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Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct

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A case came up at last that made him wonder if he would not be relieved to discover that his new boss was simply neutral in matters of morals. She asked him to review one of her estate plans whereby the rich husband of an incompetent was enabled to set up a trust in such a way as to throw the bulk of his estate taxes on his wife's children by a prior marriage, leaving the trust principal intact for his own.

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"It's an odd situation, certainly. I think I have handled it to the maximum advantage of my client."

Ronny stared. "But does Mr. Pierson know *about his wife's will and the effect of this?"*

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The editors of the U.C. Davis Law Review are sensitive to women's increased participation in the legal profession. Accordingly, editorial policy avoids using gender-specific pronouns whenever possible and when that is not possible, the feminine pronoun is used generically.

> *Mrs. Stagg smiled thinly. "One thing you'd better learn right away, Mr. Simmonds, is never to ask what clients know. Mr. Pierson does not come to One New Orange Plaza for spiritual advice. He wants to look after his incapacitated wife with the minimum injury to* his *offspring. I think that is precisely what my plan will effect."*[1]

INTRODUCTION

The traditional decisionmaking patterns between lawyers and their clients can be described by two theoretical models: the paternalist and the instrumentalist. Both models allocate decisionmaking authority based on status as lawyer or client. Mrs. Stagg personifies the paternalist lawyer who presumes to know what the client wants and pursues those ends without regard for what the client may actually desire. The paternalist assumes moral responsibility for the representation. Conversely, the instrumentalist lawyer will do the client's bidding, with little regard for the consequences, so long as her actions are not clearly prohibited by law. Under either model, the effect of the representation on third parties or the legal system is not discussed with clients.

This Article suggests that lawyers disserve their clients when they pursue ends that they have imputed to their clients through means that they have not discussed with them. At the other extreme, lawyers diminish the legitimacy of the legal system and profession when they act purely as technicians, awarding their clients too much authority and abdicating responsibility for the consequences of their actions. Social scientists, legal philosophers, and others have expressed concern that the paternalist model subverts client autonomy. On the other hand, the instrumentalist model gives short shrift to legitimate societal interests. Some legal scholars have advocated that an informed consent doctrine should be applied to the legal profession.[2]

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[1] L. AUCHINCLOSS, THE PARTNERS 32-33 (1974).

[2] *See, e.g.*, Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979); *see also* D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 158-59 (1974).

The development of the informed consent doctrine for medical malpractice is instructive. Traditionally, the patient lost the capacity to choose after entering a therapeutic relationship: "The ultimate result . . . is that two separate people construct a single identity between them in which one is conceived as the 'powerful manipulator' and the other is conceived as powerless to resist the manipulations." R. BURT, TAKING CARE OF STRANGERS 109 (1979).

Legal scholars, medical ethicists, and courts, have urged restructuring the doctor-patient relationship as a partnership involving mutual exchange of information and

Clients, the profession, and others have voiced increasing dissatisfaction with client-lawyer relationships. Study of the theoretical models can assist in developing a remedy for this dissatisfaction because a lawyer's theoretical orientation influences her actions in the real world. Although many clients experience problems with their lawyers, few bother to complain to disciplinary agencies; when they do, their complaints are often dismissed as communication problems.[3]

The growing dissatisfaction with the client-lawyer relationship, as

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shared decisionmaking power. *See* Note, *Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship*, 79 YALE L.J. 1533 (1970); *see also* P. RAMSEY, THE PATIENT AS PERSON 5-6 (1970) (informed consent necessary in doctor-patient relationship because of tendency to overreach the joint venture). Courts created the informed consent doctrine for use in medical malpractice cases. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.) (patient's right of self-determination requires true consent, which in turn requires reasonable disclosure by physician), *cert. denied*, 409 U.S. 1064 (1972); Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 578, 317 P.2d 170, 181 (1957) (physician must disclose all facts necessary for patient's intelligent consent; however, physician has discretion in discussing elements of risk as long as patient is sufficiently informed).

The medical profession's posture with respect to the doctrine has been largely reactive. Physicians protest that informed consent is burdensome, expensive, against their patients' best interests, and that it impedes medical progress. *See, e.g.*, Epstein, *Medical Malpractice: The Case for Contract*, 1976 AM. B. FOUND. RESEARCH J. 87, 126; Fost, *A Surrogate System for Informed Consent*, 233 J. A.M.A. 800 (1975); Ratvich, *The Myth of Informed Consent*, SURGICAL ROUNDS, Feb. 1978, at 7-8. The profession has begun to propose its own informed consent rules and participate in related projects. *See, e.g.*, AMERICAN MEDICAL ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS AND OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL 8.07 (1981); PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT (1983).

Strong parallels exist between the medical and the legal professions. Some scholars now argue that the informed consent doctrine should apply to lawyers. *See* Martyn, *supra*; Spiegel, *supra*. Professor Martyn proposes that legislatures adopt a Lawyer-Client Informed Consent Act to determine consent issues in malpractice actions, and suggests it may also improve client-lawyer relationships and reduce the incidence of malpractice actions. Martyn, *supra*, at 343-53. This author prefers the Model Rules' direct approach, which regulates communication and decisionmaking in all client-lawyer relationships. The proposed statute would have only a "trickle-down effect" on most client-lawyer relationships and would apply primarily to alleged gross violations of authority. By contrast, direct regulation would generally improve relationships and reduce the incidence of malpractice claims. Clients who participate in informed decisionmaking are less likely to be dissatisfied with the outcome. Those who participate will have little success in holding their lawyers legally responsible for the consequences of an otherwise competent decision.

[3] *See* Steele & Nimmer, *Lawyer, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RESEARCH J. 919, 967-68.

well as other problems of the legal profession, prompted the American Bar Association (ABA) to commission the preparation of a new ethics code. The Model Rules of Professional Conduct, recently adopted by the ABA, reflect the formulation of a new theoretical model for allocation of decisionmaking authority. The rules are designed both to regulate the profession and to provide ethical guidance for lawyers who seek to follow professionally responsible courses of action.[4] For the first time, professional rules mandate a certain level of communication and deference to a range of client choices. According to the late Robert J. Kutak, chair of the commission responsible for drafting the rules, "never before has there been a more client-centered code . . . drafted in a manner purposefully designed to strengthen fundamental obligations to the client."[5]

Part I of this Article examines the treatment of authority questions under previous American ethics codes that provide the basis for the traditional authority models. It then reviews empirical and interdisciplinary work on client-lawyer relationships and the theoretical decisionmaking models for the rules' drafters to choose from. Part II analyzes the text and comments of the applicable sections of the Model Rules of Professional Conduct, and proposes that the regulatory and ethical framework created by the Model Rules supports a new joint venture model for allocation of authority between client and lawyer. Under this new model, the client is principal with presumptive authority over the objectives of representation, and the lawyer is principal with presumptive authority over the means by which those objectives are pursued. This framework offers enough certainty for regulatory purposes, but provides only general and tentative guidance. It necessarily leaves the parameters of the respective spheres of authority uncertain, which should facilitate genuine dialogue and compromise in close decisions. Client and lawyer must initially resolve authority disputes between themselves, by considering their respective legitimate interests in individuality and economics, and the lawyer's obligation to protect certain societal interests. Part III analyzes the Model Rules and the joint venture model in light of these interests. Part IV tests the joint

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[4] *See* Kutak, *Model Rules of Professional Conduct: Why Do We Need Them?*, 36 OKLA. L. REV. 311, 314 (1983).

[5] MODEL RULES OF PROFESSIONAL CONDUCT Chairman's Introductory Note (1982) (supplement to Nov. 1982 A.B.A.J.) [hereafter MODEL RULES]. A final draft of the Model Rules was adopted by the ABA House of Delegates in August, 1983, *reprinted in* 52 U.S.L.W. 1 (Aug. 16, 1983). The chairman's introductory comments appeared only in the 1982 version.

venture model under existing case law when the parties fail to resolve disputes satisfactorily. It identifies several variable factors that determine and may rebut the presumptive spheres of authority. Next, it examines judicial treatment of decisions arising in the different contexts of representation: office lawyering, civil litigation, and criminal defense. The Article concludes that because the Model Rules are partly a restatement of law and partly normative, they challenge the profession to adopt a more satisfactory model of client-lawyer relations.

I. Background: Allocation of Authority Under Previous American Ethics Codes

A. Origins

Codification of ethical rules for American lawyers began in 1835 with David Hoffman's *Fifty Resolutions in Regard to Professional Deportment.*[6] Lawyers were to recite these high-minded principles twice yearly to raise their standard of ethical conduct. The resolutions gave the lawyer decisionmaking power far beyond that of an ordinary agent.[7] Lawyers were portrayed as fatherly guardians of a system laden with moral questions beyond their clients' authority. For example, a lawyer should refuse to pursue a client's quibbling demands[8] or to raise a statute of limitations as a technical defense to a valid claim,[9] and should forego a claim or defense he thought unjustified.[10] The lawyer

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[6] *See* H. Drinker, Legal Ethics Appendix E, at 338-51 (1953) (quoting entire text of *Hoffman's Fifty Resolutions in Regard to Professional Deportment*, in 2 D. Hoffman, A Course of Legal Study 752-75 (2d ed. 1836)).

[7] *See* Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 Emory L.J. 909, 913-14, 925 (1980).

[8] H. Drinker, *supra* note 6, at 339 (quoting Resolution X): "Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defenses, they shall be neither enforced nor countenanced by me."

[9] *Id.* at 340 (quoting Resolution XII):

> I will never plead the Statute of Limitations when based on the mere efflux of time; for if my client is conscious he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery.

[10] *Id.* at 340 (quoting Resolution XIV):

> My client's conscience and my own are distinct entities; and though my vocation may sometimes justify my maintaining as facts or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go. In civil cases, if I am satisfied from the evidence that the fact is against my client, . . . it would be dishonorable folly in me to endeavor to incorporate it into the jurisprudence of the country . . . .

alone determined what practice or procedure was morally acceptable[11] and was bound to respect the client's wishes only with regard to terminating litigation.[12]

In 1854, Judge George Sharswood, then professor at the University of Pennsylvania Law School, delivered a series of lectures on legal ethics which sparked lively debate within the profession.[13] He allocated principal authority for the cause to the client, and principal authority over procedural decisions to the lawyer. A lawyer had discretion to refuse a matter for personal reasons, but was not morally responsible for a client who maintained an unjust cause.[14] Although it was generally preferable to follow a client's instructions, a lawyer could refuse to defeat a just claim "by insisting upon the slips of the opposite party, by sharp practice, or special pleading — in short, by any other means than a fair trial on the merits in open court."[15]

Alabama adopted the first formal Code of Ethics in 1887. It focused on litigation and bore the mark of Judge Sharswood's essay.[16] For example, a client could not demand that the lawyer abuse an opponent or refuse reasonable courtesies in litigation. The client's decision controlled in only two instances: Whether additional counsel should be retained and which course should be pursued when joint counsel differed on a vital matter.[17]

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[11] *Id.* at 346 (quoting Resolution XXXIII):

> What is wrong is not the less so from being common. And though few dare to be singular, even in a right cause, I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong cannot be professionally right, however it may be sanctioned by time or custom. If, therefore, there be among my brethren any traditional moral errors of practice, they shall be studiously avoided by me, though in so doing I unhappily come in collision with what is (erroneously, I think) too often denominated the policy of the profession.

