be based on quality rather than on whether lawyers engage in the subtle forms of disloyalty discussed earlier. Further, the disloyalty problems discussed here are only relevant if they result in clients receiving poor quality services. If clients could control the quality of the services they received, the problems that disloyalty causes would disappear.

193 See Extending Implied Warranties, supra note 191, at 373-74. Lawyers might desire such reputations for other reasons, such as self-image or peer recog-
Because consumers obviously can judge their own satisfaction, lawyers arguably have incentives to perform in ways that would enhance their reputations for satisfying clients.\textsuperscript{194} But "satisfaction," in order to work as an effective market control, would have to be correlated with quality work. Particular clients would have to have repeated needs for legal services, or some mechanism would be necessary to transmit accurately old clients' experiences to new clients. The evidence supporting the correlation between satisfaction and quality is inconclusive,\textsuperscript{195} however, and the communication channels between consumers are rudimentary.\textsuperscript{196} Beyond that, satisfaction is likely to be subjective and thus to vary from client to client. But although such concerns might encourage lawyers to provide higher-quality services, the power of this encouragement is not dependent upon communication of reputation to clients. Compare the discussion of reputation in Reder, supra note 114, at 211. Reder suggests that reputation is most at stake when the potential value of a claim is high, because the case will attract considerable attention. \textit{Id.} 222-23. He is assuming that in most instances lawyers obtain referrals from other lawyers. Both of these points may be true with regard to high-figure personal-injury litigation, in which referrals to lawyers specializing in big-money cases are common. But referrals also may be based not on reputation, but on considerations that present conflicts of interest. See note 200 infra.

\textsuperscript{194}For discussion of satisfaction as a measure of lawyer performance, see Brakel, \textit{Free Legal Services for the Poor—Staffed Office versus Judicare: The Client's Evaluation}, 1973 Wis. L. Rev. 532; Rosenthal, supra note 7, at 279.

\textsuperscript{195}This question is particularly complex because we lack agreed-upon standards of quality. See Carlson, \textit{Measuring the Quality of Legal Services: An Idea Whose Time Has Not Come}, 11 Law & Soc'y Rev. 287 (1976); Rosenthal, supra note 7. See also, discussions of competency in Carrington, \textit{The University Law School and Legal Services}, 53 N.Y.U. L. Rev. 403, 422-25 (1978); Gee & Jackson, supra note 187, at 924-25.

The empirical evidence on the relation between client satisfaction and quality of lawyer performance is very sketchy. Based on his study of judicare, Brakel argues that the two are closely correlated. S. Brakel, \textit{JUDICARE: PRIVATE FUND, PRIVATE LAWYERS AND POOR PEOPLE} (1974). But his argument is at best circular, for he never offers an independent means of measuring quality. See \textit{id.} 94-97.

In two studies done by Rosenthal, rough parallels were reported between degree of client satisfaction and the appropriateness of the outcomes of cases (as evaluated by an independent panel of attorneys). See D. Rosenthal, supra note 6, at 60; D. Rosenthal, R. Kagan, & D. Quattrone, \textit{Volunteer Attorneys and Legal Services for the Poor: New York's CLO Program 65} (1971). In both studies, however, only aggregate data were reported; no data was offered to support a correlation between particular clients' satisfaction and the evaluations of their cases. Compare J. Casper, \textit{American Criminal Justice: The Defendant's Perspective} 100 (1972) (defendants preferred criminal lawyers to public defenders despite little difference in outcomes of cases).

\textsuperscript{196}See B. Curran, supra note 148, at 200-02; D. Rosenthal, supra note 6, at 128-29. Curran's study for the American Bar Foundation showed that 30%-35% of clients sampled had reached lawyers through friends' or relatives' referrals, and that another 33% had employed lawyers they knew from non-professional situations. See also Lochner, \textit{The No Fee and Low Fee Legal Practice of Private Attorneys}, 9 Law & Soc'y Rev. 431, 437 (1975). See generally Ladinsky, \textit{The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients}, 11 Law & Soc'y Rev. 207 (1976).
client; hence it is likely to be a poor cue for other clients selecting lawyers.197

The market could also work via lawyer intermediaries, with lawyers evaluating their peers. Even if reputation among other lawyers were a reasonable indicator of quality,198 available evidence indicates that few consumers reach lawyers through lawyer referrals199 and that many of those referrals themselves raise conflict-of-interest problems.200

The market paradigm of the informed consumer making trade-offs between price and quality is thus largely inapplicable in the area of legal services. It is most likely to be accurate for repeat purchasers of legal services, who can afford to invest heavily in becoming experienced.201 Even assuming this exception for repeat users, market control is lacking over the bulk of legal practice.202

b. Legal Regulation

A second method of controlling professional disloyalty is regulation by law. The primary regulatory devices are malpractice suits for negligence and disciplinary actions.

197 See Extending Implied Warranties, supra note 191, at 372 & n.25.

198 Not only do clients have difficulty in evaluating legal services, but little useful work has been done by lawyers themselves in setting standards. See Carlson, supra note 195; Rosenthal, supra note 7.

199 B. Currant, supra note 148.

200 The primary conflict arises from the referring lawyer's interest in receiving part of the fee. See J. Carlin, supra note 138, at 162-163; D. Rosenthal, supra note 6, at 99-100; cf. Ethics and Advocacy, supra note 32, at 16-19 (recommending change in the Code to acknowledge widespread practice of fee splitting and arguing that practice would be in best interest of clients because it would give lawyers incentive to refer cases to competent lawyers). The present Code provision on fee splitting requires (1) client consent, (2) a division of fees in proportion to work done, and (3) a total fee no higher than reasonable compensation for the work performed. ABA Code of Professional Responsibility, DR 2-107.


202 The suggestion of developing separate rules for different segments of the legal-services market is not new. See Ethics and Advocacy, supra note 32, at 10-11 (1978) (recommending that standards of professional conduct for lawyers who represent large corporate clients should differ from those for lawyers who represent less affluent, one-time clients); Bellow & Kettleson, From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice, 58 B.U. L. Rev. 337 (1978). See also Heinz & Laumann, The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies, 76 Mich. L. Rev. 1111 (1978) (arguing on the basis of survey of Chicago Bar that legal profession is highly differentiated by client type). Heinz and Laumann also argue that this structuring by client interests deprives lawyers of autonomy because it allows clients to set the boundaries of their work.
Little information is available with which to gauge the effectiveness of malpractice litigation as a regulatory mechanism. The difficulty of proving causation and the infrequency of suits suggest that the threat of a malpractice action is not an effective deterrent. Moreover, malpractice doctrine protects the lawyer's exercise of his "judgment," even though it is in situations calling for the exercise of the lawyer's judgment that the need to monitor his decisions is greatest. The more the decision involves the lawyer's judgment, the more likely he will unthinkingly pursue his self-interest without confronting the norm of client service and the less likely that an evaluation of his decision will reveal the impact of self-interest. Finally, the standard of liability in malpractice

---


204 See text accompanying notes 397-98 infra.

205 The frequency of suit has been increasing. See sources cited note 9 supra.

206 The liability standard in legal-malpractice cases is the duty to exercise the skill and knowledge ordinarily possessed by lawyers in good standing. See, e.g., Hansen v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (1975). See also R. MALLEN & V. LEVIT, supra note 33, at 164-165; Wade, supra note 40, at 763-65. In applying this standard, courts sometimes have carved out areas of lawyer conduct, labelled those areas "judgment," and stated that there is no liability for mistakes of judgment. See Wade, supra note 40, at 765. Two areas in particular have been treated in this fashion—tactical decisions made during litigation and opinions or actions based upon interpretations of unclear law. See id. 763-65; Note, Attorney Malpractice, 63 COLUM. L. REV. 1292, 1298-1301 (1963). At times this use of the label "judgment" has seemed to be only a declaration that where there are at least two or more reasonable courses of action, the choice of one over another is not unreasonable (or negligent). At other times, however, courts seem to be saying that all tactical decisions and all decisions based on unclear law are insulated from scrutiny, regardless of whether the lawyer's conduct arguably was negligent. Id.

207 As used here, judgment is the process by which knowledge and skill are applied to reach a decision. See E. FREIDSON, DOCTORING TOGETHER 130 (1975). As Freidson points out, the label "judgment" can be used to justify what non-professionals would call mistakes. Id. 127-31. See also M. MILLMAN, THE UNKIND CUT 10-11, 129 (Morrow paperback ed. 1978). Because judgment exists to varying degrees, see Engel, The Standardization of Lawyers' Services, 1977 AM. B. FOUND. RESEARCH J. 817, 821-22, the concern with judgment may obscure the issue of whether a choice was reasonable under the circumstances. Deference to judgment may also foreclose investigation into whether the appropriate steps were taken before the judgment was made. See generally Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (imposing obligation to perform research before making judgment). Finally, even if deference to judgment is proper, the question remains as to whose judgment should govern. This question is the major concern of this article.

208 See Anderson, supra note 75, at 757-58, 760-61. In addition, as Professor Alschuler notes with regard to claims of incompetent counsel in criminal cases, judges are reluctant to make judgments about members of the bar. Focusing on whether the decision is the result of the client's choice avoids any intimation of professional insult. Alschuler, The Supreme Court, The Defense Attorney and the Guilty Plea, 47 U. COLO. L. REV. 1, 43 (1975).
cases does not necessarily encourage the optimal degree of care. The standard may be biased in favor of lawyers' decisions.

Direct regulation by the profession is no more effective in controlling professional disloyalty. The only provision of the Code of Professional Responsibility directly related to quality of performance is Canon 6, requiring a lawyer to represent a client competently. The effectiveness of this provision as a regulatory device depends upon the definition given to competence and upon the adequacy of enforcement. Competence has largely been left undefined, however. DR 6-101A, which implements this canon, prohibits a lawyer from "[n]eglect[ing] a legal matter entrusted to him." Neglect, however, has been defined as a "consistent failure to carry out . . . obligations," usually involving "more than a single act or omission," and does not include "an error of judgment made in good faith." This provision, then, is largely directed at blatant failures to provide adequate representation.

The enforcement process accentuates this skewing. Quality problems often are seen as contractual and therefore deemed outside the reach of the disciplinary process. Disciplinary agencies are

---

209 See note 206 supra.

210 See Note, Comparative Approaches to Liability for Medical Maloccurrences, 84 Yale L.J. 1141, 1148 (1975) (discussing the customary conduct defense in medical malpractice cases).

211 See id. See also, Calabresi, supra note 140, at 134 (if custom standard is undesirable the solution is simply to change it).

212 Of course, there is the possibility of indirect regulation—to limited and uncertain effect—through peer and supervisor pressure, at least in large-firm and institutional practice. For a study of this phenomenon in the medical field, see C. Bosk, Forgive and Remember (1979).

213 Canon 6 could be effective simply as a norm that lawyers will conform to regardless of enforcement. See notes 228-32 infra & accompanying text. Whether Canon 6 operates as a norm because of enforcement, the scope and clarity of the definition of "competence" will be major variables affecting the Canon's success. See F. Zimring & C. Hawkins, Deterrence (1973); Geerken & Gove, Deterrence: Some Theoretical Considerations, 9 Law & Soc'y Rev. 497 (1975).

214 See Ethics and Advocacy, supra note 32, at 11-13 (recommending that standards defining competence be developed); Marks & Cathcart, Discipline Within the Legal Profession: Is It Self Regulation?, 1974 U. Ill. L.F. 193, 200-01. See also sources cited in note 220 supra.


217 Id.

218 Id.

219 For general descriptions of the disciplinary enforcement process, see Marks & Cathcart, supra note 214; Steele & Nimmer, Lawyer, Clients and Professional Regulation 1976 Am. B. Found. Research J. 917, 921-33; ABA Special Committee on Evaluation of Disciplinary Enforcement (Tom C. Clark, chairman) Problems and Recommendations in Disciplinary Enforcement (Final Draft 1970) [hereinafter cited as Clark Report].
looking only for deviant members of the profession.\textsuperscript{220} As a result, quality problems often are not addressed or are characterized as frivolous. For example, Marks' and Cathcart's interviews with members of disciplinary agencies revealed that a breakdown in communication between lawyer and client, the single largest source of complaints, was seen largely as a public-relations problem, rather than one of discipline or quality, even when attributable to the lawyer.\textsuperscript{221}

Canon 5 may also be relevant: the language of EC 5-1 is broad enough to cover not only traditional conflicts of interest but also the forms of professional disloyalty discussed above.\textsuperscript{222} If clients recognize such problems, however, they are more likely to perceive them as quality problems.\textsuperscript{223} They will not know whether the lawyer acted out of self-interest, but only that they did not receive the "services" to which they felt entitled.\textsuperscript{224} And quality complaints are largely ignored by disciplinary agencies.\textsuperscript{225}

Even if such complaints were not ignored and were recognized as potential conflict-of-interest problems, the type of disloyalty discussed above is, by and large, not susceptible of proof after the fact. No tangible evidence proves the conflict, such as purchase of the client's property or representation of clients with differing interests.\textsuperscript{226} Indeed, it is the combination of the exercise of the lawyer's

\textsuperscript{220} Marks & Cathcart, \textit{supra} note 214, at 221, 225-26; Steele & Nimmer, \textit{supra} note 219, at 923, 932-33, 981.

\textsuperscript{221} Marks & Cathcart, \textit{supra} note 214, at 210.

\textsuperscript{222} The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

\textsuperscript{223} See Steele & Nimmer, \textit{supra} note 219, at 923 (client complaints tend to present not allegations conforming to profession's definitions of unethical conduct, but disputes concerning quality of services or failure to meet expectations as to cost or promptness).

\textsuperscript{224} Id. 950. But see the discussion at id. 957, in which a client characterizes the problem as his case getting lost because it was small in relation to other clients' cases. It is interesting to note, however, that this client failed to report the problem to a disciplinary agency.

\textsuperscript{225} See notes 219-21 \textit{supra} & accompanying text.

judgment and the possibility of self-interest which creates the need for the prophylactic device of client decisionmaking.\textsuperscript{227} Although no definitive conclusion can be reached without a study of disciplinary-agency actions, Canon 5 will not likely be useful in resolving these disloyalty problems.

c. Regulation by Norms

Many commentators argue that, even if the market and legal regulation do not provide adequate monitoring of lawyer performance, lawyers, as professionals, adhere to a set of internalized norms, including undivided loyalty to the client's interests and a commitment to quality performance. These norms are said to play the role market and legal regulation play in other areas, making external monitoring largely unnecessary, except in cases of deviants.\textsuperscript{228} In a sense, this argument rebuts the "normal" assumption of self-interested behavior.

The absence of reliable data makes this claim difficult to evaluate. The burden of proof should rest on those who argue that lawyers are more altruistic than others. Certainly, published studies of lawyers' values do not support this hypothesis.\textsuperscript{229} Both the Code of Professional Responsibility and the disciplinary process suggest that lawyers are as self-interested as the rest of society.\textsuperscript{230}

\textsuperscript{227} See notes 206-08 supra & accompanying text.

\textsuperscript{228} See, e.g., Parsons, supra note 133, at 335-36; Extending Implied Warranties, supra note 191, at 406, 411.

\textsuperscript{229} Data on this subject are limited, but they support the statement in the text. A recent study of the prestige that lawyers associate with various types of law practice concludes that the "higher a speciality stands in its reputation for being motivated by altruistic . . . considerations, the lower it is likely to be in the prestige order," Laumann & Heinz, Specialization and Prestige in the Legal Profession: The Structure of Difference, 1977 AM. B. FOUND. RESEARCH J. 155, 202. While the authors "doubt that altruism is directly or consciously derogated, . . . it seems clear that the profit motive and the values associated with it are given precedence in the allocation of prestige within the profession." Id. 204. One other empirical study of lawyers that looked at this question is an unpublished Ph.D. dissertation. It is reported to reach the same conclusion—that lawyers value money-making. Zahedi, An Analytical Study of Attorneys' Occupational Values and Satisfactions (1962) (unpublished Ph.D. dissertation, University of Southern California), cited in O. MARU, RESEARCH ON THE LEGAL PROFESSION 44 nn.109 & 110 (1972). Furthermore, two studies conclude that there is little increase in law students' commitment to altruistic goals during law school. See Comment, A Survey of Chicago Law Student Opinions and Career Expectations, 67 NW. U. L. REV. 628 (1972); Thielens, The Socialization of Law Students (1965) (unpublished Ph.D. dissertation, Columbia University).

For a discussion of doctors' altruistic behavior, see E. FREIDSON, PROFESSION OF MEDICINE 172-78 (1970) (surveying the literature and concluding "that while physicians do not lack a service . . . orientation, it does not seem to be a very prominent value compared to others." Id. 178). See also note 187 supra.

\textsuperscript{230} See sources cited in note 219 supra; Morgan, The Evolving Concept of Professional Responsibility, 90 HARV. L. REV. 702 (1977). The argument then is
The arguments for regulation through internalized norms prove, on examination, to be either tautologies or arguments of necessity. According to the former, professionals are those who regulate the conduct of their work according to internalized values. Because lawyers are professionals, the argument goes, they regulate their conduct according to such values. Whether or not it is desirable to define professionals in this way, such definitions say nothing empirically or logically about lawyers' behavior. Arguments from necessity infer that, because neither the market nor regulation by law adequately monitors professional performance, the client must trust the professional to provide effective service. From this necessity for trust, it is argued that the profession must manifest a service orientation. Again, whether or not this reasoning reflects desirable normative goals, it says little about the actual existence of a service orientation.

Finally, the meager evidence on the quality of lawyers' performance suggests that the combination of the market, legal regulation, and internalized norms has produced a level of quality that leaves a good deal of room for improvement. Rosenthal's study of personal-injury decisionmaking, which set out to prove that client participation improves outcomes, demonstrates at least that lawyer performance is frequently suboptimal. See D. Rosenthal, supra note 6, at 61.

Rosenthal submitted the case files from a sample of 60 personal-injury cases to a panel of five experts for an evaluation of the cases' worth at three different times: one year after the accident, four years after, and at trial. Id. 37. A composite evaluation figure was computed by averaging the five responses for the time period which most closely approximated the actual time of dispositions. In 77% of the cases, the client's recovery was less than the panel's evaluation figure; in 42%, the actual recovery was more than 30% lower than the evaluation figure. Id. 59.

It might be argued that an equally plausible explanation for these data is that the defendants' lawyers performed exceptionally well. There are two reasons, however, for thinking that below-average performances by the plaintiffs' lawyers is the more likely explanation. First, the qualitative descriptions provided by Rosenthal illustrate instances of poor lawyering. Id. 30-33. Second, the defendants' lawyers were all insurance company lawyers, a group that can be viewed as consisting of buyers who offer prices (settlements) that vary with the skill of the sellers. See generally Reder, supra note 114, at 216-26.

Moreover, to the extent that insurance company settlement policy was a variable, Rosenthal attempted to account for it by telling the expert panel the name
150 case files of legal-services lawyers, concludes that, by and large, cases were processed routinely, that lawyers often failed to take steps that a competent lawyer should take, and that the clients obtained inadequate results. Studies of criminal-defense work show the same patterns. Finally, one study has suggested that, in probate practice, the level of competence varies greatly.

Admittedly, none of this evidence conclusively proves quality is below the appropriate level. The studies are empirically insufficient to "prove" anything, even in the respective areas of practice each addressed. More important, perhaps, all of the above studies examined areas of practice in which the "normal" discipline of the market—hourly fees—was absent. The problem may not be that lawyers deliver suboptimal service, but that, in increasingly large areas of practice, either bureaucratic structures or "nonoptimal" fee arrangements dominate.

Without studies of hourly fee practice, evaluating this argument is difficult. Economic theory, however, does not necessarily suggest that hourly fee arrangements are superior control devices. Nothing of the company. D. Rosenthal, supra note 6, at 206. Finally, it is possible that Rosenthal's data understates the "loss" to the client. The evaluation at different time periods was to control for case value increasing over time because insurance companies know they can take advantage of a plaintiff's immediate need for funds. Therefore, one would expect that recoveries would go up as trial approached. Although Rosenthal recognized that different plaintiffs might make different trade-offs between time and money, id. at 36, he accepted the time of settlement as the time that reflected the plaintiff's decision about what tradeoff to make between time and money. To the extent any plaintiff was manipulated by his lawyer to accept a settlement at a different time than he otherwise would have, Rosenthal's data would not reflect that potential "loss" to the plaintiff.

238 Bellow, supra note 183, at 109 n. 7.


242 Furthermore, the profession lacks agreed-upon standards of quality. See note 195 supra.

243 Structural changes in the delivery of services create new problems, particularly problems of rationing services, see Mechanic, The Growth of Medical Technology and Bureaucracy: Implications for Medical Care, 1977 MILLBANK MEM. FUND Q. 61 (Winter 1977), but whether they create new quality-of-care problems is an open question. Clients, however, may feel that bureaucratization of legal-services delivery creates quality problems. See J. Casper, supra note 195; Casper, Improving Defender-Client Relations, 34 NAT'L LEGAL AID & DEFENDER A. BRIEFCASE 114 (1977). But see S. Brakel, supra note 195, at 89-110.
inherent in such arrangements provides an incentive to devote the appropriate amount of hours to a case, or the appropriate effort per hour. Further, at least anecdotal evidence shows a tendency in corporate practice to overdeliver legal services. This unnecessary work is similar to low-quality work in that the value of the services the client receives is not equivalent to the payment he makes.

Although the quality problems may be different in hourly fee practice, they may still exist. If quality problems are less serious in these types of practice, this difference may be due more to the ability of clients to monitor the lawyer's work than to any disparity in fee structures. And increasing ability to monitor work is part of what informed consent is about.

240 H. Leibenstein, Beyond Economic Man 95-117 (1976) (decision about effort turns on a variety of factors, but some inefficiencies are always present); Clermont & Currivan, supra note 181, at 543 ("the lawyer has no direct economic incentive to work . . . the number of hours his client's best interests dictate").


242 See Anderson, supra note 75, at 752 n.38.

The medical field has a comparable problem: the performance of unneeded surgery. A congressional report estimated that 17% of the surgical procedures performed in the United States during 1974 were unnecessary. Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, Report on Cost and Quality of Health Care: Unnecessary Surgery 30, 94th Cong., 2d Sess. (Subcomm. Print 1976). Another possible indicator of quality problems is withdrawal from the market. See Anderson, supra note 75, at 755 n.39. Whether such withdrawal has occurred with legal services is a controversial question. First we have no agreed-upon definition of "need for legal services." See B. Curran, supra note 148, at 9; cf. Mayhew, Institutions of Representation: Civil Justice and The Public 9 Law & Soc'y Rev. 401 (1975) (question of legal needs not static but related to structure of institutions of representation). Second, even if we agreed there was a "legal need" present, individuals have a variety of alternatives besides lawyers for satisfying that need. They could negotiate for themselves, see Ross and Littlefield, Complaint As a Problem Solving Mechanism, 12 Law & Soc'y Rev. 199 (1978); submit their dispute to another agency, see Steele, Fraud, Dispute and the Consumer: Responding to Consumer Complaints, 123 U. Pa. L. Rev. 1107 (1975); or simply decide to "avoid" resolving it, see Felstiner, The Influence of Social Organization on Dispute Processing, 9 Law & Soc'y Rev. 63 (1974). Third, even if we had agreement that a legal need was unsatisfied, we would still have to discover why people were not going to lawyers before we could conclude there was "market deterioration" attributable to quality problems. People may not be going to lawyers because they do not value the end products of the legal system, rather than because of anything directly related to lawyering. See Galanter, Delivering Legality: Some Proposals for the Direction of Research, 11 Law & Soc'y Rev. 225 (1976); cf. MacCauley, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55 (1963) (contract law not usually needed in business relationships). Or it may be because of cost problems that would only be exacerbated by the solution offered here. See Schwartz, How Can Legal Education Respond to Changes in the Legal Profession, 53 N.Y.U. L. Rev. 440, 451-52 (1978).

243 See text accompanying notes 263-66 infra.
2. Superior Knowledge

The superior knowledge of lawyers is the generalized technical information and the experience brought to bear on their clients' problems. The client possesses superior knowledge of another sort—knowledge of the facts and circumstances of his case. To the extent that this information is historical, the lawyer may elicit it through skillful interviewing. The client, however, also possesses unique knowledge regarding his goals and values as related to his case, information that even a skillful interviewer may not be able to elicit.

Settlement, a decision allocated to the client by present law, illustrates this point. The relatively simple decision to accept or reject a settlement offer of $2,000 in a personal-injury case involves the valuation and comparison of monetary and nonmonetary factors, including the risk that the client will lose at trial. The client must compare an immediate payment of $2,000 with a future payment that may be greater or less than $2,000. How the client will value the future payment will depend on when he would receive it, on the spread of the possible outcomes, and on his degree of risk aversion. For example, assume his lawyer tells him that, if he refuses the offer, he has a sixty-percent chance of receiving $4,000 and a forty-percent chance of receiving nothing. The value of this sixty-percent lottery to the client depends upon the client's attitude towards risk. A client who is strongly risk-averse may prefer the certain $2,000; one who prefers risk may take the chance of getting $4,000.

Other factors to be considered include the client's feelings about going to trial. Does he place positive value on "telling his story," or is he concerned about feeling foolish? What does settlement

---

244 As a fixed payment is pushed farther into the future, its present value decreases, V. BRUDNEY & M. CHEIRTELSTEIN, CORPORATE FINANCE 32-33 (1972).

245 Id. 63-64.

246 See H. RAIFFA, DECISION ANALYSIS (1968). Further, it is likely that the lawyer's and client's risk propensities will diverge because the client is a one-shot player. See note 181 supra.

247 The problems involved for the lawyer in reaching this calculation are extremely difficult. It is my experience that in practice we either overestimate our ability to make such judgments or throw up our hands and confess that we can only guess. Very little work has been done on how lawyers might refine predictive judgments. See G. BELLOW & B. MOLTON, supra note 163, at 1004-17 (discussing ways lawyers might begin thinking about making such predictions).

248 Risk propensity is not a static concept—it is dependent upon circumstances as well as an individual's nature. A client's present needs for funds, his alternative uses of the money, and his ability to borrow may all influence his attitude towards risk.
mean for his self-image—"chickening out," vindication, or a "wise" tendency not to prolong a dispute unnecessarily?

A sensitive lawyer might, through appropriate probing, uncover the values at stake in his client's settlement decision. More difficult will be eliciting the precise weights the client attaches to each of the factors governing that decision. Although the literature on decision theory is voluminous, there is little evidence that a lawyer can completely elicit such information. The client will always know more than he can tell.

What is the significance of the client's superior knowledge of his own values? Perhaps this knowledge is merely another reason why settlement decisions belong to the client. Such decisions frequently require the weighing of almost incomparable values. Because the lawyer cannot know the relative weights of the competing values for his client, he cannot be sure that his decision will satisfy his client's real needs.

The same difficulty can arise in connection with other tactical choices. The decision to seek a continuance may involve a trade-off between the client's tolerance of anxiety and an opportunity for greater gains. Whether to call a particular witness may involve more than technical questions of evidence: the client may want to avoid subjecting the witness to a public attack on his credibility or to harassment at the hands of the opposition. The decision to try a case to judge or jury may involve not only considerations of which decisionmaker will be more favorable, but also client preference regarding the audience for his story. In addition to technical questions of jurisdiction and venue, choice of forum may also be affected by the client's convenience and tolerance of delay.

The basic problem is that the division between subject matter and procedure is inevitably artificial. It is based upon a false view of an ends/means dichotomy. A client in a civil suit may want

---

240 See D. Binder & S. Price, Legal Interviewing and Counseling chs. 8 & 9 (1977) [hereinafter cited as Binder & Price] (discussion of counseling techniques designed to elicit these client concerns).

250 In Slovic, Fischhoff, & Lichtenstein, Behavioral Decision Theory, 28 Ann. Rev. Psych. 1, 21-24 (1977), the authors review the research and decide that it provides no clear conclusion. Accord D. Binder & S. Price, supra note 249, at 148-53 (based on authors' experience). See also Simon, supra note 126, at 41 (given positivist assumption that ends are "subjective, individual and arbitrary," lawyers cannot meaningfully understand clients' values).


money, but he may want that money at the least cost in terms of personal embarrassment and delay. A criminal defendant may want liberty, but he may also want to tell his story, obtain absolution, or protect a friend. These other ends may not rise to consciousness at the time of the initial lawyer-client consultation. They may not occur to the client, or to the lawyer, until particular means are selected for achieving the ostensibly primary end of money or freedom.

Further, a client often comes to a lawyer without fixed, unambiguous ends in mind. Just as patients may approach physicians with nothing more than generalized demands for improved health, clients may approach lawyers with nothing more than the desire for advice about their problems. For such clients, the formulation of concrete goals will depend upon what they are told they can get, which in turn depends upon the lawyer's assessment of what means are appropriate for their situations. That judgment is likely to be influenced by the lawyer's values and his sense of role. For example, a client who receives an eviction notice may come to a lawyer for help about "this." Whether "this" comes to mean defending the eviction, finding housing, obtaining more time to move, or resolving the dispute with the landlord may depend as much on the lawyer's selection of means as on the client's fixed ends. Allocating the choice of means to the lawyer can, in effect, determine the ends that the client will pursue.