[12] *Id.* at 342 (quoting Resolution XIX):

> Should my client be disposed to compromise, or to settle his claim, or defense; and especially if he be content with a verdict or judgment, that has been rendered; or having no opinion of his own, relies with confidence on mine, I will in all such cases greatly respect his wishes and real interest.

[13] *See* Bowman, *The Proposed Model Rules of Professional Conduct: What Hath the ABA Wrought?*, 13 PAC. L.J. 273, 276 (1982).

[14] *See generally* G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 81-99 (1876).

[15] *Id.* at 99.

[16] *See* Bowman, *supra* note 13, at 278.

[17] *See* H. DRINKER, *supra* note 6, app. F, at 359-61 (ALABAMA CODE OF ETHICS ¶ 30).

Ten states had adopted some form of the Alabama Code by 1906.[18] Two years later the ABA followed suit, adopting the Canons of Professional Ethics.[19] The Canons continued the litigation focus of the Alabama Code and its paternalistic grant of primary authority to the lawyer. A client's authority is inferred only from statements of the lawyer's authority: the lawyer controls incidental trial matters "not affecting the merits of the cause, or working substantial prejudice to the rights of the client."[20]

B. Code of Professional Responsibility

By the mid-1960's bar leaders and scholars reached a consensus that the Canons lacked the organization and specificity needed for effective guidance and regulation of modern practice. At the request of then ABA President Lewis F. Powell, Jr., a committee evaluated the Canons and drafted a new set of rules.[21] The Model Code of Professional Responsibility (CPR), adopted by the ABA in 1969, made few substantive changes,[22] but was organized on three levels to distinguish between self-evident norms in the Canons, aspirational objectives in the Ethical Considerations, and mandatory obligations in the Disciplinary Rules.[23]

The CPR addresses decisionmaking authority more clearly than its predecessors, but is sufficiently vague that it can be used to support either the paternalist or the instrumentalist model. Most references are

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[18] Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia, West Virginia, and Wisconsin. *See* Bowman, *supra* note 13, at 280 & n.50.

[19] *See* Bowman, *supra* note 13, at 281-82.

[20] CANONS OF PROFESSIONAL ETHICS Canon 24 (1965). Professor Patterson contends that around the turn of the century, lawyers' perception of loyalty to client diverged from that contained in the ethical codes. While Hoffman, Sharswood, and the current ethical codes supported a reciprocal agency model, leading lawyers espoused "a responsibility to the clients as their primary and even exclusive moral obligation as lawyers." Patterson, *supra* note 7, at 913-14.

[21] *See* Bowman, *supra* note 13, at 283-85.

[22] Specifically, the Code of Professional Responsibility made the following changes from the 1908 Canons and their prevailing interpretations: (1) DR 2-107(A)(1) and (3) created a limited exception to the prohibition against fee-splitting; (2) DR 2-102(B) limited the conditions under which a legislator's name could appear in a law firm's name or notices; (3) DR 2-102(E) permitted lawyers to designate an earned degree or title indicating legal training in connection with their names; (4) DR 6-101(A)(3) prohibited a lawyer from neglecting an entrusted matter. *See id.* at 286-87.

[23] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (Preliminary Statement 1969) [hereafter CPR]. Although all states have adopted some form of the Canons and Disciplinary Rules, the Ethical Considerations have not been universally adopted. *See, e.g.*, OKLA. STAT. tit. V, ch. 1, app. 3 (1981).

under Canon 7, a litigation focused series of rules on the duty of zealous representation within legal bounds; little is said about office lawyering. It offers some helpful guidance in the aspirational Ethical Considerations (EC), but the applicable Disciplinary Rule (DR), 7-101, is cryptic at best.

Two Ethical Considerations and one Disciplinary Rule pertain directly to allocation of authority. EC 7-7 seemingly vests principal authority in the client, thus supporting the instrumentalist model.[24] EC 7-8 encourages the lawyer to help the client make informed decisions by offering advice on all relevant considerations: "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."[25] DR 7-101 reflects ambivalence about the proper division of authority, but largely supports the instrumentalist model. Lawyers understand the rule as imposing a duty of zealous representation. It prohibits a lawyer from intentionally failing to seek a client's lawful objectives through reasonably available means, but allows the lawyer to extend to others reasonable professional courtesies.[26]

Traditional interpretations of the CPR offer little guidance on the proper division of authority between lawyer and client. The ABA Standing Committee on Ethics and Professional Responsibility has issued few relevant opinions and none of these clarify matters.[27] Court

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[24] *See* EC 7-7, *infra* Appendix B.

[25] *See infra* Appendix B; *cf.* EC 9-2 ("In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."); EC 7-26 ("A lawyer should, however, 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."); EC 5-12 ("Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken.").

[26] DR 7-101(A) initially gives the client primary authority: it recognizes the relationship's contractual nature and prohibits a lawyer from intentionally failing to seek a client's lawful objectives through reasonably available means. However, this is qualified by paragraph (A)(1), which permits a lawyer to avoid offensive tactics, to grant reasonable requests of opposing counsel, and to treat all involved in the legal process with courtesy and respect. The standard is further obscured by subsection (B), which allows the lawyer, when "permissible," to exercise professional judgment and forego asserting a client's right or position. *See infra* Appendix B.

[27] *See, e.g.*, ABA Comm. on Professional Ethics and Grievances, Formal Op. 326 (1970) (lawyer must inform client of every offer from opposing party); Informal Op. 1373 (1976) (criminal defense lawyer obligated to transmit plea bargain offer) (dic-

decisions are necessarily ad hoc. The array of cases reflects a strong litigation bias, probably because a convenient forum is available.

The CPR achieved substantial improvement over the 1908 Canons by trying to articulate minimum levels of conduct subject to professional regulation. Nevertheless, brief experience with the CPR demonstrated that it left much room for improvement.[28] The Code also may have been a victim of its time. Four years after its adoption, the Watergate scandal surfaced. The number of lawyers involved in dubious or illegal activities raised many questions about the effectiveness of professional self-regulation. In the face of mounting criticism, the ABA Commission on Evaluation of Professional Standards, commonly referred to as the Kutak Commission, was appointed to study the problems. It concluded that a "comprehensive reformulation was required."[29] The Commission chose the restatement format, stating ethical principles as black-letter rules of law, followed by comments to aid in their interpretation.[30] The rules are intended as "discrete and specific standards identifying the matters that the conscientious lawyer would consider in resolving a question."[31] Additionally, the Commission decided that the rules should be client-centered.[32]

For the first time, professional rules allocate decisionmaking authority. In part, they adopt the aspirational standards of the CPR. The prescribed allocation suggests a joint venture model of authority. Unlike the previous codes, the Model Rules do not vest primary decisionmaking authority in either participant. Legal authority over specific decisions depends upon the legitimate interests of the lawyer, the client, and the legal system. The Model Rules go beyond pure regulation and create an ethical framework for a new, collaborative model of client-lawyer relations.

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tum); Informal Op. 1160 (1971) (juvenile court lawyer has primary duty to have client exonerated); *see also* Finman & Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 112-13 (1981) (unclear if opinions are advisory or binding).

[28] *See* Bowman, *supra* note 13, at 288-89 (citing criticism of the CPR as rigid, simplistic, and difficult to read); Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957, 960 (1978) (CPR inadequate); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704-05 (1977) (CPR misorders priorities).

[29] MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft 1980) at i.

[30] *See* Bowman, *supra* note 13, at 288.

[31] MODEL RULES, *supra* note 5, Chairman's Introductory Note (1982).

[32] *See id.*

C. Decisionmaking Models: Theoretical Options for The Model Rules

Both the paternalist and the instrumentalist models are role-differentiated: one's status in the relationship determines decisionmaking authority.[33] In the paternalist model, the lawyer claims exclusive decisionmaking authority,[34] premised on the belief that lay clients cannot make sound legal decisions because law is technical, complex, and esoteric.[35] A paternalist lawyer is morally isolated from the client, acting in ways that she thinks will benefit the client without discourse about what the client wants or needs.[36] This model is prevalent in representations of individual, less sophisticated clients.[37] The lawyer may insist on the right to control. After all, it is reasoned, she was hired for her judgment. If that judgment is refused, the lawyer should withdraw.[38] Vari-

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[33] *See* Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 15-24 (1975).

[34] *See* T. PARSONS, ESSAYS IN SOCIOLOGICAL THEORY 34, 370 (1954).

[35] *See, e.g.*, Becker, *The Nature of a Profession*, in EDUCATION FOR THE PROFESSIONS 27-46 (1962).

[36] *See* T. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 3-20 (1981) [hereafter T. SHAFFER, CHRISTIAN LAWYER]; Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231 (1979) [hereafter Shaffer, *Moral Discourse*].

[37] *See* D. ROSENTHAL, *supra* note 2, at 13 (lawyer's belief that client involvement is destructive); Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1206-08 (1975) (tendency to plea bargain). A lawyer has greater freedom of action in civil rights, plaintiffs' personal injury cases, family law, and criminal defense cases than in banking, anti-trust defense, securities, and labor management cases. J. HEINZ & E. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 101-04 & n.7 (1982) (table 4.3); *see also* Laumann & Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 AM. B. FOUND. RESEARCH J. 155, 206 (practice of law is routine for most cases; only wealthy clients can insist upon complex solutions).

[38] *See* Alschuler, *supra* note 37, at 1306-13 (quoting a number of criminal defense attorneys adhering to this view and suggesting the inherent difficulties in such an absolutist position). In a commencement address, Chief Judge Clement Haynsworth of the Fourth Circuit defined the client-lawyer relationship:

> [The lawyer] serves his clients without being their servant. He serves to further the lawful and proper objective of the client, but the lawyer must never forget that he is the master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and legally right . . . . [T]he lawyer must serve the client's legal needs as the lawyer sees them, not as the client sees them. During my years of practice . . . I told [my clients] what would be done and . . . firmly rejected suggestions that I do something else which I felt improper.

Freedman, *A Lawyer Doesn't Always Know Best*, 7 HUM. RTS. 28, 29 (1978) (quoting Judge Haynsworth).

ous scholars contend that the paternalist lawyer subverts client autonomy, imposes her own moral values, and pursues standardized, imputed ends that are unresponsive to the client's actual needs.[39]

The instrumentalist model reflects a sharply different view of the client's competence to make legal decisions. In the instrumentalist model, the client is the principal decisionmaker; the lawyer merely supplies the technical knowledge and skills necessary to implement those decisions. Because the profession has a monopoly on legal services, clients need an attorney's assistance to pursue individual autonomy.[40] Like the paternalist, the instrumentalist lawyer is morally isolated from the client.[41] Critics claim that the instrumentalist collapses distinctions between substance and legal process.[42] At its extreme, the instrumentalist model describes the proverbial "gun for hire."

Legal scholars[43] and social scientists[44] have criticized traditional client-lawyer models. The time is ripe for a new model. Social science data, internal demands for changed client-lawyer relations, and the Kutak Commission's efforts to reevaluate the profession have converged. In deciding to include a Model Rule on decisionmaking authority, the drafters had the opportunity to choose between the traditional paternalist or instrumentalist models or to select another, intermediate model as the framework for decisionmaking. Although the drafters did not explicitly state which framework they selected, this Article contends that the Rules provide an ethical framework for an intermediate model, that of a collaborative joint venture. This model rejects a high degree of role differentiation, with inherent inequalities based on status.[45] To enhance client autonomy and to gain the benefit of the client's unique

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[39] *See generally* D. ROSENTHAL, *supra* note 2; T. SHAFFER, CHRISTIAN LAWYER, *supra* note 36; Freedman, *supra* note 38; Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Wasserstrom, *supra* note 33.

[40] *See* Freedman, *supra* note 38, at 52; Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1073 (1976).

[41] *See* T. SHAFFER, CHRISTIAN LAWYER, *supra* note 36; Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1078-97 (1979).

[42] *See* Dauer & Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 573-84 (1977); Simon, *supra* note 39, at 106-13.

[43] *See, e.g.*, T. SHAFFER, CHRISTIAN LAWYER, *supra* note 36; Freedman, *supra* note 38; Lehman, *supra* note 41; Martyn, *supra* note 2; Mazor, *Power and Responsibility in the Attorney-Client Relation*, 20 STAN. L. REV. 1120 (1968); Simon, *supra* note 39; Spiegel, *supra* note 2; Wasserstrom, *supra* note 33.

[44] *See, e.g.*, B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC (1977); D. ROSENTHAL, *supra* note 2; Steele & Nimmer, *supra* note 3.

[45] *See, e.g.*, Simon, *supra* note 39; Wasserstrom, *supra* note 33.

insights and knowledge, client participation is encouraged.[46] There is more interaction between lawyer and client,[47] who together confront moral and other questions that arise in the representation.[48] The collaborative model involves more personal risk than the traditional models because its participants cannot hide behind formal role distinctions. In return for the greater risk, there is the hope of more satisfactory relationships, improved results, and increased respect for autonomy of both lawyer and client.

II. Model Rules of Professional Conduct

A. Textual Analysis

Professional ethical rules serve two critical functions. As regulations, they define minimum standards of proper conduct for purposes of professional discipline.[49] As ethical norms, they provide guidelines by which lawyers can resolve difficult issues of professional discretion.[50] Lawyers need general principles that serve equally to guide and to determine when breach has occurred. The rules must give reasonable notice of potential violations, but should not be so certain as to discourage personal deliberation.

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[46] *See* D. Rosenthal, *supra* note 2; Lehman, *supra* note 41. Many clients believe attorneys do not keep them adequately informed of case progress or planned activity, but that their lawyers do try to understand their needs and the outcome they desire. One survey found that one-half of the client-respondents believed that lawyers did not meet their needs for ongoing information about how the work was progressing; one-third believed lawyers did not care whether clients fully understood what needed to be done and why; and one-fifth did not believe lawyers try to understand client needs in terms of desired outcome. *See* B. Curran, *supra* note 44, at 230, 235; *see also* D. Rosenthal, *supra* note 2, at 113 (survey indicated lawyers' unwillingness to discuss major aspects of litigation with client); Stone & White, *The Public Image of the Legal Profession: 1960-1975*, 49 N.Y. St. B.J. 298, 301 (1977) (survey found public believes lawyers need to inform clients better). Clients who had consulted a specific lawyer more than once gave the highest proportion of excellent ratings and the lowest proportion of poor ratings when asked to rate lawyers on seven characteristics. *See* B. Curran, *supra* note 44, at 210-11. This positive correlation could be expected because the respondents chose to become repeat users of lawyers with whom they were satisfied.

[47] *See* Wasserstrom, *supra* note 33, at 15-24.

[48] *See* T. Shaffer, Christian Lawyer, *supra* note 36, at 13-20; Lehman, *supra* note 41, at 1089-91.

[49] *See* Model Rules, *supra* note 5, Chairman's Introductory Note at 3 (1982).

[50] *Id.* Preamble.

1. Decisionmaking Framework

Communication and allocation are the critical components of the Model Rules' decisionmaking framework. Rule 1.2(a) allocates decisions concerning objectives of representation to the client and decisions as to the means by which they are pursued to the lawyer. Different communication obligations are imposed for objectives and means: a lawyer is required only to *consult* a client on the means by which objectives are to be pursued, but must "*explain* a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[51]

This nonlegal terminology of "objectives" and "means" originated in the CPR's ambivalent references to decisionmaking authority.[52] Courts traditionally have determined authority by whether a decision is substantive or procedural, yet have deviated from that standard when necessary to protect the lawyer's or the client's legitimate interests. The Model Rules' dichotomy between means and objectives gives the profession needed guidance on the allocation of authority, but no bright lines exist. Sometimes a clear distinction is impossible, and "in many cases the client-lawyer relationship partakes of a joint undertaking."[53] This guidance should facilitate dialogue between lawyer and client, and on borderline questions, should encourage consensus or compromise to avoid either party risking a wrongful assumption of authority.[54]

The lawyer's authority to override certain client decisions is superimposed on this framework. Sometimes it is mandatory: a lawyer shall not counsel a client to engage in or assist in conduct known to be criminal or fraudulent,[55] and must withdraw if the representation will result in a violation of the Rules of Professional Conduct or other law.[56] The attorney who knows that a client expects prohibited assistance must advise the client of the limitations on the lawyer's conduct.[57] Usually the authority to override is permissive: Rule 1.2(c) allows a lawyer, after consultation with a client, to limit the objectives or means of rep-

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[51] MODEL RULE 1.2 (1983), *infra* Appendix C (emphasis added).

[52] *See* DR 7-101, EC 7-8, *infra* Appendix B.

[53] MODEL RULE 1.2 comment (1983).

[54] *See* Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decisionmaking and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RESEARCH J. 1003, 1007-15 (reviewing earlier version of current Rule 1.2).

[55] MODEL RULE 1.2(d) (1983), *infra* Appendix C.

[56] MODEL RULE 1.16(a)(1) (1983), *infra* Appendix C.

[57] MODEL RULE 1.2(e) (1983), *infra* Appendix C.

resentation. The lawyer may withdraw when a client uses the attorney's services to perpetrate a crime or fraud, or insists on pursuing an objective the lawyer considers repugnant or imprudent.

2. Communication

Rule 1.4(b) is the legal profession's regulatory counterpart to the medical informed consent doctrine. The lawyer must provide sufficient information for the client to participate intelligently in making decisions on objectives and means. The information to be given varies with the kind of advice or assistance involved, the client's willingness and ability to participate, and whether there is reasonable time for explanations.[58] As a general principle, "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."[59] At times a lawyer may delay giving information when the client's response to an immediate communication is likely to be rash.[60]

Adequacy of disclosure is determined objectively, based on information appropriate for a responsible adult client to make an informed decision. Even when a client delegates broader authority, the lawyer should keep her apprised of the status of the matter for which the attorney has been engaged, although a system of limited or occasional reporting may be arranged. Special difficulties arise in representing a client with impaired ability to make adequately considered decisions.[61] Regardless of whether the client can make legally binding decisions, the lawyer should endeavor to maintain a normal relationship and communication with the person represented.[62]

The focus on communication is critical. Clients are often unaware of their right to participate in decisionmaking unless informed by their

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[58] MODEL RULE 1.4 comment (1983). The comments to the Model Rules distinguish between contexts of representation and topics of expected communication. In litigation, the lawyer should explain general strategy and the prospects of success, and should consult with the client about tactics that might injure or coerce others. It is usually unnecessary to give detailed explanations of trial or negotiation strategy. *Id.* When representing a client in negotiations and "there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement." *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] MODEL RULE 1.14(a) (1983), *infra* Appendix C.

lawyers. When so informed, they must rely on their attorneys to explain the law, its significance to the facts, and other relevant considerations. Initially, counsel must predict whether the disputed question involves objectives or means, so that the proper person can decide the issue. This power to characterize a decision may be tempered by the inherent risk that some other authority will ultimately judge the lawyer's determination erroneous. Some lawyers tend to shape the presentation of this information to encourage client deference to their professional judgment. However, they should make a good faith effort to be objective in their analysis. Notwithstanding the lawyer's opportunities to manipulate information, sometimes a client disagrees with a recommended course of action. If it is a means decision, the lawyer's decision is final. However, if the decision involves a client's lawful objectives, the lawyer must defer to the client's choice.

3. Objectives of Representation

Objectives of representation are broadly described as "the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations."[63] The client has ultimate authority over objectives, not limited to the desired technical or legal end, because a client's broader purposes may be only remotely related to that end. The objectives of representation properly encompass the client's overall purpose or desired result, other matters affecting the client's legal rights, obligations or financial interests, and subjective concerns, including business, political, moral, or personal values.[64]

Rule 1.2(a) explicitly requires a lawyer to abide by a client's decision whether to accept a settlement offer. In a criminal case, the lawyer must abide by the client's decision regarding the plea to be entered, jury trial waiver, and whether the client will testify. Case law analysis suggests these are critical client decisions frequently usurped by the attorney.[65] The specification of these norms in the Rule is positive authority

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[63] MODEL RULE 1.2 comment (1983).

[64] The predecessors to Rules 1.2(a) and 1.2(c), Ethical Considerations 7-7 and 7-8, *infra* Appendix B, support this broad interpretation. EC 7-7 allows the lawyer to decide matters "not affecting the merits of the cause or substantially prejudicing the rights of a client . . . otherwise the authority to make decisions is exclusively that of the client." EC 7-8 cautions that "the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client."

[65] *See, e.g.*, Brookhart v. Janis, 384 U.S. 1, 5-8 (1966) (unauthorized guilty plea by counsel violated client's sixth and fourteenth amendment rights); Wiley v. Sowders, 647 F.2d 642, 648-49 (6th Cir.) (attorney may not change client's plea unless client unequivocally understands consequences of admission), *cert. denied*, 454 U.S. 1091

which can be used to discipline lawyers and overturn unauthorized decisions.

Rule 1.2(a) defines the scope of representation and the presumptive spheres of authority absent a contrary agreement between lawyer and client. Subsection (c) recognizes the relationship's contractual nature. It allows a lawyer to limit the objectives of representation if, after consultation, the client consents.[66] For example, a retainer may be for a specifically defined purpose or subject to agreed limitations. It may exclude specific objectives or means, including those the lawyer considers imprudent or repugnant. A retainer cannot, however, limit the lawyer's duty to provide competent representation or the client's right to make settlement decisions or to terminate the attorney.[67]

4. Means of Achieving Objectives

The lawyer, after consultation with the client, has final authority to decide the means by which objectives are to be pursued. That allocation is necessary if lawyers are to be held professionally responsible for actions taken on a client's behalf. Although common sense distinctions between means and objectives often will suffice, sometimes a clear line is not possible. The lawyer has presumptive authority over technical and legal tactical issues. Yet, a lawyer "should defer to the client regarding such issues as the expense to be incurred, and concern for third persons who might be adversely affected."[68] Some means decisions significantly implicate a client's values, thereby rebutting the presumption that authority resides with the lawyer. A lawyer cannot recognize such matters without understanding the client's concerns about the representation. Understanding can come only from dialogue with the client, and the dialogue, in turn, often produces consensus on a decision. Within this framework, client-lawyer relationships are joint undertakings that minimize the need to determine with whom ultimate authority lies.