As discussed above, even a lawyer who recognizes the existence of subsidiary ends would be hampered in making satisfactory procedural decisions by the client's inability fully to communicate his values to the lawyer. Beyond this difficulty is another problem akin to the "dwarfing of soft values" problem, which occurs in cost-benefit analysis. In theory, emotion-laden or subjective goals can, and perhaps will, be taken into account; in practice, however, the separation between subject matter and procedure discourages consideration of these ends. The separation of decisionmaking author-

---

253 See Schneyer, supra note 5 at 129.
254 See G. Bellow & B. Moulton, supra note 163, at 233-34; cf. Anderson, supra note 75, at 760 n.67 ("fiduciary is frequently responsible for defining what the client's interests are and for deciding how to maximize them").
256 Cf. Fitzgerald, supra note 185, at 185-87 (describing housing litigation in Chicago in which clients influenced lawyers to use different means).
257 See text accompanying notes 250-51 supra.
258 See, e.g., Tribe, Policy Science: Analysis or Ideology?, 2 Phil. & Pub. Aff., 66 (1972); Tribe, supra note 146, at 627.
ity along artificial means/ends lines may communicate an implicit value judgment that "procedural" decisions do not implicate legitimate client ends.259

In summary, then, two major considerations suggest that the lawyer's technical expertise may not produce optimal results. First, the lawyer's self-interest, and his concern for the interests of other clients, may weaken his loyalty to any particular client. Second, many of the decisions that must be made on the way to resolving a client's problems require the balancing of client values. These considerations are not sufficient, of course, to prove conclusively that an expanded rule of informed consent would be superior or even equal to professional decisionmaking. One may concede that lawyers have some incentive to take advantage of their clients and still contend that the existing set of social controls works well enough to keep the harm minimal.260 One may also concede that a client cannot communicate his entire value structure to the lawyer and still contend that the lawyer's experience in working with clients keeps him sufficiently informed about typical client values to allow him to make informed decisions.261 Only the client who has highly aberrational values will be harmed by the lawyer's informed guesses, but devising a system that will accommodate extreme cases is always difficult and frequently not worth the effort. The presumption in favor of client decisionmaking,262 the problem...

259 This "judgment" that lawyers are superior decisionmakers, at least regarding the "procedures" involved in a lawyer-client transaction, may also affect the possibility of clients making settlement decisions—a decision present law clearly assigns to them. First, it reinforces the notion that lawyers know best, thereby giving legitimacy to lawyers who believe their job is to persuade their clients to accept their judgments about settlement offers. Second, it reinforces for clients the notion that their role is simply to trust their lawyers, making it less likely that they can assume decisionmaking authority even when it is offered to them.

260 Cf. H. Leibenstein, supra note 240 (economic definition of maximization is unrealistic when applied to individuals working for others; virtually all agent-principal relationships involve some inefficiency). If Leibenstein is correct, the possibility of cheating only leads to the question whether in an imperfect world the level of cheating is optimal.

261 See Schneyer, supra note 5, at 133. This is less likely to be true, however, if the value structure of professionals as a class has certain biases. For example, it has been noted that physicians have a bias towards treatment. See, e.g., Mechanic, supra note 239, at 64; Scheff, Decision Rules, Types of Error, and Their Consequences in Medical Diagnosis, 8 BEHAVIORAL SCIENCE 97 (1963). But see Wildavsky, Doing Better and Feeling Worse, 106 DAEDALUS 105, 108 (1977) ("The patient's simple rule for resolving uncertainty is to seek care up to the level of his insurance."). Similarly, lawyers may have a bias towards legal solutions. Our "due process" solutions to problems may be due to our bias towards procedural changes rather than an honest estimate of client needs. See Trubek, Book Review, 1977 WIs. L. Rev. 303, 309-312 (1977). Of course, this "vice" may also be a defect of this Article, which can be viewed as advocating procedural solutions to substantive problems.

262 See notes 114-32 supra & accompanying text.
of disloyal professionals, and the client's inability to communicate his values to the lawyer do indicate, however, that the informed-consent principle may be an improvement over the present system, assuming that the client can make the necessary decisions. The client's competence to make decisions is the focus of the following section.

3. Decisionmaking Under Informed Consent

Professional disloyalty and superior client knowledge appear to be problems that can be ameliorated by informed consent. Disloyalty results, in part, from monitoring problems, and informed consent can be a form of monitoring. The lawyer is required periodically to justify decisions to his client. The process of thinking through alternative courses of action and explaining them to a client encourages self-scrutiny and fosters greater self-awareness of the factors influencing the lawyer's judgment, thereby improving his decisionmaking. Allocating decisionmaking authority to the client obviously takes advantage of the client's superior knowledge of his own values.

Whether the informed-consent model can serve as the basis of the lawyer-client relationship depends on the client's receipt of reliable information and ability to make the necessary decisions. Although, at the start of the lawyer-client relationship, most clients lack the information and expertise to value decisionmaking control and to evaluate the lawyer's promised performance, they are not therefore unable to fulfill their role in a relationship based on informed consent. Informed-consent doctrine does not require that the client actually make the final decisions. It does require that, at the proper time, a decision be brought to the client and that the information needed for evaluation be disclosed. The client then chooses whether to delegate the decision to the professional, seek further consultation, or make the decision himself. Thus, the client becomes the monitor of the lawyer's actions.

Performing this task requires less expertise than does evaluating the lawyer's statements in the initial meeting. Information and conclusions reported to the client may suggest a problem and the

263 See Anderson, supra note 75, at 753; Reder, supra note 114, at 220-22.
264 See Capron, supra note 5, at 371, 374-75 (one function of informed consent is to encourage self-scrutiny by physician-investigator). Monitoring might also work by simply forcing the professional to pay attention to the client's needs.
265 See notes 142-43 supra & accompanying text.
266 See note 160 supra. See also D. Rosenthal, supra note 6, at 151-61 (discussing the functioning of an informed-consent model in the lawyer-client relationship).
advisability of obtaining further information or a second opinion. Concern may be triggered by unexplained gaps or inconsistencies in the lawyer's reports, or simply by the manner in which the information is conveyed. Less knowledge is needed to recognize these problems than to solve them.

A more important consideration is the educative value of the lawyer-client relationship. At the beginning of the relationship, an inexperienced client operates in a void. He cannot be expected to evaluate the whole of a relationship that may involve many decisions and stretch over a long period of time. Informed-consent doctrine allows the client to receive information in small doses and to make less global decisions. Informed consent, if it leads to periodic meetings between lawyer and client, can help bridge the information gap between them. Thus, over time, the client's ability to monitor the lawyer's progress and to make decisions should improve.

The considerations outlined above indicate that clients may be better able to perform decisionmaking tasks under a system of informed consent than under traditional forms of contracting. Remaining, however, is the question whether clients can adequately perform their role even with the "help" provided by informed consent.

In discussing this question, examination of a decisionmaking dialogue between lawyer and client may prove useful. Assume the client is a black woman in her twenties who has a civil rights claim against the police for an illegal search. The question under discussion is in which court to sue.

Client: Why did you ask me here today?
Lawyer: Well, I have worked enough on your case to be ready to file a court action, assuming that's what you still want, but we have to decide what court to file in.

Client: What are the options?
Lawyer: Well, we can go into state court; because the jury selection is limited to Philadelphia County, we are likely to get a more favorable jury—more blacks and more

---


268 Inferential support for this conclusion comes from Rosenthal's study of the relationship between the degree of clients' participation in personal-injury cases and the cases' outcomes. His data show a statistically significant correlation between client participation and satisfactory case results. D. Rosenthal, supra note 6, at 39 & n.15. Rosenthal's four measures of client participation involved forms of monitoring, rather than actual decisionmaking by the client. See id. 32-33. Thus, Rosenthal's study suggests that monitoring is both feasible and beneficial.

269 See note 163 supra.
young people. The other option is federal court—there the case is likely to be heard sooner; it’s somewhat easier for me to litigate in, and it’s somewhat easier to get information through discovery.

Client: I don’t know—what do you think?

Lawyer: Well, the trade-off is the more favorable jury in state court versus the additional information we can get in federal court. The major additional information we are likely to get is the police investigative file. Once in a while, that turns up something—maybe in one out of ten cases. That still probably leaves state court a better forum in terms of winning the case. But, for a jury trial there, we might have to wait up to five years, probably at least four. We can get a jury trial in federal court in less than two years, maybe even one year.

Client: Time is somewhat important to me. How much difference would the difference in juries make?

Lawyer: It’s hard to say. I haven’t had that much experience with state juries in these kinds of cases, but, in a close case like yours, where credibility is everything, it could be significant.

Stopping the dialogue here, is it plausible that a client can make an intelligent decision with this information?

One major hurdle is not client incompetence, but the poor quality of information provided. The information about the difference in the likelihood of victory between state and federal courts is extremely vague. While precision is not required, something more focused than “it could be significant” is surely possible.²⁷⁰ The

²⁷⁰ For example, the lawyer could check court dockets and talk to other attorneys to broaden his experience. He then could attempt to refine into crude probabilistic data his intuition that the difference in courts could be significant. See C. Bellow & B. Moulton, supra note 163, at 1004-17, 1039; D. Binder & S. Price, supra note 249, at 140-44. If after going through this process he still could only conclude, “Who knows—I sure don’t—therefore when I say I mean it could be significant, I mean it is plausible to me that it will make a difference,” then the lawyer should decide whether it is a problem of competence or genuine uncertainty. If the problem is one of competence, the lawyer either should not handle the case or should bring in a more experienced lawyer. See ABA Code of Professional Responsibility, EC 6-3. If the problem is genuine uncertainty, decision theorists tell us the lawyer can guide his choice with “standards,” such as assuming each “state of the world” is equally likely, being a pessimist or optimist, or thinking about how he or the client would feel if the choice turned out to be wrong (“the criterion of regret”). See H. Raiffa, supra note 246. Of course they don’t tell us which “standards” to use. My point, however, is not that lawyers should teach their clients decision theory, although questions such as, “If you took this choice how would you feel if it did not work out,” should be asked of clients, but rather that once a situation of genuine uncertainty exists, the client’s choice of
client's impression that time is somewhat important is also vague. If the conversation were to continue, one would hope that both lawyer and client would be able to clarify their meanings.\footnote{1}

Assuming this clarification, can the client trust the lawyer's information? She certainly does not have the knowledge to evaluate its validity.\footnote{2} Has the informed-consent problem merely shifted to a different place? Replacing lawyer decisionmaking with client decisionmaking merely changes the problem—from potential conflicts of interests to client reliance on the lawyer's good faith in communicating information. What, if anything, has changed?

First, the conflict-of-interest argument attempted only to question the assumption that clients' interests always receive priority and thus to urge the discovery of ways to insure that lawyers' abilities are being used on their clients' behalf. Many lawyers do place their clients' interests first. If the information these lawyers provide is unreliable, the fault lies with their lawyering skills, not with their motivation. But lawyers, like others, are subject to conflicting drives\footnote{3}—in this case, self-interest and service orientation. Lawyers who would otherwise succumb to their self-interests may be deterred from providing incomplete or misleading information by the disclosure required by informed consent. Other lawyers may become aware of their self-interested actions by the necessity of ex-

\footnote{1} One might assume that lawyers who have to "practice" clarifying their meaning to many clients would become more skilled at communicating to the client than clients, who are one-shot players, would become skilled at communicating to the lawyer. For this to become a reality, however, lawyers would have to make an investment in learning to communicate with clients. As one observer has noted, lawyers can be viewed as interpreters between the language of the law and the language of their clients. Most of the training lawyers receive, however, is for translating the client's world into legal language, not translating the legal world for their clients. See O'Barr, The Language of the Law—Vehicle or Obstacle, Duke University Law and Language Project Research Report No. 12, at 33-34 (unpublished paper 1977). See also Wasserstrom, supra note 7, at 23-24.

\footnote{2} For example, assume that among the considerations in the decision whether to file suit in federal or in state court is the possibility of abstention, see, e.g., Field, The Abstention Doctrine Today, 125 U. Pa. L. Rev. 590 (1977). Even with a fairly elaborate exposition of some difficult doctrinal questions, see Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U. Pa. L. Rev. 1071 (1974), few clients can evaluate a lawyer's conclusion that abstention is likely or unlikely. Thus, in choosing the forum, or in delegating that decision to the lawyer, the client must rely on the lawyer's estimate of the probabilities.

\footnote{3} See H. Lemanstein, supra note 240, at 72-76, 93-94.
plaining their thinking. The more the dialogue between lawyer and client forces lawyers to confront the conflict between self-interest and service orientation, the more likely they will be able to conform their behavior to the client-centered model espoused by the legal profession. Informed consent cannot rid the world of dishonest lawyers. It can, however, improve the quality of clients’ understanding by prodding well-intentioned lawyers to provide full and dispassionate explanations of the legal process.

Second, informed consent might ameliorate the problem of the questionable trustworthiness of the information communicated from lawyers to clients. The doctrine might initiate a dialogue within the legal profession about appropriate ways of informing clients and might thereby influence its ideology and values. The opposite effect is, however, also possible, on the theory that trust induces trustworthy behavior and, correspondingly, that distrust becomes a self-reinforcing prophecy. What is needed is an appropriate line between trust and monitoring, one drawn closer to the monitoring side of the spectrum than is the present line.

Assuming that these information difficulties can be solved, the question remains whether the client is competent to make the decisions. Returning to our hypothetical dialogue, nothing is inherently incomprehensible about the trade-off between a better chance of success in state court and the cost of greater delay. Indeed, the question of choice of forum has no right answer.

274 See L. Festinger, A Theory of Cognitive Dissonance passim (1957). Of course, the conflict might simply cause lawyers to modify their values. Cf. C. Argyris & D. Shon, Theory in Practice: Increasing Professional Effectiveness 30 (1974) (recognition of inconsistencies between professional’s espoused theory and his actions is a learning mechanism).

275 Although the ultimate goal is understanding by the client, not simply a flow of words from lawyer to client, the informed-consent medical cases have not focussed on the client’s understanding but rather on whether the physician fulfilled the formal requirements of disclosure. See the discussions of this issue in Capron, supra note 5, at 404-418; Meisel, supra note 1, at 113-23. But see Goldstein supra note 11, at 692-95 (warning of the possibility of infringement of the patient’s autonomy if the focus is on the patient’s understanding).


277 See Burt, The Limits of Law in Regulating Health Care Decisions, 7 Hastings Center Rep. No. 7, 29 (Dec. 1977) (arguing that both the traditional conception of physician authority and the “reformist” doctrine of patient control have dangers). Rigid rules one way or the other may inhibit sharing of roles and responsibility. But cf. Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976) (analyzing rhetorical uses of concepts of individuality and altruism in private-law opinions, treatises, etc., and concluding that these opposed rhetorical modes reflect irreconcilable visions of society).

cause of the client's superior knowledge of her own values, she is not only equally competent, but likely more competent, than the lawyer to strike the balance.