5. Lawyer Override

Rule 1.2(d) and (e) limit the scope of permissible representations, requiring or permitting lawyers to override certain client choices. This

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(1981); Harrop v. Western Airlines, 550 F.2d 1143, 1145 (9th Cir. 1977) (attorney may not settle action without express permission of client); People v. Robles, 2 Cal. 3d 205, 215, 466 P.2d 710, 716, 85 Cal. Rptr. 166, 172 (1970) (defendant entitled to testify despite contrary advice from counsel).

[66] MODEL RULE 1.2(c) (1983), *infra* Appendix C.

[67] MODEL RULE 1.2 comment (1983).

[68] *Id.*

power is based on the lawyer's professional obligations as an officer of the legal system and on recognition of the lawyer's interests in reputation, dignity, and autonomy.

Subsection (d) prohibits a lawyer from counseling a client to engage in or from assisting a client in known criminal or fraudulent conduct. A lawyer may, however, discuss the consequences of proposed conduct and counsel or assist a client's "good faith effort to determine the validity, scope, meaning or application of the law."[69]

Mandatory override usually will be triggered by subsection (e). A client may suggest a questionable course of conduct in the hope that the lawyer will not be constrained by professional obligations.[70] For example, a client might unwittingly suggest conduct violating the lawyer's duties of fairness to opposing parties or candor to the tribunal. When a lawyer knows the client expects prohibited assistance, she must advise the client about the relevant limitations on her professional conduct.[71] Consultation may persuade the client to forego the prohibited course of action. If not, and the client still demands such assistance, the lawyer is required to decline or withdraw from the representation.[72]

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[69] MODEL RULE 1.2(d) (1983), *infra* Appendix C. There is a critical but subtle distinction between the permissible legal analysis of questionable conduct and prohibited assistance. Subsection (d) seldom will require a lawyer to override and withdraw. The law makes too many subtle and factual distinctions for a lawyer to *know* with certainty that a client is using her services to engage in criminal or fraudulent conduct. *See* J. Hamilton, The Ethical Situation of In-House Counsel 12-19, 24-28 (May 1, 1982) (unpublished manuscript).

[70] MODEL RULE 1.16 comment (1983).

[71] MODEL RULE 1.2(e) (1983), *infra* Appendix C.

[72] MODEL RULE 1.16(a)(1) comment (1983). Rule 1.2(e) is authority for a lawyer to give "peremptory advice." Geoffrey Hazard, Reporter for the Model Rules, defined peremptory advice as follows:

> Peremptory advice is in form like any other legal advice — a suggestion coupled with a supporting statement of reasons. Its tenor, however, is such that the recipient can disregard it only if he is foolish or if the advice itself is misguided.
>
> . . . .
>
> Advice is made peremptory when it is cast in purely technical terms compelling a single conclusion about what to do. If the advice acknowledges that more than one course of action might be countenanced, it obviously leaves the responsiblity for choice with the client. If the advice is not cast in purely technical terms — if it refers to questions of right and wrong or to "policy" — it is also not peremptory.

G. HAZARD, ETHICS IN THE PRACTICE OF LAW 147 (1978); *see also* Florida Bar v. Wagner, 212 So.2d 770, 772-73 (Fla. 1968) (lawyer should persuade client authorization of payment for litigation support services); *In re* A, 276 Or. 225, 237-40, 554 P.2d 479, 486-87 (1976) (lawyer must seek client consent to disclose deceptive omission in

The lawyer may, after consulting with a prospective client, secure consent to a limited retainer which excludes means or objectives the lawyer finds imprudent or repugnant.[73] Once representation has commenced, the lawyer's permissive override authority is limited. The lawyer may withdraw without client consent if it can be done without a material, adverse effect on the client's interest. Otherwise, unilateral withdrawal is permitted only if the client has in some way violated the relationship.[74] Rule 1.16(b)(3) authorizes withdrawal if the client insists on pursuing an objective the lawyer considers repugnant or imprudent. Lawyers must be able to declare themselves conscientious objectors in that rare instance of a serious, irreconcilable dispute.

Thus, by providing only general guidance, the Rules promote genuine dialogue between interdependent persons. A lawyer cannot understand a client's objectives without first explaining a proposed action and then listening to the client's response. The risk that accompanies this uncertainty forces the parties to make choices.[75] Lawyer and client must step outside their fixed roles and honestly assess the merits of their respective contentions. Regardless of whether they reach a consensus, the resulting dialogue acknowledges their interdependence in a common venture.

B. Lawyer and Client As Joint Venturers

A joint venture is a mutual agency in which each person is both principal and agent of the other; *inter se*, they have reciprocal fiduciary duties.[76] Decisionmaking is theoretically shared, although in practice one party may conduct all activities, with the other's involvement limited to investment in the venture. By contrast, in the client-lawyer relationship, courts formally recognize only the lawyer's status as agent and fiduciary of the client. The lawyer is subject to the client's control over the manner of her performance. A client's rights as principal are deter-

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testimony to court; if client refuses, lawyer must withdraw).

[73] MODEL RULE 1.2(c) comment (1983).

[74] MODEL RULE 1.16(b) (1983), *infra* Appendix C.

[75] This forces them "to resolve this question initially for themselves with only tentative, generalized guidance regarding the law's willingness subsequently to approve or to penalize those resolutions." R. BURT, *supra* note 2, at 132 (regarding patient-physician relationship).

[76] *See* C. ROHRLICH, ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES § 2.20 (5th ed. 1983); *see also* C.H. Codding & Sons v. Armour & Co., 404 F.2d 1, 4 (10th Cir. 1968) (breach of joint venture agreement); Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928) (joint venturers owe duty of highest loyalty).

mined by the substantive law and the lawyer's duties.[77] Nevertheless, the joint venture is a useful analogy for considering authority in the client-lawyer relationship. Both are contractual business relations of limited purpose and scope. Neither typically requires its participants' full attention. Either may involve a single matter, or a series of related projects.[78]

Under the theoretical framework suggested by the Rules, lawyer and client are joint venturers in a highly interdependent, common enterprise. Each is respected as an individual with legitimate claims to autonomy, dignity, and responsibility.[79] Typically the client begins the venture by reciting a problem and a desired end. The client offers to contribute capital in the form of a legal problem and fees. In return, the lawyer offers to contribute labor in the form of accumulated knowledge, expertise, reputation, and time.

The relationship is personal, collaborative, and terminable at will.[80] Either participant may decline to enter it because of dissatisfaction with the proposed terms, objectives, or courses of action. Mutual expectations are initially defined and are revised as the relationship develops. Each participant contributes valued resources to the common end. The client is not a depersonalized object with a standard legal problem capable of solution by legal, utilitarian calculations.[81] Rather, the client's objectives are a unique balance of personal values subject to constant modification.[82]

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[77] *See* Patterson, *supra* note 7, at 964-65.

[78] *See generally* J. CRANE & A. BROMBERG, LAW OF PARTNERSHIP § 35 (1968).

[79] *See* Simon, *supra* note 39, at 33; *cf. id.* at 130-44; Wasserstrom, *supra* note 33, at 19-24. Simon contends that traditional professional advocacy fails to further a client's autonomy, dignity, and responsibility. Instead a model of "non-professional advocacy" is required so that advocacy questions are treated as personal ethical matters decided by the client. Wasserstrom makes a similar argument that the high degree of role differentiation between lawyer and client results in a morally flawed relationship for which "deprofessionalizing" is the solution. Lawyers must use simpler, less technical language to permit direct communication and to demystify the legal process. It requires a different kind of client-lawyer relationship; one involving wholeness of interaction, equality, and little role differentiation. This author avoids Simon's and Wasserstrom's terms because the lawyer's responsibilities *qua* professional intrinsically benefit society by requiring the lawyer to act in each representation so as not to damage the overall integrity of the legal system. *See infra* text accompanying notes 130-42.

[80] "The fact that these pairs of people are joint venturers is evident from the fact that consent is a continuing and repeatable requirement." P. RAMSEY, *supra* note 2, at 6 (concerning patient-physician relationship).

[81] *See* Lehman, *supra* note 41, at 1087-88; Simon, *supra* note 39, at 52-53; Wasserstrom, *supra* note 33, at 19; *cf.* R. BURT, *supra* note 2, at 83-89.

[82] *See* Simon, *supra* note 39, at 55, 115-18.

By definition, a collaborative relationship has moral content.[83] Matters of conscience are relevant, even if they are vague or ill-defined. Deadlock occurs when consensus or compromise is impossible, leaving the entire venture at risk. Each co-venturer must decide whether to dissolve the relationship over that issue.[84] The client risks both the loss of an attorney familiar with the problem and the ability to achieve the desired objective. The lawyer risks financial loss and damaged reputation, and may later have to defend her actions before a tribunal.

The joint venture model is, in several respects, exemplified by attorney Joseph Rauh's representation of playwright Lillian Hellman before the House Committee on Un-American Activities (HUAC).[85] Hellman first consulted Abe Fortas, who shared his hunch that the time might be appropriate for someone to take a moral stance before the committee by offering to testify only about herself. Hellman immediately felt this was the right position for her. However, Fortas perceived a conflict because his firm represented another HUAC witness and referred Hellman to Rauh.

Rauh and Hellman largely achieved a collaborative relationship between equals. They communicated frankly and demonstrated mutual trust and respect.[86] Rauh educated Hellman about the fifth amendment and how its technicalities affected her. She understood and accepted the substantial risk of prosecution and imprisonment for contempt if she waived the privilege against self-incrimination to testify about herself but refused to testify about others. Rauh first drafted a letter for Hellman to send to the committee. Hellman redrafted the letter to reflect her own style. After several revisions, they reached a satisfactory compromise. In the letter, Hellman related her understanding of the fifth amendment and her unwillingness to harm innocent persons. She offered to testify freely about herself, waiving the fifth amendment

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[83] *See generally* Shaffer, *Moral Discourse*, *supra* note 36; Shaffer, *The Legal Ethics of Servanthood*, in 8 SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE 34 (L. Hodges ed. 1982). Shaffer suggests Martin Buber's model of the I-Thou relationship for being in a client-lawyer relation. Quoting Buber, he says the relationship's tendency is " 'as far as possible to change something in the other, but also to let *me* be changed by him.' Change is the model in moral discourse, and the poetic paradigm as well, but it is openness to change — vulnerability, risk — which is the essence of moral discourse." Shaffer, *Moral Discourse*, *supra* note 36, at 248 (emphasis in original) (footnote omitted).

[84] *See generally* G. HAZARD, *supra* note 72, at 136-49; *cf.* R. BURT, *supra* note 2, at 134-43.

[85] *See generally* L. HELLMAN, SCOUNDREL TIME 51-112 (1976).