Furthermore, although the proposition that such information is understandable to the average person cannot be empirically verified, it seems to be implied by the ability of the average person to make the decisions required in daily life.\textsuperscript{279} The situations that prompt clients to seek legal advice are stressful, however, and will perhaps impair client competence to make decisions.\textsuperscript{280} Furthermore, litigation and involvement with lawyers is not ordinary life. Unless the number of clients whose decisionmaking capacities are adversely affected by these psychological forces is so great that the costs of informed consent to them outweigh the gains to other clients,\textsuperscript{281} though, these arguments serve only to emphasize the importance of the process used in informing clients. A strong rights-based argument might reject as irrelevant even evidence of psychological dysfunction. The weaker version of the rights-based argument suggested here simply contends that the possibility of psychological inability to make decisions is not sufficiently plausible to warrant rejection of informed consent.

Finally, the choice-of-forum question discussed above seems no more difficult than the settlement decisions that current law assigns to clients. A similar balancing of likelihood of victory against extended delay is involved in both situations. The conclusion that the client should make both decisions thus seems compelling, unless clients' control over settlements is ended or a distinction is drawn between settlements and other decisions involving similar values.

(distinguishing between simple questions, which can be answered with enough information, and complex questions, which involve tradeoffs of values and which information alone cannot answer). Wexler argues that we do not answer complex questions; we decide them. \textit{Id.} 193-94.

\textsuperscript{279} Many important consumer decisions, such as buying a house, involve tradeoffs between accepting a known product and spending time and effort to search for something that might be better. See, e.g., Stigler, \textit{The Economics of Information}, 69 J. POLITICAL ECON. 213 (1961).

\textsuperscript{280} See Capron, \textit{supra} note 5, at 377-92 (discussion of various barriers to patients' capacity to make choices, including the impact of psychological forces and the relationship with the physician).

\textsuperscript{281} An intermediate approach would allow lawyers to take over decisionmaking authority when, in their judgment, the client's decisionmaking capacity is impaired or not functioning appropriately because of the pressures of the situation. See D. Binder & S. Price, \textit{supra} note 249. The danger here is the problem of overextension. If lawyers could better recognize which clients are competent to make decisions than clients themselves can, and if lawyers would not use "inability to make intelligent decisions" as a justification in inappropriate cases, then perhaps this intermediate position would have merit. Given lawyers' propensity to view themselves as "experts" and the tendency to equate "wrong" decisions with incapacity, I have my doubts about creating such an exception.
Although settlements are perhaps more likely to involve client values and client conflicts with their attorneys, the only reason for drawing a line between settlements and other similar decisions seems to be administrative convenience: the need to have a clear demarcation between client and lawyer decisions. For some people, this justification might be sufficient to overcome the presumption in favor of client decisionmaking, but, as the subject-matter cases illustrated, a limitation of client decisionmaking to just settlements is likely to be unstable.\(^2\) Pressures will emerge for courts to treat similarly situations that result in clients losing their claims. The purported administrative ease is therefore illusory.

The other proposition, that lawyers should control all decisions, including settlements, requires even stronger justification than the existing set of rules. But this brings us full circle. Clients have not been proven incompetent. Even assuming the lawyer has more experience in dealing with uncertain predictive data, the major conceptual difficulty is not comprehending the information, but making the trade-off between an increase in the probability of success and a loss of time. This type of question has no right answer. Hence, competence is somewhat beside the point: the issue is who should make this trade-off. The client knows better whether he wants to perform the balancing himself or delegate that task to the lawyer. The lawyer's guesses about the client's desires in this respect are likely to be wrong.\(^3\) Informed consent can therefore improve lawyer-client decisionmaking by allowing the client's values to control and by putting the client in a position to monitor the lawyer's performance.

**D. The Problem of Cost**

Of course, the switch to a rule of informed consent would involve certain costs: the costs of increased lawyer and client time discussing decisionmaking and making collaborative decisions; the costs of enforcing the client's right to information;\(^4\) the possible

\(^2\) On the difficulty of drawing the line between subject matter and procedure, see note 110 supra.

\(^3\) Studies of physicians show that they generally underestimate their patients' desire for information and ability to understand information. See McKinlay, supra note 19, at 3; Pratt, Soligmann, & Reader, Physicians' Views on the Level of Medical Information Among Patients, in PATIENTS, PHYSICIANS & ILLNESS 222 (E. Jaco ed. 1958). See also Waitzkin & Stoeckle, The Communication of Information About Illness: Clinical, Sociological, and Methodological Considerations, in PSYCHOSOCIAL ASPECTS OF PHYSICAL ILLNESS 180 (Z. Lipowski ed., 8 ADVANCES PSYCHOSOMATIC MED. 1972).

\(^4\) The primary cost here would be the time and effort spent litigating informed-consent issues.
costs of limiting lawyer autonomy;\textsuperscript{285} and, if increased client control prolongs hearings, the costs of increased court time.\textsuperscript{286} These costs may be substantial, but perhaps not as large as expected. Multiplication of the cost of the initial meeting between lawyer and client by the number of subsequent meetings almost certainly would overstate the total cost in terms of the lawyer's and client's time. As the relationship progresses, the client should become more familiar with the lawyer, the case, and the legal process. The exchanges between lawyer and client should thus become more efficient and less time-consuming.\textsuperscript{287} Furthermore, a rule of informed consent might encourage lawyers to become more skilled at conducting decision-making discussions with clients. Clients too might have an incentive to educate themselves about the legal process. Both developments ultimately could reduce the costs of informed consent.

Moreover, cost alone should not be determinative. Clients do not currently make informed choices between cost and other values, and some system must therefore be devised for educating clients about the value of decisionmaking authority. Such a system inevitably has costs.\textsuperscript{288} The question, then, is not whether the costs exist, but whether they are justifiable. Some of the reasons are those already discussed: the ineffectiveness of market controls in regulating the lawyer-client relationship,\textsuperscript{289} the capacity of informed consent to ameliorate the problem of professional disloyalty,\textsuperscript{290} and the opportunities the doctrine affords to take advantage of the client's superior knowledge of his values.\textsuperscript{291}

Using again the example of a client deciding whether to file in state or federal court, a discussion such as the one sketched above might take a half hour of a lawyer's time.\textsuperscript{292} Clients might well be willing to pay a minimum of twenty-five to fifty dollars for the opportunity to decide whether they wish to incur delays of up to

\textsuperscript{285} See notes 305-06 infra & accompanying text.
\textsuperscript{286} See text accompanying notes 328 & 332 infra. This increased time would be a cost to the public, as well as to the lawyer and client.
\textsuperscript{287} See note 149 supra.
\textsuperscript{288} See generally G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 80-88 (1978).
\textsuperscript{289} See notes 140-53 supra & accompanying text.
\textsuperscript{290} See text accompanying note 262 supra.
\textsuperscript{291} Id.
\textsuperscript{292} Based on my own experience, a half hour is a realistic estimate, even though the dialogue set out takes only several minutes. The studies from medical literature are inconclusive as to time. One early study reports that in most cases disclosure took less than ten minutes. See N. HERSHEY & S. BUSHKOFF, INFORMED CONSENT STUDY 35-36 (1969). But given the importance this Article places on the process of informing the client, and that study's lack of attention to the question of whether the patients actually understood what they were told, it does not make sense to extrapolate from it.
five years before trial. The present system usually does not give them the opportunity to make that choice. Informed consent, by contrast, affords clients the option of deciding that participating in any given decision is worth the cost. The relevant question, at least in cost-benefit terms, is whether the cost of discussing this option should be imposed upon every client in order to insure that some clients have the choice.

Even if balancing the possible benefits of informed consent against its costs does not yield a clear resolution in favor of the doctrine, the inquiry should not come to an end. The client's interest in making decisions affecting his case, because it is his case, must also be considered. Such decisionmaking involves important aspects of personal freedom and should thus be protected absent a clear showing that the costs are prohibitive.

293 Fifty dollars an hour is a realistic rough estimate of a lawyer's hourly fee. See Clermont & Currivan, supra note 181, at 533 n.5. Estimations of additional costs, such as enforcement costs, are completely speculative. The important point, however, is the plausibility of the assertion in the text that clients will be willing to pay for the opportunity to make the decision.

294 The practice of lawyers is not to bring such decisions to clients. See D. Rosenthal, supra note 6, at 113.

295 The costs of discussing the option would be much lower than the costs of making the decision. Imagine a different beginning to our dialogue discussed earlier:

Lawyer: We now have to decide what court to file in. Choosing state court would mean a long delay but might mean a better chance of winning. If you leave the decision to me, I will go to state court, but if the delay is important to you, we can discuss it. This is your decision, if you wish, but if we do discuss it, it may take a half hour or so, which, as you know, costs $25 of my time. What do you want to do?

This discussion would take a few minutes. It may not be all that a "rational" decisionmaker would want to know in order to decide whether to engage in further discussion, but it sufficiently conveys the nature of the decision involved. The possibility of "waivers," see note 182 supra, presents significant implementation problems, however. By indicating his preference among the available options and by emphasizing the increased cost to the client of discussing those options, the lawyer might convince the client that further discussion would be a waste of money.

296 First, even if one agrees that the above example rings true, it might be argued that the number of discussions involved in any given case might make informed consent too costly. Second, informed consent might be most needed with clients who could least afford the extra cost, because affluent repeat-player clients already monitor their lawyers' performance. But see M. Wessel, supra note 241, passim.

297 See note 113 supra & text accompanying note 116 supra.

298 Therefore, the analysis being applied here might be said to be an impure theory that attempts to take account of both cost-benefit analysis and rights. See, e.g., Barry, Book Review, 82 Yale L.J. 629, 652 (1978); Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. Legal Stud. 49, 76 (1979); Michelman, Norms and Normativity in the Economic Theory of Law, 62 Minn. L. Rev. 1015, 1035-48 (1978).
E. The Lawyer’s Interests

Because the lawyer is his client’s agent, his only legitimate interest is arguably serving the best interests of his client. Decision-making problems, then, would arise only when a client decided on an action which the lawyer judged to be contrary to the client’s best interests. This narrow view of the lawyer’s interest seems misguided in two respects. A system of rules that ignores the lawyer’s own interests may have little chance of adoption. Moreover, if the lawyer does have legitimate interests, ignoring them would be as objectionable as ignoring those of the client.

What are these legitimate interests? The lawyer has an interest in autonomy; an interest in his identity as a lawyer; a craft interest in not being forced to do substandard work; and an interest in not being forced to violate his own standards of professional responsibility or those of the profession.

1. Lawyer Autonomy in Performing Work

Professionals, by definition, are those who have control over their work. A rule of informed consent limits such control. The need for this limitation does not detract from the legitimacy of the lawyer’s demand for control, a demand composed of several related elements. It includes the demand for control over hours and economic terms, over evaluation of work, and over performance. This last aspect is the focus of this section; the others, however, deserve some brief comments.

The demand for control over hours and economic terms is the core of economic bargaining. As such, it raises issues to be

299 A major difficulty with adopting a rule of informed consent is the problem of implementation. See text accompanying notes 389-97 infra. To the extent such implementation is dependent on professionals themselves, id., a strategy of trying to understand and to accommodate their legitimate needs seems more likely to facilitate adoption than one that simply dismisses them.

300 See, e.g., E. FREDSON, supra note 229, at 44-45 (“autonomy of technique is at the core of what is unique about the profession”); E. HUGHES, MEN AND THEIR WORK 78-80 (1958) (formal status of a profession reflects society’s grant of a license and mandate to control the profession’s work).

301 These demands derive from the lawyer’s role as worker. See, e.g., P. BLUMBERG, INDUSTRIAL DEMOCRACY (1969); A. FOX, supra note 276; D. JENKINS, JOB POWER (1973). As Fox states: “Work is . . . one of the major sets of roles, relations, and structures which provide, or fail to provide, the individual with scope for the development of his personality.” A. Fox, supra note 276, at 46. But there is an inescapable tension in this position. The professional may still have more control than the ordinary worker. See id. 33-34. But if one believes that all workers should have more control over their work, one’s goal should be not to turn professionals into machines, but to bring them closer to the desired norm, taking account not of the definitional aspects of professionalism, but of the work professionals do.
negotiated between employer and employee.\footnote{A. Fox, supra note 276, at 298; E. Freidson, supra note 229, at 367; Oldham, Organized Labor, the Environment, and the Taft-Hartley Act, 71 Mich. L. Rev. 936, 981-1002 (1973).} The professional's demand for this type of control should carry no more weight than that of any other worker; unless, therefore, all workers have uni-
lateral control over these aspects of employment, the professional
should be no exception.\footnote{Freidson suggests that governmental control of medicine will not violate the core of autonomy that defines a professional, as long as the professional retains control over the technical spheres of his practice. \textit{See} E. Freidson, \textit{supra} note 229, at 45, 345. This is not to say that control over economic factors is unimportant. Indeed, such control may be of first importance. \textit{See} McKinlay, \textit{The Business of Good Doctoring or Doctoring As Good Business: Reflections on Freidson's View of the Medical Game}, 7 Int'l. J. Health Services 459, 467 (1977) (“there are different levels of control operating and the amount of control that physicians exert may actually be quite limited when viewed in relation to the industrial and financial forces . . . and the controls that they exert.”).} To the extent that the monitoring re-
quired by informed consent gives the client more power to control
these aspects of a lawyer's work, such monitoring does not infringe
a legitimate interest.

Professional control over evaluation of work traditionally has
served to protect professional autonomy, but this consideration does
not justify it. The major argument for giving professionals greater
control than other workers over evaluation of their work is that
professionals' work involves specialized knowledge and techniques,
which can only be judged by other professionals.\footnote{See Wolfram, \textit{Barriers to Effective Public Participation in Regulation of the Legal Profession}, 62 Minn. L. Rev. 619, 628-30 (1978). \textit{There may be a fairness argument here as well. Only those who have been involved in this profession or work can truly understand the conflicting considerations. See} Hughes, \textit{Mistakes at Work}, 17 Can. J. Econ. & Pol. Sci. 320 (1951).} This interest
in evaluation by peers, even if legitimate, is not infringed by a rule
of informed consent.

A professional's control over the way he performs his work may,
however, be justified by considerations of autonomy. The literature
on work and workers contrasts control over the decision to do a
particular task with control over the decisions involved in perform-
ing that task.\footnote{See A. Fox, \textit{supra} note 276, at 16. Allan Donagan draws a similar distinc-
tion between the patient's authority to decide on a course of treatment and the
physician's authority to decide how a course of treatment is to be carried out.
Donagan, \textit{Informed Consent in Therapy and Experimentation}, 2 J. Med. & Phil. 307, 313 (1977).} Controlling the latter decisions greatly curbs a
worker's discretion. Although specifying the task to be performed
can likewise have that effect, it frequently leaves the worker large
discretion over choices of techniques, over ordering of subtasks,
and so on. Discretion and autonomy are not synonymous; at some
point, however, limits on discretion interfere with a worker's autonomy in a very basic way.

First, meticulous control over how a worker does a task denies his capacity to do the job. To an auto mechanic, for example, a knowledgeable car owner might not merely say, "The car is not running; please fix it," but might specify both the task he wanted performed—"Fix the carburetor"—and how to perform that task—"First, turn that screw, then remove that part and soak it in oil, . . ." At some point, the specificity of the instructions infringes the mechanic's sense of being a mechanic. He is then justified in asserting that the owner does not want a mechanic, but merely a tool. The mechanic may choose to be such a tool, but that is a choice the mechanic should have; society should not impose it on him.

Second, the more external control exerted over the way one does a task, the closer such control comes to dictating one's physical movements, at some point becoming control over the worker's body. Because control over one's body is a fundamental aspect of the notion of autonomy, maintaining control over the way one does a task is similarly fundamental.

Finally, being told how to do a task with great specificity is reminiscent of childhood, denying the adult potential for competence. Being told to do a particular task may be distasteful, but, in some sense, it affirms one's ability to do the task.

The distinction between being ordered to do a task and being told how to do it does not correlate precisely with the absence or existence of autonomy. But the closer a rule comes to prescribing the exact steps a worker must take, the more the prescription infringes the worker's sense of autonomy. Thus, despite its definitional difficulties, the distinction between task and performance of task is, by and large, a useful tool. The notion of task has a certain core that resists endless subdivision; it implies something that potentially involves more than one action.

2. The Lawyer's Interest in Identity as a Lawyer

A lawyer has an interest deriving from the scope of the definition of "lawyer." Actions required beyond that scope may deny his identity as a lawyer. As Freidson has written with regard to doctors:

306 See note 113 supra.

307 Cf. E. FREIDSON, supra note 207, at 123-24 (doctors must not be treated as if they were schoolchildren).
[Physicians'] knowledge and technique . . . set limits past which they cannot go without ceasing to be physicians. While the physician anxious to please can offer a money-back guarantee like any reputable village healer without damaging his medical technique, he cannot substitute a poultice of cow dung for an injection of antibiotic in the treatment of a bacterial infection. When his patients are markedly different from him, he cannot satisfy them without giving up his profession.\textsuperscript{308}

Similar limits may characterize the lawyer-client relationship. For example, are legal-services lawyers who object to performing the role of social worker justified in trying to set limits on that role?\textsuperscript{309} What of the lawyer who is asked to engage in political lobbying or picketing?\textsuperscript{310}

Because our notions of lawyering are so elastic,\textsuperscript{311} such questions do not have hard and fast answers. These issues involve the scope of what an individual offers when he presents himself as a lawyer. Ideally, any discrepancy in the concept of "lawyer" between lawyer and client should be worked out at the beginning of their relationship. If these differences are not explored at the outset, disputes that arise later should not be resolved by allocating decisionmaking authority along subject-matter/procedure lines. Rather, courts should examine closely the undertaking by lawyer and client. They should require the lawyer to inform his client of the limits on representation. A rule of informed consent imposes this requirement.\textsuperscript{312}

\begin{itemize}
\item \textsuperscript{308} E. FREIDSON, PROFESSIONAL DOMINANCE 111-12 (1970).
\item \textsuperscript{310} Id. 210; cf. Wexler, Practicing Law for Poor People, 79 YALE L.J. 1049, 1064-65 (1970) (lawyer's description of his feelings on accompanying a group of women to a welfare office to demand an emergency check and to a hospital to demand treatment of an infant).
\item \textsuperscript{311} As Katz points out, some of the activities that legal-services lawyers label social work are performed in private practice. J. Katz, supra note 309, at 30. Lawyering is not a static concept. The lawyer's role as intermediary may lead him to perform all sorts of tasks. Cf. Hazard, Reflections on Four Studies of the Legal Profession, 13 SOCIAL PROBLEMS: LAW & SO'Y SUPP. 46-47 (1965) ("At the bottom, the lawyer's role is as limited and as limitless as the short and simple annals of the poor; at the top, his role embraces the challenge, opportunities and frustrations of the largest political and economic enterprises of which society is capable.").
\item \textsuperscript{312} This requirement derives from the proposition that a lay standard should be used to determine the scope of the lawyer's duties. See text accompanying notes 386-96 infra.
\end{itemize}
3. The Lawyer's Interest in Craft

The lawyer's third major interest in controlling decisions is to protect his sense of self-esteem as a lawyer. Although related to both autonomy and ethical interests, this interest is distinct from both. It stems from a sense of craft and pride in one's work. The lawyer, directed by his client to make an argument the lawyer deems untenable, may feel that the instruction infringes his autonomy, and he may feel morally bound not to present frivolous arguments. But he also has an interest in not being compelled to produce what he considers substandard work.

4. The Lawyer's Interest in Professional Responsibility

Finally, the lawyer has an interest in not being forced to make decisions that conflict with either the profession's or his own code of professional responsibility. Expansion of the role of client decisionmaking might increase the number of instances in which a lawyer will be asked to violate these sets of rules.

Assume a case in which a lawyer does not want to present the testimony of a witness because he believes the testimony would be false. Assume further that the Code does not prohibit presentation of the evidence, but leaves the decision to the lawyer's discretion. Present case law suggests that the lawyer need not ask the

---

313 See T. VEBLEN, THE INSTINCT OF WORKMANSHP (1914). The sense of pride and craft is related to the performance of rituals at work that help distinguish the craft from the outsider's perception of it. See Hughes, Mistakes at Work, 17 CAN. J. ECON. & POL. SCI. 320, 324 (1951).

314 This obligation may stem from the lawyer's own sense of what is morally required, or from a decision to accept the dictates of the Code of Professional Responsibility that prohibit presentation of such claims. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102, 2-109, 2-110; cf. Fed. R. Civ. P. 11 (signature of attorney on pleading certifies that "to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."). See also text accompanying notes 336-39 infra.

315 One's own code is the complex of rules that an individual accepts as governing his behavior as a lawyer. It includes personal rules and rules derived from the profession. Thus, it is not necessarily congruent with the Code of Professional Responsibility. Every lawyer has such a code, whether explicitly acknowledged or not. See Alderman, Three Discussions of Legal Ethics, 126 U. PA. L. REV. 452, 452-53 (1977); Flynn, Professional Ethics and the Lawyer's Duty to Self, 1976 WASH. U. L.Q. 429.

316 The present Code prohibits "knowingly" using perjured or false testimony. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(4). See also ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINION No. 150 (1974) (lawyer may not present witness who will testify to what counsel knows to be untrue). Whether the lawyer has discretion not to introduce testimony when he merely believes the testimony will be false is not clear. One position is that DR 7-101(B)(2), which provides that a lawyer may refuse to participate in conduct that he believes to be unlawful, gives the lawyer this option. See Morgan, supra note 230, at 737. But see Bellow & Kettleson, supra note 202, at 373 (arguing that Morgan overstates
client whether to offer the testimony.\footnote{317} If, however, informed-consent doctrine allocated the decision to the client, he could insist that the witness be called.\footnote{318} Informed consent may therefore create additional ethical conflicts for the lawyer.\footnote{319}

Informed consent, however, would not necessarily require presentation of the testimony. Under that doctrine, after discussing the issue with the client, the lawyer could decide not to call the witness because of suspected perjury. He would then have to justify that conclusion to the client. If the latter insisted on calling the witness, the lawyer could be allowed to withdraw. The availability of that option turns on the Code's rules governing substantive behavior.\footnote{320} Respect for an individual's autonomy requires an open exchange of views, although not necessarily acquiescence in anything that person desires.\footnote{321}

\footnote{317}{See} text accompanying notes 42-79 \textit{supra}.

\footnote{318}{At} that point, the possible conflict between the instructions rule and the subject-matter/procedure rule would have to be faced. See text accompanying notes 32-33 \textit{supra}. In any event, once the decision is brought to the client, the client ultimately can assert control by discharging the lawyer. \textit{See} ABA \textit{Code of Professional Responsibility}, EC 7-26 ("lawyer should . . . present any admissible evidence his client desires to have presented unless he knows, or . . . should know, that such testimony . . . is false, fraudulent or perjured").

\footnote{319}{\textit{But see}} text following note 325 \textit{infra} (arguing lawyer has to face this conflict even under the present rules).

\footnote{320}{For} example, the Code's substantive rules on presenting such testimony could be redrafted to make it clear that the lawyer could withdraw if the client insisted on presentation of the testimony. \textit{See} note 376 \textit{infra}.

\footnote{321}{\textit{But see}} Fried, \textit{The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation}, 85 \textit{Yale L.J.} 1060 (1976). Fried defines a friend as one who adopts another's interests as his own, \textit{id.} 1071, a definition implying that the lawyer, as friend, does for the client all that the client would do for himself. But Fried acknowledges that friendship involves trust and care, \textit{id.}, 1075, and that the lawyer's loyalty qua friend is limited to what the rules of advocacy permit, \textit{id.} 1081. Therefore, the position in the text is not necessarily inconsistent with Fried's. The decisive question becomes what the rules of advocacy should permit.

The lawyer may well decline to withdraw and instead accede to his client's wishes. Moreover, withdrawal, while solving the individual lawyer's ethical dilemma, creates its own problems. The client would then proceed without a lawyer—an alternative which raises the problems of pro se representation—or find a lawyer willing to present the testimony. If these are the consequences of informed consent, what has been gained?

First, fostering these lawyer-client conflicts may actually lead to less unethical behavior. As William Simon argues, lawyers, rather than confront differences with their clients, may impute selfish motives and ends to them. Under present practice, therefore, the lawyer might present possibly false testimony on the unquestioned assumption that the client so desires. Informed consent offers two possibilities for change: the lawyer may discover that his assumption was wrong, or the client, after discussion with the lawyer, may decide against presenting the testimony.

Second, the lawyer's relationship with the client demands a dialogue. Discussion helps insure that the lawyer's rationale is the purported moral ground, rather than some other. In addition, the client may be able to allay the lawyer's concern about the veracity of the witness.

Finally, the lawyer should be grappling with this ethical dilemma without regard to a rule of informed consent. Even if the lawyer makes the decision himself, he has to balance his obligation of zealous representation against the obligation not to present testimony that he believes false. Informed consent may bring this problem to the surface, but it does not create it. The present system, in contrast, tends to obscure this dilemma, with the result that both the lawyer and client try to deny responsibility. Leff and Dauer have characterized the situation this way: "Client: 'That's up to my lawyer (and anyway, I can't be responsible since I don't understand all that stuff).’ Lawyer: ‘The choices aren't mine, and the system demands that I protect my client.'" Informed consent

---

322 See generally J. Carlin, supra note 138; J. Carlin, Lawyers' Ethics (1966) (presenting evidence that economic pressures will lead practitioners to violate ethical norms).


325 Simon, supra note 126, at 53-59.

326 See Schwartz, The Professionalism and Accountability of Lawyers, 66 Cal. L. Rev. 669, 690 (1978) ("Whatever the client's own moral standards, the client is entitled to expect an honest response from the lawyer.").

327 Dauer & Leff, supra note 321, at 583 n.40.
offers the possibility of forcing both lawyer and client to look seriously at the question of responsibility.

Whether or not this issue is confronted, the lawyer's interest in not being forced to engage in unethical behavior is not necessarily threatened by the doctrine of informed consent. Perhaps instead the rule will force the legal system to delineate more clearly how the lawyer is to serve two masters: client and justice.\footnote{Id. 583 n.41.}

F. The Public's Interests

The public has its own interests in the choice of a decision-making rule. The House of Lords suggested in \textit{Rondel v. Worsley},\footnote{[1967] 3 W.L.R. 1666.} for example, that allowing clients to sue lawyers for not following directions might cause lawyers to neglect the duties they owe the courts and the public. In that case, the Lords held barristers immune from liability for litigation errors,\footnote{The facts were hardly favorable to a contrary decision. The plaintiff in \textit{Rondel v. Worsley}, [1967] 3 W.L.R. 1666, was a defendant in a criminal case who had employed the barrister-defendant on a dock brief. (Under the English rule, the barrister had to accept Rondel as his client.) Rondel had been charged with causing grievous bodily harm. The main error alleged to have been committed by the barrister was in failing to establish that the injury was caused by Rondel's biting the complaining witness, rather than by his using a knife. The malpractice suit was not brought until six years after the criminal trial, and two amendments of the complaint were necessary to fashion even a possible claim. Id. 1674.} reasoning that because "[t]he line between proper and improper conduct . . . is by no means easy to draw in many borderline cases,"\footnote{Id.} exposure to liability might lead counsel to engage in such dubious tactics as misleading the court, casting unfounded aspersions on the other party, or withholding evidence.\footnote{Id. 1674.}

This argument against adopting a rule of informed consent is similar to that discussed above regarding the increased pressure on the lawyer to violate ethical codes. Increased client authority poses the danger of clients pressuring their lawyers to engage in dubious tactics, and adding the threat of malpractice suits could lead some lawyers to succumb to client pressure.

On the other hand, even under the present rules, lawyers may approach the limits of ethical behavior because of their perceptions of clients' wishes.\footnote{See Frankel, \textit{The Search for Truth: An Umpireal View}, 123 U. Pa. L. Rev. 1031 (1975).} The impact on this behavior of a change in
the allocation of decisionmaking authority is not self-evident. As argued earlier, a rule of informed consent may test the assumption that clients want their lawyers to engage in unethical behavior. If clients do not behave as hypothesized, pressure for unethical behavior may not increase, but may in fact be reduced. Moreover, a system that allows parties to present their disputes should not then take away their control of the dispute because of mistrust of their way of handling the matter. Instead, the appropriate substantive limits on the presentation of disputes should be confronted directly. Clients can be given more decisionmaking authority and, at the same time, the responsibility for placing limits on the exercise of that authority.

The public also has an interest in the efficient operation of the court system. If ethical conflicts between lawyer and client lead to increased pro se representation, the court system may operate less efficiently. In addition, broader client decisionmaking might necessitate delays during trials to enable lawyers to give clients sufficient information to make decisions. Finally, such a change might lead to the introduction of evidence and issues that, at present, lawyers screen out.

Pro se litigation is bothersome, but its burdens fall more heavily on clients than on courts. Any inefficiency it creates seems susceptible of control through the adoption of appropriate judicial management techniques. Similarly, delays for consultation are fully amenable to control by the trial judge. The problem of introduction of evidence and information that lawyers now screen out might be a bit more serious. Clients, because they do not understand the concept of relevance or the danger that overinclusiveness can dilute the persuasive power of a case, will want to present more material than will lawyers. The potential cost of overinclusion still seems quite small, involved only in those few lawyer-client transactions that reach trial, and then only when clients disregard their lawyers' advice. Moreover, judges retain the ability to screen out irrelevant evidence. Finally, lawyers, with their emphasis upon procedure, may actually create more delay than would occur if

---

334 See Zeigler & Hermann, supra note 323.
335 See Wainwright v. Sykes, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring); id. 95 n.2 (Stevens, J., concurring).
337 Trial judges have enormous discretion in granting continuances and in controlling potentially disruptive courtroom behavior. See Chused, supra note 7, at 649-53, 682.
clients were allowed broader decisionmaking power. Overall, therefore, the efficiency that would be lost due to a switch of rules seems minimal.