[86] *See id.* at 60-62, 99-102.

privilege, if the committee agreed to refrain from questioning her about other persons.[87]

Immediately before the scheduled appearance, Thurman Arnold telephoned Rauh and urged him to abandon the plan which he said would send Hellman straight to jail.[88] Rauh relayed Arnold's advice to Hellman, who refused to change course because she could not cope with such a last minute change.[89] During her appearance HUAC counsel entered the letter into the record and Rauh quickly distributed copies to the press. A few minutes later the contempt risk arose when Hellman refused to answer a question about someone else.[90] Their finesse, and the press' response to it, enabled Hellman to avoid both prosecution and being smeared with the label "fifth amendment communist."[91]

Rauh's representation generally respected Hellman's autonomous decision to risk prosecution. Twice, however, he failed to respect her as the dominant partner. During a meeting with HUAC counsel, Rauh made a specific comment about Hellman's writing that she rejected for reasons of political integrity.[92] The second failure causes greater concern: he did not consult Hellman about whether to distribute the letter if an opportunity arose. As the principal with the greater stake, Hellman was entitled to make that decision. Had she been consulted, she might have revised the letter or refused its distribution. Her interests in autonomy and self-determination entitled her to be consulted. An attorney representing a client in a fundamentally political matter must exercise utmost care to ensure that all actions coincide with the client's lawful objectives.

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[87] *See id.* at 92-94.

[88] *See id.* at 101-02. Freedman recites Fortas' description of Arnold as a lawyer who "did not permit a client 'to dictate or determine the strategy or substance of the representation, even if the client insisted that his prescription for the litigation was necessary to serve the larger cause to which he was committed.' " Freedman, *supra* note 38, at 29. Arnold's advice to Rauh certainly is in keeping with that approach.

[89] *See* L. HELLMAN, *supra* note 85, at 101-02.

[90] *See id.* at 104-08.

[91] *Id.* at 107-11.

[92] During the period of the Nazi-Soviet Pact prior to the Second World War, the American Communist Party had criticized one of Hellman's earlier plays, *Watch on the Rhine*, as belligerent and war-mongering. Hellman objected to her attorney's use of the criticism to prove her independence from Communist influence. *Id.* at 58, 84-86.

III. INTEREST ANALYSIS

As stated in the Preamble to the Model Rules: "Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living."[93] This analysis identifies three classes of interests to assist in dispute resolution in the joint venture model: Individuality, economic interests, and societal interests in the legal system. Client-lawyer conflicts may occur within or among these classes. If the lawyer is affiliated with a firm, the lawyer and the firm may also experience conflicts within or among these classes. Because each situation is unique, it is impossible to prescribe the proper balance of interests. This analysis can only identify some of the issues to be considered.

A. Individuality Interests: Autonomy, Dignity, and Responsibility

Individuality is a fundamental value with three aspects: autonomy, dignity, and responsibility.[94] In any client-lawyer relationship, each actor has legitimate concerns for individuality and self-determination. Legal assistance should respect the client's individuality. Nevertheless, a lawyer is not merely an instrument through which a client achieves self-determination. The lawyer also has legitimate claims to autonomy, dignity, and responsibility as an individual and as a professional.

Autonomy refers to one's moral freedom; it is the capacity to be self-legislating, free from another's domination.[95] Autonomy combines authenticity (a self-consciousness of what one is and wants to be) and independence (the procedural and substantive liberty to make one's own moral judgments).[96] Autonomy is an elusive concept, especially in the context of legal representations.[97] Rational persons consult lawyers for advice because they lack the time, knowledge, training, and skill to investigate unfamiliar matters independently. Unless there is special

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[93] MODEL RULES, *supra* note 5, Preamble (1982).

[94] *See* Simon, *supra* note 39, at 33.

[95] "Autonomy" is defined, in relevant part, in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 148 (1966 ed.) as: "1: the quality or state of being independent, free, and self-directing: individual or group freedom . . . 3: the sovereignty of reason in the sphere of morals; possession of moral freedom or self-determination: power of the individual to be self-legislating in the realm of morals — opposed to heteronomy."

[96] *See* G. DWORKIN, AUTONOMY AND BEHAVIOR CONTROL 23-26 (1976).

[97] *See, e.g.*, Dworkin, *Moral Autonomy*, in MORALS, SCIENCE, AND SOCIALITY 156 (1978). Substantive liberty pertains to one's ability to make basic choices, while procedural liberty refers to the capacity to effectuate those choices.

reason for doubt, a client will not thereafter verify a lawyer's legal judgment. Neither lawyer nor client can make truly autonomous choices. Clients often manipulate their factual presentations to influence the resulting advice. Nor can a lawyer avoid manipulating the client to some degree. The legal advice clients receive is based on their factual presentation, the applicable law, and the lawyer's personal and professional values. Although clients may make the ultimate moral choices, it cannot be said those choices are free from the lawyer's influence.[98]

Dignity focuses on the interpersonal aspects of the relationship. It relates to a lawyer's and a client's perceptions of themselves and each other: whether each has self-respect and is regarded as worthy of esteem by the other. For clients, dignity entails a shared perception that the client's input to the relationship matters, irrespective of social status, education, mental capacity, or age. In turn, it suggests that the client should respect the lawyer as an individual, not merely as a tool for achieving the client's ends.

Responsibility embraces issues of accountability for a decision and its consequences. Clients are responsible for decisions about the objectives of representation because they bear most legal, financial, and moral consequences.[99] Lawyers may be held professionally accountable or civilly liable for some decisions regardless of a client's willingness to assume the risks.

A client's and a lawyer's interests may conflict when the lawyer's professional judgment is incompatible with nonlegal considerations that are important to the client.[100] A client may, for personal reasons, decide to enter a disadvantageous transaction, forego tax savings or refrain from asserting a valid claim or defense in litigation. On these types of issues the lawyer should explain the options and their legal conse-

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[98] *See generally* Dworkin, *supra* note 97.

[99] *See, e.g.*, J. STEWART, THE PARTNERS 152-200 (1983) (corporate client suffered financially from law firm's failure to determine conflict potential before assuming complex representation); Mazor, *supra* note 43 (clients need protection from unauthorized acts); Steele & Nimmer, *supra* note 3, at 959 (client convicted as a result of lawyer's negligent failure to list claim in bankruptcy filing).

[100] Consider also the conflicts between a criminal defendant's autonomy and liberty interests and the lawyer's concerns for reputation and professional responsibility. Defense lawyers expect most of their clients to be convicted. After conviction the clients may demonstrate their unhappiness by claiming they received ineffective assistance of counsel. Sensible defense lawyers anticipate such charges and document the representation for later use in defense of their reputation. *See* Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1039 (1981).

quences and unambiguously affirm the client's right to choose.[101] Conversely, a client may want the lawyer to file a meritless or vindictive lawsuit, or an unwarranted motion to disqualify a judge or opposing counsel, or to draft a clearly unconscionable contract. The lawyer may properly explain why she considers that action legally, ethically, or morally impermissible and refuse the request. The joint venture may then be dissolved.

Between those extremes lie many disputes that involve a relative balance between the lawyer's and client's legitimate concerns. Absent compromise or concession, one person must predict who is authorized to decide. A wrong prediction may result in adverse consequences. In such cases, "[i]f there remains an ethically autonomous course for the conscientious lawyer, it lies between Scylla and Charybdis."[102]

B. Economic Interests

Despite some protestations to the contrary,[103] lawyer and client are generally recognized as being engaged in a business relationship. The lawyer performs services for the client and expects to be compensated.[104] Their respective economic interests are a frequent source of

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[101] *See* Lehman, *supra* note 41, at 1091.

[102] G. HAZARD, *supra* note 72, at 42.

[103] Professor Charles Fried romantically depicts the lawyer as a client's "special-purpose friend," seemingly forgetting that the client pays the lawyer. *See* Fried, *supra* note 40, at 1071. *But see* Dauer & Leff, *supra* note 42, at 580-83 (criticizing Fried's interpretation).

[104] This analysis excludes pro bono, legal aid, public defender, and appointed counsel representations which involve very different economic forces that influence decision-making authority. State-provided representation for indigent criminal defendants presents especially difficult authority questions. There are no financial incentives to limit the claims, defenses, or strategies the client may want to pursue. Conversely, defense counsel's willingness and ability to pursue each client's desired defense aggressively is subject to the severe economic constraints imposed by the state and its overburdened public defense system. Neither lawyer nor client has any real bargaining power in the relationship. The problem is compounded further because these relationships are not based on any true consent or mutual selection of client and lawyer. The nonconsensual and nonmarket origins of these relationships may explain the frequent, serious authority disputes in this context that do not ordinarily surface in consensual, private, client-lawyer relationships. *See, e.g.*, Jones v. Barnes, 103 S. Ct. 3308 (1983) (indigent defendant not constitutionally entitled to have appointed counsel raise on appeal every nonfrivolous issue client suggests); Morris v. Slappy, 103 S. Ct. 1610 (1983) (no sixth amendment guarantee to "meaningful relationship" with counsel); Polk County v. Dodson, 454 U.S. 312 (1981) (appeal dismissed after public defender withdrew because claims frivolous; held, no state action for 42 U.S.C.A. § 1983 liability).

tension, distrust, and dispute.[105] One may start with the assumption that lawyer and client are rational, economic beings who act in accordance with their direct economic interests.[106] The lawyer performs the quantity and quality of services necessary to maximize profits. The client wants the optimal legal result for the lowest cost; demand for services diminishes as cost exceeds the break-even point.

This analysis breaks down because not all clients are rational economic actors. Individuals cannot control their need for legal services as they can vary demand for consumer goods; lawsuits, criminal charges, and personal crises may require a lawyer's assistance. Vast differences among clients' bargaining power affect their abilities to influence the terms and manner of representation in a given relationship. That power depends on a client's ability to pay for services and her potential to be a repeat customer. Thus, a major corporation is better able to protect its interests in a client-lawyer relationship than a criminal defendant represented by appointed counsel. Finally, clients do not evaluate legal services strictly in direct economic terms; they also consider established personal relations, expertise, prestige, and power.

Clients' frequent failure to act in a rational economic manner helps explain lawyers' traditional ability to determine fees unilaterally. In the past, many clients trusted their lawyers' judgment on the work to be done and the amount charged and paid without question, even if bills seemed excessive.[107] Now, with increased competition for legal business and heightened consumer awareness, clients tend to question their attorneys' prerogatives to make decisions affecting their economic interests.[108]

At least three kinds of disputes directly involve the economic interests of both lawyers and their clients. There are conflicts about the quantity and type of work the lawyer performs, productivity, and risks incurred.

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[105] *See, e.g.*, Burt, *supra* note 100, at 1021; Steele & Nimmer, *supra* note 3, at 952-54.

[106] *See* Clermont & Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 534 (1978).

[107] *See* Steele & Nimmer, *supra* note 3, at 958-59; *see also* J. STEWART, *supra* note 99, at 97-98 (IBM paid Cravath, Swaine & Moore enormous fees and expenses for antitrust defense work, apparently without question, even when charges seemed excessive).

[108] *See, e.g.*, Banks, *Litigation Cost Control: A Xerox Case History*, and Gonser, *Automated Litigation Management*, in DISPUTE MANAGEMENT: A MANUAL OF INNOVATIVE CORPORATE STRATEGIES FOR THE AVOIDANCE AND RESOLUTION OF LEGAL DISPUTES VI-A.1-B.1 (1980) [hereafter DISPUTE MANAGEMENT MANUAL]; Mercherle, *What Does the Client Expect in Return for Dollars Expended?*, 17 FORUM 510 (1981).