If a broader client decisionmaking rule would adversely affect the "correctness" of the results of litigation, the public might legitimately be concerned that informed consent will lessen the impact of legal rules. As argued earlier, whether the informed-consent doctrine would produce worse results is debatable, particularly it "correct" means what the parties desire. Alternatively, if "correct" corresponds to substantive law, the present system allows so many possibilities for deviation from this goal that rejection of the informed-consent rule on this ground seems a strange place to begin reform.

The public might also be interested in preventing non-fee-paying clients from placing unreasonable demands upon their lawyers. Paying clients will limit their demands to those which pass their own market test. Clients who do not have this rationing incentive may, however, place unlimited demands on their lawyers. This is a serious problem. Any legal-services lawyer or public defender has had to face difficult decisions regarding the use of his time. Allocating decisionmaking authority according to the subject-matter/procedure line is not, however, a rational solution to this problem. At present, legal-services lawyers tend to ration their time by giving more services to the most aggressive clients, though the most aggressive (or knowledgeable) client may not be the most deserving. The subject-matter/procedure line may be used to justify failure to accede to client demands, but the individual lawyer must still develop his own criteria for making such decisions. He must decide, for example, whether one or two or ten depositions is enough.

338 See Argersinger v. Hamlin, 407 U.S. 25, 58 (1972) (Powell, J., concurring) (suggesting that the provision of counsel will "exacerbate delay . . . [because of] the common tactic of counsel of exhausting every possible legal avenue, without due regard to its probable payoff.").

339 See Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Studies 309, 402-10 (1973). For example, suppose a party chose to have a witness testify for reasons unrelated to the outcome of the case, and suppose that this witness increased the likelihood of a "wrong result" because the witness prejudiced the jury against the party. (Indeed, it was for this reason that the lawyer would not have offered the witness.) Although the client may have been willing to bear this cost, from the system's perspective of producing correct substantive results, this choice produced an additional cost which was not properly accounted for by the client.

340 See Frankel, supra note 333.

341 For a general discussion of rationing problems in the nonmarket areas of delivering medical services, see Mechanic, supra note 239. See also Bellow & Kettleson, supra note 202, at 353-62.

342 See Hosticka, supra note 235.
in a particular case. Leaving these decisions to the lawyer's discretion neither rationally allocates resources nor satisfies legitimate client demands.\(^{343}\) As with ethical limitations, open confrontation with the choices involved is a better way of resolving these problems than simply giving the lawyer control over procedure and tactics.

IV. APPLYING THE THEORY

A. Who Makes What Decisions: The Client's Interests

The previous section examined the various interests at stake in the allocation of decisionmaking authority between lawyer and client. It concluded that, when a client's values are likely to be implicated, or when professional disloyalty is suspected, it is reasonable to presume that an informed client would elect to have the decision in question submitted to him. Broader decisionmaking powers would be afforded to a client than under the subject-matter/procedure rule, because client values and potential lawyer conflicts are likely to be involved in many of the decisions that traditionally have been labeled procedural.\(^{344}\) The next step, however, is not to replace the subject-matter/procedure line with another definitional categorization, but to begin to consider specific lawyering decisions and allocate them either to the lawyer or client in accordance with the above framework.\(^{345}\) The following examples are not intended to be an exhaustive taxonomy, but only a more modest effort at beginning to apply the analysis developed in the previous section.

One basic value that will be important to clients involved in litigation is the opportunity to present their stories.\(^{346}\) The "pro-

---

\(^{343}\) See Bellow, supra note 183; Bellow & Kettleson, supra note 202, at 361-62.  
\(^{344}\) See notes 179-86 supra & accompanying text.  
\(^{345}\) But see Ethics and Advocacy, supra note 32, at 14 (distinguishing between strategic decisions, which are the client's to make, and tactical decisions, which are the lawyer's). See also G. Bellow & B. Moulton, supra note 163, at 53 (technical decisions are the lawyer's); White, supra note 10, at 75 (ends are for client; means are for lawyer). The approach taken in the text is preferable to those noted here because the latter rely on vague dividing lines, and because it is more fruitful to allocate decisions on the basis of the particular interests involved.  
\(^{346}\) This does not mean that most clients will not trade their right to present their stories for a satisfactory outcome through negotiation, but only that if no satisfactory outcome is forthcoming, control over presentation of the stories behind their disputes seems likely to be important to most clients. Cf. Casper, Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment, 12 Law & Soc'y Rev. 237, 246-48 (1978) (defendants in criminal cases who plead guilty are somewhat more likely to feel they were treated fairly than defendants who go to trial, but of those who went to trial 14% felt unfairly treated because unable to present their side of case). Moreover, the more the dispute involves issues of principle, the more likely the client is to place high value on this opportunity. See generally, Crowe, supra note 185; Upham, Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits, 10 Law & Soc'y Rev. 579 (1976).
cedural" decisions of which claims to argue and which witnesses to call should thus belong to the client. Selecting the forum and a jury or non-jury trial are also part of presenting one's story. Apart from that rationale, however, the choices of forum and decision-maker should be allocated to the client because they frequently involve a trade-off between delay and other values.347

Decisions relating to the initiation of a suit, to pre-trial motions, and to discovery may be tainted by professional disloyalty and therefore should be made by the client. The decision to file a lawsuit may be influenced by the lawyer's perception that filing cements the attorney-client relationship, induces the client to pay a fee, or facilitates handling the client.348 Motion practice and discovery decisions directly involve the trade-off between quality and cost.349 In fixed-fee cases, a lawyer may have an incentive to underutilize motions or discovery, whereas the opposite may be the case in large hourly fee litigation.

A third group of situations present more difficult problems of classification. For example, the decisions whether to accept or strike a juror or to cross-examine a particular witness relate to the client's presentation of his story. On the other hand, allocation of these decisions to the client might entail delays at trial for lawyer-client conferences and greater client control over the way a lawyer performs his tasks. On balance, decisions that can be anticipated before trial—the general type of jury to be selected350 or whether to cross-examine particular witnesses—should be reserved for the client.351 The implementation of these decisions should be left to the lawyer.

Continuances present similar problems of accommodating competing interests. Normally, a short continuance is of no significance. In some situations, however, the delay may be significant to the

347 See text accompanying note 278 supra.
348 See Brown & Shaffer, Towards a Jurisprudence for the Law Office, 17 Am. J. Jurius. 125, 135 n.27 (1972).
349 See J. JEANS, TRIAL ADVOCACY 140 (1975) ("any motion regardless of its merit triggers two events—a bill to a client, a delay in the case"); M. WESSEL, supra note 241, at 164 (on the costs of discovery).
350 The text does not answer the question whether a client's instructions should control the selection of a particular juror. It merely argues that the lawyer must bring that decision to the client. Although the lawyer should not be allowed to act contrary to his client's explicit instructions, the unanswered question is whether the difference in opinion should allow the lawyer to withdraw. See text accompanying notes 361-73 infra.
351 Even if ordering a lawyer to do a cross-examination is perceived as ordering a lawyer how to do a task, it does not involve such control that his identity as a lawyer is threatened, or that his movements or actions are being dictated in such a way as to constitute an infringement of his body. Being told to ask questions in a particular manner would threaten those interests, however.
client. In addition, lawyers may agree to continuances in order to preserve their relationships with opposing counsel or with the judge. Here, then, a *de minimus* rule that excludes short continuances from mandatory client decisionmaking makes the most sense.

The decisions discussed above cluster into units which maximize the client's ability to monitor the lawyer and which minimize expense. For example, decisions whether to sue, what claims to make, and which court to sue in will obviously arise at the early stages of litigation; decisions about discovery at the next major planning stage; and decisions about what evidence to present at trial at the final planning stage. Moreover, with each of these decisions, meaningful client decisionmaking is feasible if the lawyer gives the client enough accurate information.

Finally, the decisions likely to implicate client values are those involving what tasks to perform, rather than how to perform particular tasks. Even if a client chooses the witnesses to be called at trial, for example, the lawyer still determines the order of proof and the details of eliciting testimony, including the framing of questions. Similarly, even if the client determines the general scope of discovery, the lawyer, in implementing that plan, still has control over drafting particular discovery requests, asking questions at deposition, and the myriad details surrounding discovery. Therefore, applying the criteria formulated above will, in most cases, not infringe the lawyer's autonomy.

Outside of litigation, the issue usually is not whether the client has authority to make decisions, but whether the lawyer has supplied the client with adequate information. At least some non-litigation decisions have, however, been viewed as technical questions solely for the lawyer. This allocation of authority should be reexamined under the rules suggested here. The specificity of language in an agreement is one such decision. Determining the degree of specificity involves technical questions relating to use of language, mixed technical and judgmental questions relating to


353 Cf. Rosenthal, *supra* note 7, at 273-76 (discussing the need for client and lawyer to confer at various stages of a case).

354 See text accompanying notes 270-77 supra.

355 Similarly, a lawyer's conflicts with clients are more likely to arise over whether to do a task than over the exact details of implementation.

recognition of the lack of specificity, and mixed technical and judgmental questions relating to correction of the lack of specificity. This last decision should be the client's. When imprecision is recognized, the decision whether to cure it can turn on various factors: the ability to draft more precise language in light of future contingencies; the willingness of the parties to agree to more specific language; the costs of remedying the imprecision; the risk of the deal falling through if changes are made; and the potential future difficulties caused by such imprecision.\textsuperscript{357} Making this decision requires as much weighing of subjective values as does balancing risk versus gain in the settlement situation. A lawyer should thus be required to ask his client about material imprecision in agreements.\textsuperscript{358}

B. Who Makes What Decisions: The Lawyer's and the Public's Interests

This section has thus far looked at decisionmaking largely from the client's perspective. Accommodation of the interests of the lawyer and the public must also be considered.

As discussed above, the lawyer's autonomy interest can largely be satisfied by the informed-consent rule itself;\textsuperscript{359} the lawyer's identity interest can be accommodated by the initial lawyer-client agreement.\textsuperscript{360} In some cases, however, the competing interests cannot be so neatly reconciled. Guidance then comes not from the rules of informed consent, but from those governing withdrawal from representation and those setting limits on lawyer's behavior.\textsuperscript{361}

The Code of Professional Responsibility distinguishes between mandatory and permissive withdrawal. The mandatory-withdrawal rules serve primarily to protect the public's interests; permissive-


\textsuperscript{358} See id. 436. Contrary to the position taken here, however, the Comment advocates adoption of a professional standard of materiality.

\textsuperscript{359} See notes 300-07 supra & accompanying text.

\textsuperscript{360} See notes 308-12 supra & accompanying text.

\textsuperscript{361} It is assumed that these standards suggested for incorporation into the Code would also be incorporated into the informed-consent doctrine for litigation purposes. Although there is no necessary relation between the two sets of standards, using the Code provisions to discuss the relevant considerations seems the most natural way to present these issues. Further, as discussed later, meaningful implementation of informed consent most likely will require changes both in legal doctrines and in the Code. See text accompanying notes 400-08 infra.
withdrawal rules reflect an attempt to accommodate the interests of the lawyer.\textsuperscript{362}

A lawyer must withdraw from representation when (1) his client is taking steps, either within or without litigation, "merely for the purpose of harassing or maliciously injuring any person," (2) "his continued employment will result in the violation of a disciplinary rule," (3) "his mental or physical condition renders it unreasonably difficult for him to carry out his employment effectively," or (4) "he is discharged by the client."\textsuperscript{363} These rules rely primarily on other disciplinary rules to set the standards for mandatory withdrawal. This structure makes clear that, rather than allocating decisionmaking to lawyers because of distrust of clients, substantive rules governing conduct can be used to protect important public interests. The latter approach may create more conflict within the lawyer-client relationship and may lead to more instances of pro se representation. For the reasons articulated earlier,\textsuperscript{364} these potential costs would be worth bearing.

The lawyer's craft and professional-responsibility interests would be served by a liberal provision for permissive withdrawal. More latitude may, however, encourage lawyers to threaten withdrawal in order to coerce clients into accepting their decisions on matters properly left to clients.\textsuperscript{365} Termination of an existing lawyer-client relationship often imposes substantial financial and psychological costs upon the client. The client incurs the time

\textsuperscript{362}These distinctions are not as neat as the text may imply. Permissive-withdrawal rules operate in areas that involve public interests, and public interests may be the factor that, after balancing the concerns of the client and the lawyer, influences us to grant the lawyer the freedom to withdraw. Similarly, while lawyers generally have an interest in maximizing their latitude, see Morgan, supra note 230, at 737, in certain instances they might prefer mandatory rules because mandatory rules help insure that everybody conforms to certain standards of behavior, thereby making the practice of law less costly because one does not always have to police the other lawyer. See Shuchman, supra note 352, at 93-94. Still, when public interests are sufficiently great, we would expect a rule requiring mandatory withdrawal, because a rule of permissive withdrawal implies that either choice is acceptable. A rule of permissive withdrawal does not simply delegate to the lawyer the decision to enforce the public interest. If that were our policy, we would formulate a rule that told the lawyer that if he determined that conduct violated a particular standard, albeit a vague one, he had to withdraw.

\textsuperscript{363}ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110(B). Before withdrawing, the lawyer has a duty to take reasonable steps to avoid foreseeable prejudice to the rights of his client. Id. DR 2-110(A)(2). Withdrawal is also constrained by requiring the lawyer to seek approval of the court when a case is pending before a tribunal. Id. DR 2-110(A), and because the lawyer faces possible liability for breach of contract.

\textsuperscript{364}See notes 316-39 supra & accompanying text.

\textsuperscript{365}See Alschuler, supra note 152, at 1192; Brown & Brown, supra note 356, at 475.
and expense of securing new counsel and educating him about the case. Psychological costs may include reliving embarrassing or uncomfortable incidents with a new person or feeling abandoned in time of need. In addition, fully educating a new lawyer may be impossible in some cases because of lapses of time or because the first lawyer was a participant in an ongoing transaction. The lawyer's need for business might limit coercive use of withdrawals, but the possibility of coercion would remain. The rules on permissive withdrawal must therefore be precisely drawn to strike the appropriate balance between preserving the client's decisionmaking power and protecting the lawyer's interests.  

Several of the present Code provisions are too vague to perform this function. A lawyer may withdraw (or request permission from the court to withdraw) when the client renders it unreasonably difficult for the lawyer effectively to carry out his job, or, in matters not pending before a tribunal, when a client "insists" that the lawyer engage in conduct contrary to the lawyer's judgment and advice.  

Taken literally, the "disagreement with judgment" provision would allow a lawyer to withdraw at the slightest disagreement with a client. Even if "judgment" connotes a serious disagreement, the lawyer interests involved should be addressed more precisely. Similarly, "unreasonably difficult to carry out employment" may be interpreted to mean disagreement over the decisions allocated to the client, albeit perhaps important ones. Again, specific language referring to particular kinds of disagreement should be drafted.  

How might the lawyer interests be more precisely addressed? The craft interest lies in the integrity of one's work and one's reputation. The first question is whether this interest is strongly implicated in all, or only some, of the decisions a client might make. Should an attorney, for example, in the midst of his representation of a client, be able to say, "Look, I don't want to force you to proceed otherwise, but I won't participate in drawing up this silly

---

366 At their boundaries, the lawyer's interests in autonomy and craft are sufficiently vague to warrant concern about overextension. For example, Freidson describes vividly the problems the administration of a prepaid group medical practice had in controlling doctors' hours because the issue was perceived by the doctors as one of work autonomy. See E. Freidson, supra note 207, at 27-28, 227. With regard to the craft interest, David Riesman has described the "fantastically unutilitarian character" of the briefs written for the Appeals Bureau of the New York District Attorney's Office, where he worked as a lawyer. In open-and-shut cases, the briefs still included erudite citations of cases and elaborate arguments. Riesman, Toward an Anthropological Science of Law and the Legal Profession, 57 Am. J. Soc. 121, 133 (1951).  

367 ABA Code of Professional Responsibility, DR 2-110(C)(1)(c) & (e).
document. If you persist, I will have to withdraw."? Although the attorney's reputation is involved, the answer should be no. The connection between the attorney's reputation and the client's ends is too tenuous. The legal system does not generally hold attorneys responsible for the ends their clients pursue; even if a change in policy could be justified when serving important public interests, the lawyers' interests are insufficient justification. Lawyer coercion of clients for paternalistic reasons would be too likely. In addition, the lawyer is not totally unprotected. He may simply decline employment at the beginning of the relationship, and he retains his power to influence a decision by expressing his views.

With regard to decisions that more directly involve the lawyer's performance of his lawyering tasks, the lawyer's craft interest may be greater. In some instances the Code protects those interests without need for the "disagreement with judgment" provision; in others, new, more specific provisions would be useful. For example, the Code allows a lawyer to withdraw when his client insists on presenting claims or defenses that are not warranted under existing law and cannot be supported by good-faith arguments for a change in the law. This provision may not adequately protect the lawyer's interests. Some claims, though supportable by good-faith arguments, might impinge upon a lawyer's sense of craft or concern for reputation. Further, the vagueness of the standard

---

368 See generally Schwartz, supra note 326; Simon, supra note 126.

369 "A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but . . . [he] should not lightly decline proffered employment." ABA Code of Professional Responsibility, EC 2-26. Given this freedom, it is possible that the harder we make it for attorneys to withdraw, the more attorneys will try to protect themselves at the inception of the relationship by either screening clients, increasing fees, or trying to impose conditions.

370 ABA Code of Professional Responsibility, DR 7-102(A)(2) prohibits advancing such claims "knowingly." DR 2-110(C)(2) permits withdrawal when continued employment is likely to result in violation of a Disciplinary Rule.

371 There is no case law directly interpreting DR 7-102(A)(2). But courts have had considerable difficulty in drawing lines between meritorious and non-meritorious claims. The federal courts, for instance, have failed to establish workable standards for screening out frivolous cases filed in forma pauperis under 28 U.S.C. § 1915(d) (1976). See Catz & Guyer, Federal In Forma Pauperis Litigation: In Search of Judicial Standards, 31 Rutgers L. Rev. 655, 676 (1978). In Anders v. California, 386 U.S. 738 (1967) the Supreme Court, dealing with the issue of withdrawal by counsel from frivolous criminal appeals, avoided setting any standard. Instead the Court adopted the procedural solution of requiring counsel to file a brief with the court referring to anything in the record that might support the appeal. Id. 744. And in Christiansburg Garment Co. v. EEOC, 494 U.S. 412 (1989), the Court decided that costs and attorneys' fees could be awarded to prevailing defendants in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1976), when the original claim was unfounded,
is unfair to those lawyers who might not be allowed to withdraw because others believe the claim can be supported by a good-faith argument.\textsuperscript{372}

These objections are not persuasive. If reasonable lawyers consider an argument plausible, then it is unlikely to jeopardize seriously the lawyer's reputation. Moreover, if the unfairness argument is considered serious, a subjective standard would both alleviate the vagueness problem and protect a particular lawyer's sense of craft which happened to be higher than the norm.\textsuperscript{373}

Similarly, the lawyer has an interest in not presenting untrustworthy proof. EC 7-26 of the Code provides that a lawyer should present "any admissible evidence his client desires unless he knows or . . . should know, that such testimony is false, fraudulent or perjured." Because its knowledge requirement is so strict,\textsuperscript{374} this provision may not sufficiently protect the lawyer's interest. Although there are general provisions of the Code that might allow a lawyer more discretion than does this provision,\textsuperscript{375} the issue should be addressed more directly. For example, a lawyer could be allowed to request withdrawal if his client insisted on presenting testimony the lawyer strongly believed would be false, fraudulent, or perjured.\textsuperscript{376}

meritless, frivolous, or vexatiously brought. \textit{Id.} 421. Subsequent lower court cases have done little to give content to this vague directive.

The problem, of course, is not susceptible of easy solution. Not only do we have the possibility of an infinite variety of factual situations, but any strict line discouraging claims has the possibility of keeping out meritorious ones. The difficulties are accentuated further when market mechanisms for screening are lacking.

\textsuperscript{372}See Schwartz, supra note 326, at 681-83 (discussing a comparable problem with regard to a standard prohibiting the lawyer from using unfair, unconscionable, or unjust means, or helping the client to achieve unfair, unconscionable, or unjust ends).

\textsuperscript{373}See Goldsmith v. Pyramid Communications, Inc., 362 F. Supp. 694 (S.D.N.Y. 1973). If the subjective standard were adopted for permissive withdrawal, we would still utilize an objective standard for mandatory withdrawal. Here, the public interest lies in discouraging frivolous litigation. Therefore, a lawyer's subjective belief in the validity of a claim would not justify continued representation when reasonable lawyers did not think a good faith argument could be made. Further, even with a subjective standard for permissive withdrawal, the lawyer would have an obligation to first research the case law and consider applicable secondary sources. Moreover, it is not a subjective belief in the wisdom of the claim that is relevant, but rather whether respectable arguments can be made for the claim.

\textsuperscript{374}For a discussion of the possible interpretations of "knowledge," see M. Freedman, \textit{supra} note 324, at 51-57 (1975). Freedman concludes that the Code has set a standard that is almost impossible to meet. \textit{Id.} 57. See also Schwartz, \textit{supra} note 326, at 688.

\textsuperscript{375}See ABA Code of Professional Responsibility, DR 7-101(B)(2) (the lawyer may "refuse to aid or participate in conduct that he believes to be unlawful") (discussed in note 316 supra).

\textsuperscript{376}If the use of the subjective standard is objectionable, the standard could be changed to require that the lawyer have a reasonable basis for his belief. The rule
Another set of situations involves clients' directions regarding trial preparation. A client might order a lawyer to take steps the lawyer thought unwise or unnecessary. For paying clients, cost should be a sufficient deterrent, but criteria must be developed for deciding how much is enough in a particular nonpaying client's case. When the client's directions are primarily for purposes of delay, however, the Code should not merely allow the lawyer to refuse, but should require refusal.

A problem arises at the other extreme when the client asks the attorney to forego steps he would normally take in implementing the chosen course of action. For example, assume the client requests the lawyer to forego additional investigation or legal research. If the lawyer reasonably believes that such investigation is necessary to minimally competent lawyering or to discover any underlying ethical problems, he should not be forced to deliver shoddy services. The profession must adhere to minimum standards of competent performance, but the "disagreement with judgment" or "unreasonably difficult to carry out employment" provisions are not needed to protect this interest. A provision would be sufficient that allowed withdrawal when the client prevented his attorney from "carrying out his employment in a minimally competent manner by restricting the lawyer's scope of investigation."

Much of the above discussion applies also to the lawyer's interests in not being compelled to participate in decisions that violate his or the profession's standards of professional responsibility. Again, this interest is important, perhaps deserving of more protection than given in the present Code, but the standard of "disagreement with judgment" is not the answer. Its breadth presents the possibility of overreaching, and its lack of explicit reference to moral or ethical grounds for withdrawal undercuts the very values it was likely designed to protect. If the lawyer is to have the freedom

---

377 See note 343 supra & accompanying text.

378 The Code does not deal very directly with delay. It prohibits taking actions merely to harass another, ABA Code of Professional Responsibility, DR 7-102(A)(1); knowingly advancing unwarranted claims, id. DR 7-102(A)(2); and asking questions that a lawyer has no reasonable basis to believe relevant and that are intended to degrade the witness, id. DR 7-106(C)(2). All of these actions may be ones that also cause delay, but a provision dealing directly with actions taken primarily for delay seems warranted.

379 Perhaps the "unreasonably difficult to carry out employment" provision was meant to apply to this situation, although it seems more likely to have been aimed at clients the lawyer thinks are meddlesome.

380 There is some evidence that the "disagreement with judgment" provision may have been inserted in the Code to allow a lawyer who is not in litigation to
to withdraw because of his moral disagreement with his client's means or objectives, the Code should say so. Nothing in a rule of informed consent would prevent the lawyer from acting in accordance with such a provision.  

When a matter is pending before a tribunal, the situation is more complex. The court's interests enter the picture, and the client's ability to secure other counsel without suffering harm is diminished. The Code recognizes this difference. The provision allowing withdrawal for "disagreements with judgment" does not apply to matters pending before a tribunal; withdrawal from representation is then subject to the consent of the court. The requirement of judicial consent creates two problems. First, a lawyer who seeks to withdraw without harming his client is frequently put in an untenable position. Revealing his reasons for wanting to withdraw inevitably harms his client; failure to reveal them, however, will prevent withdrawal. Verification of the lawyer's reasons seems necessary, but institutional mechanisms for doing so must be developed. The possibilities include assignment of a separate judge to hear withdrawal motions or withdrawal on the basis of a sealed motion, subject to sanctions if upon subsequent review withdrawal is found unjustified.

The second difficulty is the delay created by withdrawal. In criminal cases, judges frequently have been very reluctant to allow withdrawal, even when both lawyer and client desired termination of their relationship. They have created "shotgun marriages."

withdraw for ethical reasons. See Report of the Joint Conference on Professional Responsibility of the Association of American Law Schools and American Bar Association, 44 ABA J. 1159 (1958) ("The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair or of doubtful legality." Id. 1161.) EC 7-3 of the Code explicitly recognizes the lawyer's two different roles. ABA Code of Professional Responsibility, EC 7-3; See also id. EC 7-8.

381 See text accompanying notes 316-28 supra.
382 ABA Code of Professional Responsibility, DR 2-110(A)(1).
383 Whenever a lawyer has to reveal that his client has a frivolous case or is about to commit perjury, it is obvious that such information will influence the judge, and even in a jury case, this influence may be significant. It is my experience that the feeling of doing more harm to the client than simply ceasing representation is a strong deterrent to asking the court's permission to withdraw from representation.
384 These are usually cases in which a defendant with appointed counsel asks for new counsel because of a disagreement with his present lawyer. For example, in People v. Wilson, 43 Mich. App. 459, 204 N.W.2d 269 (1972), the defendant complained that his lawyer had not made himself available to discuss the case and that the lawyer-client relationship was so strained that the client was afraid to give his attorney the names of his potential alibi witnesses. The trial judge refused to
unreasonably elevating the concern about delay above the interests of lawyer and client.385 If the Code were worded more precisely, as suggested here, courts would properly be obliged to give more credence to requests for withdrawal to reflect these more particularized interests.

In some situations, however, a lawyer may have good grounds for permissive withdrawal, but switching lawyers would cause an intolerable delay or the problem would likely recur with the second lawyer. Clients should then be forced to choose between proceeding pro se and accepting less control over the lawyer. Such cases involve only a narrow band of possible attorney interests: principally, not being excessively directed in the execution of lawyering tasks; not being forced to do substandard work; and not being required to do something morally objectionable. Judicial consent to withdrawal in these situations would be an appropriate trade-off for expanding client decisionmaking in other spheres.

C. What Information Should be Communicated?

Allocating decisionmaking authority is only half of the informed-consent problem. The other half is devising a standard for determining what information the lawyer should communicate to his client. The Code provides that a lawyer should take the initiative to insure that his client has been informed of all relevant considerations.386 Though a good starting point, more must be said than that the burden is on the lawyer to initiate decisionmaking hold a hearing on the merits of these claims and gave the defendant the choice of proceeding pro se or with the lawyer. On appeal of the conviction, it was held that denial of the defendant's request without investigation of his claims was an abuse of discretion.

Wilson and other cases require the trial judge to investigate disagreements between counsel and client before ruling on a substitution request when the defendant raises substantial grounds for substitution. See, e.g., United States v. Woods, 487 F.2d 1218 (5th Cir. 1973); Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970). But when such a hearing is held, the defendant must show good cause, such as an irreconcilable conflict which might lead to an unjust verdict, before substitution of counsel will be allowed. Mere disagreement over trial tactics is not sufficient. See, e.g., United States v. Calabro, 467 F.2d 973, 985-87 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973); United States ex rel. Torry v. Rockefeller, 361 F. Supp. 422, 425-26 (W.D.N.Y. 1973); People v. Williams, 2 Cal. 3d 894, 905-06, 471 P.2d 1008, 1015-16, 88 Cal. Rptr. 208, 215 (1970), cert. denied, 401 U.S. 919 (1971).


386 ABA Code of Professional Responsibility, EC 7-8.
discussions. The Code should specify what information is relevant or material.\footnote{387}

First, the lawyer should have an obligation to identify for his client the alternative courses of action. In some cases this will be easy—to sue or not to sue—but, in many cases, the set of options will be larger. Whether a particular option should be communicated by the lawyer depends on a combination of professional expertise and client standards of materiality. Professional expertise determines the range of possible options;\footnote{388} the client's needs determine whether a particular option should be communicated.

Once alternatives have been identified, the lawyer's next obligation is to evaluate the likely consequences of each alternative, disclosing as clearly as possible the certainty or uncertainty of his judgments. Again, the degree of communication is determined by the professional expertise and the client's needs.