Conflicts arise over expenses, such as witness and consulting fees, document preparation, and travel. Finally, economic conflicts surface during settlement of litigation, or when a lawyer seeks to limit or end a representation because it conflicts with professional concerns. Proper analysis of these areas of conflict requires consideration of specific fee arrangements. The participants' contractual allocation of financial risks suggests probable conflicts and some basis for their reconciliation. To illustrate the problems with economic conflicts, this section outlines three characteristic fee arrangements: Hourly, contingent, and flat fees. Beyond compliance with ethical standards and professional competence, authority over an economic conflict decision usually lies with the party bearing the costs.

1. Hourly Fee Arrangements

Because hourly fees imperfectly measure the value received by the client and because the lawyer lacks direct economic incentive to achieve maximum efficiency, their economic interests are misaligned.[109] Market forces dictate that lawyers retained on an hourly basis are subject to the greatest amount of client control. Clients who are expected to pay for time and expenses have legitimate claims to limit the time and how it is spent. For example, they have greater authority to select the issues to be pursued, the form and extent of discovery, and determine expenses. Traditionally, many clients have relinquished that authority, trusting their lawyers' exercise of professional judgment and expecting them not to abuse that trust.[110] Today, sophisticated clients increasingly exercise their authority by implementing various mechanisms for cost evaluation and control.[111]

In the typical hourly fee retainer, there is no stated limit to the total fees charged. This client joint venturer is not a limited partner who can know the total costs and investment at the outset. The nature and extent of legal work is inherently uncertain and may depend upon forces outside the lawyer's or client's control. When the venture's planned activities are necessarily incomplete, the client has an even greater need to be consulted about the anticipated costs associated with the possible courses of action.

Serious decisionmaking conflicts arise in these representations when

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[109] Clermont & Currivan, *supra* note 106, at 535-36, 554, 568-69.

[110] Mutual expectations and understandings established in ongoing, satisfactory relationships may justify that trust. *Cf.* MODEL RULE 1.5 comment (1983).

[111] *See* Mercherle, *supra* note 108 (insurance defense work); DISPUTE MANAGEMENT MANUAL, *supra* note 108 (litigation for large corporations).

a client wants the lawyer to pursue illegal ends, baseless claims, speculative litigation, or other ethically questionable objectives. When a lawyer is paid for all time spent on the client's behalf, her economic self-interest dictates pursuance of any course of action the client requests.[112] Thus, a lawyer may avoid factual investigation that would establish that a client is using her services to perpetrate fraud, thereby requiring withdrawal from the representation.[113] Similarly, an hourly client may want her lawyer to assert baseless or highly speculative claims; to do so is in the lawyer's short-term economic interest although, in her professional judgment, these claims will fail. If a client could evaluate claims knowledgeably and objectively, her economic self-restraint might deter speculative or groundless litigation. Typically, however, clients are unable to do so, and must rely on advice of counsel.[114] Economic interests cannot determine these conflicts with ethical constraints and professional judgment. The lawyer must objectively evaluate whether the proposed conduct is legally permissible and in the client's long-term economic interest and share this assessment with the client. Desire to maximize fees is not a proper consideration. Moreover, regardless of client desires, the lawyer must refuse to assist with illegal conduct or groundless litigation.

2. Contingent Fee Arrangements

Contingent fees create inherent conflicts between a lawyer's and a client's economic interests,[115] although their economic interests are par-

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[112] Elihu Root reportedly once said, "The client never wants to be told he can't do what he wants to do; he wants to be told how to do it, and it is the lawyer's business to tell him how." R. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1947, at 667 (1946).

[113] This problem is exacerbated when a major paying client is involved. *See*, Taylor, *Ethics and the Law: A Case History*, N.Y. Times, Jan. 9, 1983, § 6 (Magazine), at 31, 33 [hereafter Taylor, *Ethics and Law*]. The Singer Hutner law firm has agreed to pay about $10 million to persons its client OPM defrauded, allegedly with the firm's unconscious assistance. OPM paid the firm $3.2 million in fees in 1980, which constituted 60% of the firm's annual income. The firm's investigation and evaluation of the situation, and subsequent ethical decisions, were heavily influenced by its desire to continue the financially rewarding representation.

[114] Clermont & Currivan, *supra* note 106, at 571.

[115] The profession has long disfavored contingent fees because of historical proscriptions against maintenance and champerty, and because of a suspicion that lawyers' financial self-interest discourages ethical behavior. *See id.* at 569-70. Contingent fees were first permitted, subject to restrictions, because the profession understood that many persons could not otherwise afford to assert valid legal claims. *See* CPR EC 2-20, 2-24, DR 2-106, 5-103; MODEL RULES 1.5, 1.8; J. AUERBACH, UNEQUAL JUSTICE

tially aligned. The lawyer is paid, if at all, only upon recovery for the client, and that payment increases with the size of the recovery. Because the financial risk is largely shifted to the lawyer, the contingent fee resembles profit and loss sharing among partners.

The alignment of economic interests is only partial; significant conflicts remain.[116] As a practical matter, clients who retain attorneys on a contingency basis lack the leverage to force their lawyers to expend a specific amount or type of effort. Therefore, the legal system must rely on other restraints to make the lawyer act in a client's best interest.[117] The lawyer's professional reputation, self-respect, and desire to avoid disciplinary or malpractice claims are the primary incentives to represent the contingent fee client competently.[118]

Because a client's contingent financial obligations become fixed at the end of a case, economic conflicts often surface when a settlement offer is presented.[119] These conflicts are heightened by the effect of delay on lawyer or client[120] and by offers of nonmonetary remedies. The law

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44-45 (1976). These clients were often poor or middle income, one-time consumers with personal injury claims who typically had limited bargaining power with their lawyers. That is no longer necessarily true; affluent individuals and business entities sometimes elect to pay their lawyers on a contingent rather than on an hourly basis.

[116] Clermont and Currivan explain:

> Although lawyer and client share a common interest in victory, misalignment exists with respect to the number of hours the lawyer should work. Because the client's net recovery varies directly with the gross recovery, and because the client must pay a fixed percentage fee without regard to the number of hours worked, the client's economic interests are best served when the lawyer devotes a very large number of hours to ensure the maximum settlement or judgment. However, the lawyer optimizes his own economic position by working a much smaller number of hours; direct economic incentive prods him to obtain a respectable settlement with relatively slight effort, thus securing for himself the maximum profit. Here again our legal system must rely on restraints other than direct economic incentive to make the lawyer act in the client's best interests.

Clermont & Currivan, *supra* note 106, at 536; *see also* D. ROSENTHAL, *supra* note 2, at 96-98.

[117] Clermont & Currivan, *supra* note 106, at 536.

[118] *See supra* text accompanying notes 94-102; *see also* note 195 and accompanying text.

[119] *See, e.g.*, Burt, *supra* note 100, at 1020-21 (some successful personal injury plaintiffs are suspicious of their lawyers because they are left with long-term physical disabilities and a portion of their "true financial due," while the lawyer enjoys the large fee in good health).

[120] The client may have immediate cash flow demands, while the lawyer does not. Clermont & Currivan, *supra* note 106, at 575. The reverse may also be true. *See infra* notes 172 & 180.

vests clients with authority over settlement decisions;[121] it is at this point that contingent fee clients have the greatest bargaining power with their lawyers. Conflict arises when a lawyer obtains a barely reasonable settlement offer that could be improved upon with a greater investment of time, thus reducing the lawyer's profit. In accepting a contingent fee arrangement, the lawyer has assumed both risk of loss and chance of gain; diminished profit from a case is therefore not a legitimate economic interest that can supersede the client's settlement authority. Unless the claim is meritless, the lawyer must proceed with the representation until the client is persuaded to accept a settlement or the case is tried.

The final dispute in contingent fee representations occurs when a lawyer determines that a claim is meritless or futile and the client wants to persist. At that point, the lawyer's and client's economic interests completely diverge. The client's sole contribution to the joint venture now appears worthless, and the client takes little risk by going forward. Because the lawyer bears the primary risk of loss, it is in her economic interest to stop working and consider withdrawing from the case.[122] In this situation, the lawyer's individuality and economic interests coincide with societal interests. Continued representation could damage one's professional reputation, violate ethical responsibilities, and impose an unreasonable financial burden.[123] Under the circumstances, a lawyer properly may override the client's wishes and withdraw, provided that reasonable steps are taken to protect the client's remaining interests.[124]

3. Flat Fee Arrangements

Legal representation based on flat fees is analogous to being paid for piecework in a production system. For a set price, typically paid in advance, the lawyer provides routine, limited services for a simple adoption, bankruptcy, divorce, or criminal charge. The fee offers cer-

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[121] *See* MODEL RULE 1.2(a) (1983), *infra* Appendix C; *infra* notes 172-78.

[122] It may not be in the lawyer's economic interest to withdraw immediately if the case can be settled for nuisance value with a minimum amount of effort by plaintiff's lawyer. If that is not feasible, it is in the lawyer's short- and long-term economic interest to withdraw, avoiding further investment in a losing proposition and the risk of suit for malicious prosecution.

[123] *See, e.g.*, CPR DR 7-102; MODEL RULE 3.1 (1983); Kirsch v. Duryea, 21 Cal. 3d 303, 309-11, 578 P.2d 935, 939-40, 146 Cal. Rptr. 218, 222-23 (1978) (not malpractice to withdraw from suit thought meritless); *infra* text accompanying notes 137-39 and *infra* note 217.

[124] *See* MODEL RULE 1.16(b)(5), (d) (1983), *infra* Appendix C.

tainty to middle- and low-income clients who may not want or need individualized and costly legal services.[125]

To maintain a profitable practice based on flat fees, a lawyer must handle a large volume of routine matters.[126] This is done in several ways. Some lawyers and clinics achieve increased efficiency and productivity by specializing in limited areas of practice, such as divorce or bankruptcy. Legal functions are standardized so that paralegal or clerical personnel and computers can do much of the work. Other attorneys cut corners and devote limited time to each matter, which often results in poor preparation and reduced quality of services.[127] Less reputable criminal defense lawyers handle large volumes of cases in an assembly-line fashion.[128] Their clients often are persuaded to accept unsatisfactory plea bargains based on misleading or incomplete advice.[129]

Flat fees certainly have the potential for a conflict between a lawyer's economic interests and a client's legal interests. The conflict may be latent in civil matters because routine procedures may not adequately determine whether a client has special needs that do not fit a standard package. Refined intake procedures, such as a questionnaire or interview format conducted by a paralegal, could better identify those persons who need more individualized services. An appropriate fee adjustment, contracted for in advance, could then account for any additional services.

For criminal matters, the resulting problems are intractable. The client has little bargaining power to resolve authority questions. The fee is paid up front and the client, who may be unsophisticated, is already compromised by the filing of criminal charges. If imprisonment results, the client is unable personally to voice dissatisfaction to the attorney.

C. Societal Interests in the Legal System

When only the lawyer's and the client's legitimate interests in individuality and economics are implicated, the participants are free to rec-

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[125] *See* B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES 42-43 (1970).