Adoption of this approach would work significant changes in present law. The line of cases that protect lawyer "judgment," for example, hold that, if average lawyers have differing views of the law, then no opinion within the spectrum of accepted views can be considered negligent.\footnote{389} This rule fails to impose on the lawyer any obligation to tell the client of the uncertain status of the law. In contrast, the standard above would require such disclosure whenever the uncertainty would be relevant to a client's decision.\footnote{390}

The operation of the proposed standard can be illustrated by examining the malpractice case of Smith v. St. Paul Fire & Marine Insurance Co.\footnote{391} In that case, the clients wanted to dispose of certain estate property as soon as possible. Taking a judgment of possession under Louisiana law allowed them to do so, and they were advised that that action would not affect the valuation of the property for federal estate tax purposes. When the lawyer gave this

\footnote{387} The question of what standard to use to judge materiality also arises. This Article advocates a client-oriented standard, rather than a professional-oriented one. See text accompanying notes 16-25 supra. This fails to answer the question whether the lay standard should be objective or subjective, see Capron supra note 5, at 408-18, but it seems more important to resolve the professional-versus-lay-standard question first and only then to attempt to define more precisely what is meant by material information. See Note, Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship, 79 Yale L.J. 1533, 1561-62 (1970). Indeed, if the objective standard of materiality includes the obligation to inquire into whether a client has particular needs, the differences between the objective and subjective standards will be small. See also note 450 infra.

\footnote{388} Katz, supra note 1, at 169.

\footnote{389} See notes 99 & 206 supra.

\footnote{390} For example, it is hard to imagine a settlement decision in which such information would not be material.

\footnote{391} 366 F. Supp. 1283 (M.D. La. 1973), aff'd, 500 F.2d 1131 (5th Cir. 1974).
advice, no cases were on point, and the advice was in accord with standard practice.

About seventeen months later, however, a court decision contrary to the lawyer's advice cost the clients about $14,000. The clients sued for malpractice. In finding for the defendant, the Smith court's premise seemed to be that the standard for disclosure was professional practice at the time the advice was given. The question whether the clients would want to know that no cases upheld the lawyer's view and that risk was involved was brushed aside. In the court's view, "there are two kinds of lawyers, one who tries to scare his client to death, and others . . . who exercise their professional judgment to the best of their ability and have confidence in their judgment." The court never wondered whether these clients would have preferred to have been "scared." Under the proposed standards, the lawyer would have been obligated to disclose that his advice was unsupported by case law because this information was material to the clients' decision to take a judgment of possession. Failure to do so would have subjected the lawyer to liability for malpractice.

The disclosure principle advocated here would also affect the case law involving a lawyer's duty to warn of future factual contingencies. For example, in Wright v. Williams, the clients, who were purchasing a boat, consulted the defendant-lawyer to review the purchase agreement. They did not tell the lawyer that they intended to use the boat for commercial purposes. After the purchase was final, they discovered a technical clause in the agreement that prevented that use of the boat. In dismissing the malpractice suit against the lawyer, the court held that, absent expert testimony showing that clients were customarily warned about this clause, the lawyer could not be held liable. The standards set forth above

392 Id. 1286. The court did state that if there are reasonable grounds for the attorney to believe that the advice was questionable, he is obligated to so advise his client. Id. 1290. But it went on to ignore this question. It ignored plaintiff's witnesses, who testified that they thought a risk was involved; and it ignored several cases which held that the definition of distribution turns on the shifting of the economic benefits of the property transferred, rather than on the technicalities of state law. See Hertsche v. United States, 244 F. Supp. 347 (D. Ore. 1965), aff'd, 366 F.2d 93 (9th Cir. 1966); Prell v. Commissioner, 48 T.C. 67 (1967). Instead, the court relied on the absence of cases directly on point and on the fact that other attorneys gave similar advice to conclude that defendant's ultimate conclusion about the law was reasonable.


395 At one point the appellate court states that when plaintiffs were asked the purpose for which the vessel would be used, they replied pleasure. Id. 196. But
place the responsibility for initiative on the lawyer and define relevance from the perspective of the client. They look to the reasonable expectations of the client, not solely to the standard of the profession, and they would change the result in Wright. Rather than place the burden on the client to know enough law to tell his lawyer the relevant facts, this approach assumes that the lawyer, not the client, should know the potential relevance of particular facts.396

D. Problems in Implementation

Even if changes such as those suggested above were made in the current malpractice law and in the Code, several substantial barriers to their effectiveness would remain. Two will be briefly addressed: one is a doctrinal problem; the other goes to the validity of the whole effort.

The doctrinal problem is similar to that faced in the medical cases: the requirements of proving causation and damages limit the possibility of a successful suit. The problem comprises three interrelated aspects. First, the plaintiff may have to prove that he would have decided differently had he been advised properly—and that the outcome would have been different if he had made the decision in question.397 Second, familiar notions of causality require that the client show that he would have won the original law suit but for the lawyer’s error; in the malpractice suit, the client must therefore, relitigate the first law suit as well, presenting the evidence that was, and would have been, presented there.398 Third

the findings of fact at the trial court were more ambiguous. Id. 197. If the plaintiffs had been asked the boat’s intended use, the case would present the somewhat more difficult question of whether they should have been informed that if they ever intended to use it for business they would not be able to do so. Given that such a restriction would affect the value of the boat it would seem that clients should be so informed.

396 This is not to say that there would not be difficulties in deciding how far a lawyer must go in anticipating risks. In Bank of Ancortes v. Cook, 10 Wash. App. 391, 517 P.2d 633 (1974), for example, the lawyer prepared a homestead declaration for his client for purposes of a Washington exemption statute. The declaration was not filed until after the client had moved to another state and was held to be invalid on that ground. The client had moved suddenly, three days after consulting the lawyer, and although he had been considering moving at the time, he did not so advise the lawyer. On these facts, judgment was entered for the lawyer on a malpractice claim because the lawyer could not reasonably have anticipated that the client would move. Looking at this case from the client’s perspective does not make it an easy one. But it demonstrates the relevance of the client’s expectations about the effect of the lawyer’s advice on the client’s future behavior. See the discussion of this issue using the Bank of Ancortes case in L. Brown & E. Dauers, supra note 93, at 232-62.

397 See text accompanying note 25 supra.

398 See note 33 supra.
is the problem of damages. Even where causation has been shown, proving damages due to errors in litigation has also been held to require retrying the original law suit within the malpractice case.\textsuperscript{399}

These problems can be alleviated partially with recognition of an independent action for failure to secure informed consent as a dignitary injury. In such an action, harm would be considered inherent in the failure to allow the client to make the decision. Whether the plaintiff would have decided differently or whether the harm caused other injury need not be considered.\textsuperscript{400} This rule might encourage nuisance suits, but a more substantial objection is that, even with this change, the likelihood of substantial recovery seems slim enough to discourage even meritorious suits.

The causation problem must therefore be faced more directly. Professor Capron has suggested a subjective standard to determine whether a client would have decided differently.\textsuperscript{401} Such a proposal fits the theory offered here; the more a decision involves conflicting values for a particular client, the more plausible that the client would have decided differently. Even if this suggestion were adopted, the extent of its impact is difficult to discern.\textsuperscript{402}

Moreover, the problem of the suit-within-a-suit requirement remains. This requirement is intended to ascertain the effect of an action that did not take place.\textsuperscript{403} In the malpractice case, the client is required to reenact the first lawsuit as he thinks it should have happened in order to prove that the alleged defect caused the earlier loss. Although this requirement has been criticized as unfair to clients,\textsuperscript{404} it dispenses with the client's need for expert testimony, and it is reasonably calculated to answer an unanswerable question. In cases in which this reconstruction is impossible, the client should have the option of presenting expert testimony.\textsuperscript{405}

The suit-within-a-suit requirement has, however, been misapplied with regard to damages. Even when the lawyer's conduct

\textsuperscript{399} Id.

\textsuperscript{400} See Goldstein, supra note 11, at 691; Katz, supra note 1, at 163; Riskin, supra note 15, at 603-04.

\textsuperscript{401} Capron, supra note 5, at 408.

\textsuperscript{402} Riskin, supra note 15.

\textsuperscript{403} R. MALLEN & V. LEVIT, supra note 33, § 133, at 200.

\textsuperscript{404} Note, A Modern Approach to the Legal Malpractice Tort, 52 IND. L.J. 689, 692-95 (1977).

\textsuperscript{405} See Warwick, Paul & Warwick v. Dotter, 190 So. 2d 596 (Fla. Dist. Ct. App. 1966).

Several medical cases hold that expert testimony showing increased risk of bad results is sufficient to get to the jury on issues of proximate cause. See, e.g., Voegeli v. Lewis, 568 F.2d 89 (9th Cir. 1977); Daniels v. Hadley Memorial Hosp., 566 F.2d 749 (D.C. Cir. 1977), Hamil v. Bashline, 481 Pa. 256, 382 A.2d 1280 (1978).
clearly caused the client’s loss, the client has been asked to prove the value of that loss by showing that he would have won the first suit. This is a difficult burden, not only because there was no original lawsuit, but also because the requirement mistakes the nature of the client’s loss. A lawsuit is a chance to win a sum of money; it is only an all-or-nothing proposition after the fact. Before verdict and judgment, its value reflects an estimate of the probability of winning multiplied by the likely recovery. Therefore, in those cases in which only damages are at issue, a client should not have to prove that he would have won the first law suit. The client’s financial loss should be measured by the pre-judgment value of that suit.

These suggested modifications would make the causation and damages requirements less of a hindrance to the successful implementation of an informed-consent requirement. Even the most favorable doctrinal changes, however, may not enable the rule of informed consent to affect the actual allocation of decisions between lawyer and client. Will such a doctrinal change reflect—and reinforce—a growing commitment by lawyers to the values behind informed consent, or will they simply lead to an exchange of meaningless words and forms?

These questions are, of course, difficult to answer. Studies from the medical field are inconclusive. More general “impact” studies suggest that the impact of changes on behavior depends upon knowledge of the legal changes, the likelihood and severity

---

406 G. Bellow & B. Moultton, supra note 163, at 1004-17; See Reder, supra note 114, at 552-53 (in taking case, lawyer looks at uncertainty of amount of recovery).


408 See Katz, supra note 1, at 141-42 (discussion of this issue with reference to doctors).

409 See, e.g., B. Gray, Human Subjects in Medical Experimentation 67, 107 (1975). Gray's study measured patients' comprehension of the information they received from their doctors. Women who were subjected to an experimental method of inducing labor were asked questions about the consent procedures followed. Forty percent of them did not realize that they were involved in an experiment, despite having signed a consent form that revealed the experimental nature of the project, and 41% did not realize that any risks were involved. Gray concludes that the lack of comprehension was attributable in most instances to the manner of communication and to the doctors' failure to inform subjects that there was an alternative, noneperimental way of inducing labor. Id. 209-22. See also Novack, Plumer, Smith, Ochtill, Morrow & Bennett, Changes in Physicians' Attitudes Towards Telling the Cancer Patient, 241 J. AMA 897, 898 (1979) (in 1961 only 12% of physicians surveyed generally told the patient about diagnosis of cancer; in 1977 98% reported general policy is to tell the patient). The reasons for this change are not evident from the study report.
of enforcement, and the congruity of the change with the values of
the relevant actors. The first of these variables—knowledge of the
legal change—presumably would be at a maximum when lawyers
were the regulated group. The likelihood of enforcement de-
"pends primarily on the behavior of clients. They have the respon-
sibility to mobilize the legal system. If clients do not enforce their
right to participate, because that right is not important to them,
perhaps they do expect and prefer to delegate decisions to the
professional. Lack of enforcement for this reason is of no concern.
Nonenforcement, however, due to lawyers' unwillingness to inform
clients of their right to make decisions, or to the ineffectiveness of
institutional enforcement mechanisms, is another matter. Lawyers'
control over these factors will strongly affect the chances that clients
will have of exercising control over lawyers. Absent some commit-
ment to the values of sharing decisionmaking with clients, lawyers
will not likely relinquish this control.

The third variable then—the congruence of the change with
lawyers' values—is especially critical. This variable directly affects
both the degree of enforcement and the amount of enforcement
needed. It is also central to the question whether changed behavior
will result in meaningful change in the allocation of decisions be-
tween lawyer and client. Successful implementation of client
decisionmaking is dependent on the quality and spirit of the inter-
change between lawyer and client. Understanding by the client,
not simply a flow of words from lawyer to client, is the important
end.

The easy assumption that formal means—a change in law—
cannot achieve these nonformal ends is too facile. Formal
changes may affect values, but they must first induce a dialogue
about decisionmaking authority. If, in the course of this dialogue,
a rule of informed consent is perceived solely as a threat, it will
provoke not much more than defensive and evasive action. If the
rule is perceived, however, as protecting a core of legitimate lawyer
authority and expertise and as offering opportunities to rethink
historic dilemmas, then the dialogue may provoke genuine re-
sponse. If the change is linked to a general rethinking of pro-

---

410 See Robertson & Teitelbaum, Optimizing Legal Impact: A Case Study in
411 But see J. Carlin, supra note 138 (suggesting lawyers' knowledge of
ethical standards is not very high).
412 Cf. Michelman, Formal and Associational Aims in Procedural Due Process,
in Due Process 148-50 (J. Fennock & J. Chapman eds. 1977) (contrasting formal
hearings required by procedural due process and informal explanations of official
action).
fessional-responsibility issues, to a general change in the mechanisms for monitoring lawyer behavior, and to a general change in attitudes toward consumer control, behavior will more likely emerge. Finally, if these changes are reflected not in tort doctrine alone, but in corresponding changes in the Code of Professional Responsibility and in increased attention to these issues in legal education, the formal change in law may help effect meaningful change in reality.

CONCLUSION

This, then, is the case for applying the doctrine of informed consent to the lawyer-client relationship. The lines of decision-making authority drawn by the Code and the cases are vague, the reasons for drawing them questionable. Expansion of the client's decision-making role is justified by the assumptions of our legal system; it is supported by the possibility of lawyers' disloyalty to clients and clients' inability to communicate their values to lawyers.

But a workable doctrine of informed consent must do more than address the needs of the client. It must be formulated to accommodate as well the legitimate interests of the lawyer and the public. Indeed, the role and response of the lawyer are crucial. For the doctrine can be successfully applied only if lawyers are able to relinquish some of their traditional prerogatives, recognize that their identities as lawyers will not be threatened by expanded client decisionmaking, and perceive that shared decisionmaking is the solution to dilemmas that have long plagued the profession.

The dialogue encouraged by informed-consent doctrine can be the means by which the often competing interests of lawyer, client, and public are exposed and considered, if not always reconciled in particular cases. In this respect it represents a sharp and desirable break with the present conception of the lawyer-client relationship. This Article is presented in the hope of stimulating a different sort of dialogue—by and between lawyers themselves—about whether that break will be made.


414 This is not to say that exposure of conflicting interests will effect a reconciliation, but merely that open acknowledgement of conflict is a necessary first step toward its resolution. Open acknowledgement of conflict is desirable notwithstanding the possibility of divisive effect in some cases.