[126] *See generally id.* at 43-56.

[127] *See id.* at 42; Alschuler, *supra* note 37, at 1183-86.

[128] Alschuler points out the attractive economics of such behavior: some lawyers enter more than five guilty pleas daily, each for a fee ranging between $50 and $500. *Id.* at 1183-84; *see also* Jones v. Barnes, 103 S. Ct. 3308, 3318 (1983) (Brennan, J., dissenting) (flat fee encourages swift disposition).

[129] Since many of these lawyers are known as "pleaders" who never try a case, prosecutors have no incentive to make concessions. *See* Alschuler, *supra* note 37, at 1185-86.

oncile such conflicts without external constraints. That freedom is restricted when a client's choice conflicts with certain societal interests. The legal system is designed to maintain public order and to facilitate orderly private transactions and dispute resolution. Long-term preservation of the system requires voluntary cooperation which, in turn, requires public trust in its essential fairness.[130] Society has vested the legal profession with a virtual monopoly over this system. The profession's collective societal responsibility is given substance by declaring each lawyer an officer of the legal system required to demonstrate respect for the system and to use its procedures only for legitimate purposes.[131] Accordingly, in every client-lawyer relationship, whether or not involving litigation, the lawyer acts both as agent for the client and as principal with special responsibilities for fairness and the integrity of the legal system.[132] Beyond such general affirmative duties, each lawyer has limited mandatory duties to further these societal interests. A lawyer must not knowingly make false statements of fact or law,[133] or knowingly counsel or assist a client in criminal or fraudulent activity,[134] and shall not take actions lacking substantial purpose other than to embarrass, delay, or burden a third person.[135] Each proscription is aimed at enhancing public trust and cooperation so that persons continue to use the established mechanisms and do not resort to extralegal resolution of their problems.

Adversary rules reflect societal interests in legitimate, accurate, and expedient determinations. When the process is abused, society and litigants suffer unnecessary costs, delays, and loss of respect for the legal machinery.[136] As principal, the advocate must protect societal interests in at least three areas: preventing meritless claims and contentions, ex-

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[130] *See generally*, Wall St. J., Oct. 11, 1983, at 1, col. 1.

[131] MODEL RULES Preamble (1983).

[132] *See generally* Denecke, *The Dilemma of the Virtuous Lawyer or When Do You Have to Blow the Whistle on Your Client?*, 1979 ARIZ. ST. L.J. 245, 246 (maintaining that lawyers have a built-in conflict of interest because they always have two masters, client and public); Patterson, *supra* note 7, 925-27, 960-69.

[133] MODEL RULE 4.1 (1983).

[134] MODEL RULE 1.2(e) (1983), *infra* Appendix C. *See generally* Brown, *Counsel with a Fraudulent Client*, 17 REV. SEC. REG. 909 (1984); Note, *Professional Responsibility: Model Rule 1.6: New Limitations on the Ethical Attorney with an Unethical Client*, 36 OKLA. L. REV. 925 (1983).

[135] MODEL RULE 4.4 (1983).

[136] *See* Bennett v. Unger, 272 Cal. App. 2d 202, 211, 77 Cal. Rptr. 326, 332 (1969) (appeal without merit; sanctions imposed); Cann, *Frivolous Lawsuits — The Lawyer's Duty to Say "No"*, 52 U. COLO. L. REV. 367, 368 (1981).

pediting the process, and promoting candor to the tribunal.[137] A lawyer may advance only nonfrivolous claims for which good faith arguments are available.[138] Federal courts enforce this duty through the requirement in Federal Rule of Civil Procedure 11 that a lawyer sign each pleading or filing, certifying the lawyer's "belief formed after reasonable inquiry [that the filing] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law."[139] Next, lawyers must make reasonable efforts to expedite litigation consistent with a client's legitimate interests.[140] Tactics serving no substantial purpose other than delay are prohibited.[141] Finally, lawyers have a duty of candor to the tribunal to further society's interest in accurate determinations. A lawyer may not knowingly use false evidence, or fail to disclose a client's perjury or controlling adverse precedent.[142] No litigant can demand a lawyer's assistance to violate these responsibilities.

IV. Joint Venture Model: Decisionmaking Framework

This Article has thus far explored the theoretical foundations and rationales for a joint venture authority model. Since the earliest professional regulation, the lawyer's authority has been uncertain, although greater than that of an ordinary agent subject to the principal's control over conduct and manner of performance.[143] Professor Patterson has

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[137] *See* Teitelbaum, *The Advocate's Role in the Legal System*, 6 N.M.L. Rev. 1, 16-19 (1975).

[138] Model Rule 3.1 (1983).

[139] Fed. R. Civ. P. 11.

[140] Model Rule 3.2 (1983).

[141] *Id.*; *see also* Fed. R. Civ. P. 11, 26.

[142] Model Rule 3.3 (1983).

[143] *See generally* Patterson, *supra* note 7, at 913; *supra* text accompanying notes 6-35. The Restatement (Second) of Agency provides:

> § 14. Control by Principal
> A principal has the right to control the conduct of the agent with respect to matters entrusted to him.
>
> . . .
>
> § 385. Duty to Obey
> (1) Unless otherwise agreed, an agent is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform.
> (2) Unless he is privileged to protect his own or another's interests, an agent is subject to a duty not to act in matters entrusted to him on account of the principal contrary to the directions of the principal, even though the terms of the employment prescribe that such directions shall not be given.

found in the Hoffman-Sharswood materials the historical basis for a model of "reciprocal agency in which both parties have both superior and subordinate positions."[144]

The client-principal has presumptive authority over all substantial legal rights, which are determined by the substantive law and limited by the lawyer's duties to the legal system. A client can only direct the lawyer-agent to do that which is lawful, and cannot demand assistance that is criminal, fraudulent, or violates the rules of the legal system. The lawyer-agent first identifies the client's legal rights and duties. Then, as principal, the lawyer is presumptively authorized to decide what actions may be taken to implement those rights and duties.[145] A lawyer's authority as principal is largely over procedural matters: how to achieve a client's objectives competently within ethical constraints and established legal mechanisms.

Such a general statement cannot adequately predict authority over specific decisions. Case analysis suggests presumptive spheres of authority that overlap and vary as the circumstances warrant.[146] Although opinions recite broad dicta that one party has authority for certain types of decisions, the courts' dispositions of similar disputed decisions are often inconsistent. These apparent inconsistencies reflect significant judicial ambivalence about authority questions. Like most areas of law, the law of professional responsibility is inherently fact-specific. The representation context and the specific type of decision define the presumptive spheres of authority. This presumption is rebuttable by one or more additional variable factors. Predictions about final location of authority can only be made with reference to the formation, progress, and expected duration of the client-lawyer relation, the client's identity, and timing considerations. The chart in Appendix D roughly classifies each of these variables and their impact on a court's probable evaulation of a disputed authority question. Even with consideration of these factors, prediction of authority involves some risk of error because each client-lawyer relationship is unique.

RESTATEMENT (SECOND) OF AGENCY §§ 14, 385 (1958) [hereafter RESTATEMENT 2D].

[144] Patterson, *supra* note 7, at 926.

[145] *See id.* at 964-65.

[146] The theoretical framework of presumptive spheres of authority which are rebutted by the variable factors is suggested by the cases surveyed in Part IV, *infra* notes 152-281.

A. Presumptive Spheres of Authority and Variable Factors

1. Representation Context

The representation context determines the presumptive spheres of authority.[147] Outside of litigation, clients have the greatest control over the objectives and means of their pursuit. In civil litigation, courts traditionally allocate decisions of substance or those that are obviously outcome-related to the client. Procedural and tactical decisions are allocated to the lawyer. An overlap zone embraces litigation decisions that are not readily classified as objectives or means. In civil litigation there is overlap between procedural decisions affecting substantive rights, and substantive decisions implicating a lawyer's professional obligations and other legitimate interests. Criminal defense is a hybrid representation because of constitutional protections. A defendant has final authority over which plea to enter, whether to waive jury trial, and whether to testify. Counsel is presumptively authorized to decide the strategy and conduct of the defense. Most criminal defense decisions fall within the overlap zone because they are to be made only after consultation and are subject to mutual decisionmaking authority. The very existence of an overlap zone for litigation decisions suggests defects in the traditional formula.

2. Nature of Decision

The nature of the decision is the next most important variable. Three criteria are relevant to the presumptive authority over a particular decision: Traditional allocation of authority, third party reliance on the decisionmaker's putative authority, and whether the decision involves moral, legal, or financial risk. Allocation of authority over certain types of decisions generally defines the presumptive spheres of authority. From it, third parties, courts, and agencies derive a basis for assessing and relying on a lawyer's authority. Even when a lawyer exceeds actual authority, risk analysis may require the client to bear the consequences.[148] The second criterion also raises issues of apparent authority, ratification, and the legal system's concern for finality of

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[147] The contexts are suggested by Rule 1.2 and the cases. This analysis excludes representations by government lawyers, who must make decisions that would otherwise be made by a client.

[148] *See* RESTATEMENT 2D, *supra* note 142, § 49. A court's determination of authority may differ when a dispute is between a client and a third party or between lawyer and client.

judgments.

The client usually bears the consequences of decisions involving legal, moral, or financial risk, and therefore, has authority over those choices. These include legally risky decisions relating to the outcome of representation, for example, whether to forego a valid claim or defense, and morally risky decisions affecting the client's personal interests, reputation, or third parties. Thus, the client bears the moral risk and has final authority in matters concerning breach of contract, divorce settlement, and estate planning. Lawyers bear moral and legal risk and have principal authority for issues relating to the legitimacy of the legal system, such as creation and use of documents, spurious or inflammatory claims, and perjured or deceptive testimony.

3. Specific Client-Lawyer Relationships

Client-lawyer relationships, like all interpersonal relationships, are affected by how they start, their progress, and their expected duration. A lawyer representing a client in a single, discrete matter has less authority than one who has represented a client continuously for an extended time. In a first-time representation, authority is inherently tentative because the parties have limited shared experience upon which to base reciprocal trust and confidence. Persons outside the relationship cannot justifiably assume that the lawyer has any greater authority than warranted by the subject of the representation. An assumption of greater authority may be justified when a long-term or extensive representation is involved. A continuous relation is founded on past experiences and future expectations; its stability depends on consensus and mutual respect for the proper bounds of authority. The lawyer's actual or apparent authority to bind the client may thereby be increased.

4. Client Identity

Model Rule 1.4 requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions. Client identity affects how much explanation is necessary. Individual, unsophisticated clients may need basic explanations before making most decisions; sophisticated clients may need little or no explanation of routine decisions and may require full explanation only for complex matters.

5. Timing Considerations

The timing variable has two elements: whether there was time for deliberation before making the decision,[149] and when the client first objects to the attorney's action.[150] The lawyer has less authority over significant issues that can be anticipated since the client can be consulted in advance of decision. The lawyer has greater authority to act in emergencies. However, true emergencies are rare. Litigation presents instantaneous questions which the lawyer is authorized to decide alone, such as evidentiary objections, questions to witnesses, last-minute strategy choices, and specific legal arguments.

The timing of a client's objection frequently determines whether a lawyer's decision will be upheld. A litigant cannot acquiesce when objection would be reasonable and successfully protest later if dissatisfied with the outcome. Courts uphold many decisions to further judicial economy and stable judgments. Conversely, courts often protect the legitimate interests of a client who contemporaneously objects to the lawyer's action.

B. Testing the Model

The balance of this Article tests the joint venture model by examining how courts treat authority disputes.[151] It is organized by representa-

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[149] *See id.* § 47.

[150] *Id.* § 43.

[151] This analysis omits two kinds of cases: (1) those in which a lawyer participated in a client's criminal or fraudulent conduct or in which sufficient facts gave the lawyer notice to inquire whether a transaction was prohibited; and (2) those in which the lawyer's authority is challenged by someone other than the client or a disciplinary agency. The first group is irrelevant to the legal scope of authority because no client can demand such assistance and because no lawyer can provide it without risking criminal, civil, or disciplinary liability. The second group is excluded because notions of standing undoubtedly affect a court's treatment of authority.

An inherent selection bias warrants a preliminary caveat. Any collection of cases on authority automatically gives a distorted view of client-lawyer relationships. Satisfied clients lack motivation or occasion to challenge a lawyer's decision. Most cases arise out of litigation because there is a readily accessible forum to hear a challenge. On appeal, represented by new counsel, a losing litigant has the motive and the opportunity to dispute prior counsel's authority. Convicted defendants have obvious incentives to contend that trial counsel exceeded the proper authority. When in prison they have ample time, and perhaps the legal resources, to petition for habeas corpus relief based on ineffective assistance of counsel.

Authority disputes arising out of office lawyering usually are not brought to the attention of an external tribunal. They may be compromised, go unremedied, or result in dissolution of the client-lawyer relationship. Reported decisions are often in the con-

tion contexts: office lawyering not involving litigation, civil litigation, and criminal defense work.

1. Office Lawyering — Nonlitigation Representations

Although nonlitigation representations are prevalent, authority disputes in this context seldom result in litigation. Office lawyering is diverse, encompassing a one-shot representation on a discrete matter as well as a lawyer's continuous, close involvement with many of a client's legal and business affairs. Thus, authority determinations for this group are especially fact-specific.

Clients outside the litigation context have the greatest authority to direct and control their lawyers' actions. Initially, the lawyer must obtain and communicate all relevant legal and factual information necessary for the client's informed choice of action. The lawyer then performs those tasks necessary to carry out the client's decision, complying with any express instructions. The Model Rules' means-objectives dichotomy is least applicable to this context, in which means are often closely intertwined with overall objectives.

Office lawyering is a contractual relationship defined by the parties' agreement about the services to be provided. A lawyer's responsibilities may be limited to the preparation of legally sufficient documents, with no concern for the underlying reasonableness of a transaction.[152] The client may seek representation for any lawful purpose, although the lawyer may decline to provide services deemed unreasonable or imprudent.[153] The client must be informed if the lawyer will not provide ser-

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text of disciplinary proceedings or actions for the lawyer's negligence or breach of contract. These cases often involve extreme variations from the acceptable practice of law and depict a special malpractice jurisdiction for lawyers.

Case law does not accurately depict the customary or proper scope of client-lawyer authority. Some types of representations, e.g., those involving corporate work, estate planning, securities, labor relations, employment, and government work, seldom appear in reported cases. Other factors may also contribute to the selection bias: lawyers in those areas may assume they have less freedom of action, feel constrained by client choices, and therefore consult their clients more regularly. *See also* Laumann & Heinz, *supra* note 37, at 206.

[152] *Compare* Grand Isle Campsites, Inc. v. Cheek, 249 So. 2d 268, 273 (La. Ct. App. 1971) (lawyer retained only for document preparation not liable to real estate venturers for secret profit) *with* Practical Offset, Inc. v. Davis, 83 Ill. App. 3d 566, 570-71, 404 N.E.2d 516, 520 (1980) (lawyer retained "to consummate" sale of business liable for negligent failure to ensure financing statement properly filed).

[153] *See, e.g.*, Lucas v. Ludwig, 313 So. 2d 12, 15 (La. Ct. App. 1975) (lawyer and client jointly liable for tortious invasion of privacy; lawyer should advise client when proposed conduct might be unreasonable).

vices in the client's suggested manner so that alternate choices can be made.[154] Failure to comply with a client's specific lawful instructions may render the lawyer liable for resulting damages based on contract, tort, or breach of fiduciary duties.[155]

Authority disputes often are litigated when a third party allegedly relied on a lawyer's putative authority. The client retains principal authority over the subject matter; mere retainer does not authorize a lawyer to make a contract,[156] alter its terms, grant time extensions,[157] or otherwise waive the client's rights.[158] A lawyer's acts are imputed to the client when performed in furtherance of and reasonably within the scope of the matter entrusted to the lawyer.[159] The prior course of dealing may expand a lawyer's authority beyond its usual scope.[160]

2. Civil Litigation

Most reported authority disputes arise in the litigation context; unsuccessful clients can easily decide they are dissatisfied and raise claims

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[154] *See, e.g.*, Committee on Legal Ethics of State Bar v. Smith, 156 W. Va. 471, 477, 194 S.E.2d 665, 669 (1973) (reprimanded for failure to take immediate action per client instructions; personal problems no excuse for delay).

[155] *See, e.g.*, Olfe v. Gordon, 93 Wis. 2d 173, 184-85, 286 N.W.2d 573, 578 (1980) (lawyer may be sued for losses resulting from failure to properly draft mortgage documents consistent with client's instructions); Heyer v. Flaig, 70 Cal. 2d 223, 229, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969) (malpractice liability for failing to fulfill client's testamentary directions).

[156] *See, e.g.*, McCune v. F. Alioto Fish Co., 597 F.2d 1244, 1248 n.2 (9th Cir. 1979) (client bound by covenant absent claim attorney overstepped authority); Rushing v. Garrett, 375 So. 2d 903, 906 (Fla. Dist. Ct. App. 1979) (no binding contract when attorney without authority to set price); Erickson v. Civic Plaza Nat'l Bank, 422 S.W.2d 373, 378-79 (Mo. Ct. App. 1981) (attorney without authority to contract for stock subscription).

[157] *See, e.g.*, Ashworth v. Hankins, 248 Ark. 567, 572, 452 S.W.2d 838, 841 (1970) (lawyer without authority to extend time for payment on installment land contract); Mattco, Inc. v. Mandan Radio Ass'n, 246 N.W.2d 222, 228 (N.D. 1976) (no authority to extend time to exercise preemptive right).

[158] *See, e.g.*, Ashworth v. Hankins, 248 Ark. 567, 572, 452 S.W.2d 838, 841 (1970) (lawyer without authority to extend time for payment on installment land contract).

[159] *See, e.g.*, Watson v. United Farm Agency, 165 Colo. 439, 444, 439 P.2d 738, 741 (1968) (letter concerning sale of property; lawyer's apparent authority will bind client); Allen v. Nissley, 184 Conn. 589, 440 A.2d 231, 234 (1981) (general rule may yield to special circumstances presented by lawyer's intentional neglect or fraud on the client and absence of harm to third party) (dictum).

[160] Clear View Estates, Inc. v. Veitch, 67 Wis. 2d 372, 378-79, 227 N.W.2d 84, 88-89 (1974) (prior course of dealing authorized lawyer's waiver of time for performance in option contract).

in the course of litigation. The reciprocal agency joint venture model operates most clearly in civil litigation. The client is principal in matters relating to substantive rights and duties, but these rights and duties are limited and defined by the law and its procedures.[161] The lawyer is principal with authority to assess the law and determine the process by which the client's rights or duties are protected or implemented. A litigator's scope of authority is determined by agency principles.[162] The client has a fundamental right to decide whether to be represented by counsel[163] and to determine the duration of the agency relationship.[164] Lawyer and client may agree to circumscribe or expand the lawyer's usual authority over litigation.[165]

a. Client Authority

The client has exclusive control over the cause of action and the subject matter of litigation; a lawyer may not impair, compromise, settle, or surrender the claim without the client's consent.[166] As principal, the client determines whom to sue,[167] the amount to claim,[168] whether to

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[161] Patterson, *supra* note 7, at 964-65.

[162] *Cf.* Brinkley v. Farmers Elevator Mut. Ins. Co., 485 F.2d 1283, 1286 (10th Cir. 1973) (although rules of agency apply to client-attorney relationship, client not liable for attorney negligence in areas outside scope of authority).

[163] *See, e.g.*, Harrison v. Keystone Coca-Cola Bottling Co., 428 F. Supp. 149, 152-53 (M.D. Pa. 1977) (client may select family member to represent him); *In re* Parzino, 22 Wash. App. 88, 90, 587 P.2d 201, 202 (1978) (attorney may not appeal on behalf of client if guardian opposes).

[164] *See, e.g.*, McLaughlin v. McLaughlin, 427 S.W.2d 767, 768-69 (Mo. Ct. App. 1968) (discharged attorney unauthorized to prosecute a motion for allowances *pendente lite*).

[165] Brinkley v. Farmers Elev. Mut. Ins. Co., 485 F.2d 1283, 1285-86 (10th Cir. 1973) (insurance carrier reserved only decision to settle or try cases); Delta Equip. & Constr. Co. v. Royal Indem. Co., 186 So. 2d 454, 458 (La. 1966) (representation limited to workers' compensation claims).

[166] *See, e.g.*, Price v. McComish, 22 Cal. App. 2d 92, 97, 70 P.2d 978, 980 (1937) (quoting 6 CORPUS JURIS § 147 (1916)); *see also* Bommarito v. Southern Canning Co., 208 F.2d 56, 60-61 (8th Cir. 1953) (attorney could not waive contract condition); Lewis v. Atlas Corp. 158 F.2d 599, 603 (3d Cir. 1946) (same); Graves v. P.J. Taggares Co., 94 Wash. 2d 298, 303-06, 616 P.2d 1223, 1227 (1980) (attorney may not waive client's right to jury trial); 7A C.J.S. *Attorney & Client* § 191 (1980).

[167] *See, e.g.*, Pierce v. Terra Mar Consultants, 566 S.W.2d 49, 53 (Tex. Civ. App. 1978) (reinstatement of improperly nonsuited action).

[168] *See, e.g.*, Price v. McComish, 22 Cal. App. 2d 92, 97, 70 P.2d 978, 980 (1937) (decision to accept amount tendered as settlement rests with client); Coro Fed. Credit Union v. Cameo Club of Newport, 91 R.I. 131, 133, 161 A.2d 410, 411 (1960) (attorney not authorized to determine amount of claim against defendant).

appeal,[169] and whether to accept a compromise settlement. However, when a client has led others to rely justifiably on a lawyer's apparent authority, the client may be estopped from asserting that the actions were unauthorized.[170]

Settlement authority is frequently disputed. This is due in part to lawyers' access to client funds and financial incentives for abuse.[171] Unauthorized settlements are common bases for lawyer discipline[172] or malpractice claims.[173] A lawyer has no inherent authority to enter a binding settlement for a client.[174] As a matter of law, good faith settlement offers must be disclosed and discussed with the client.[175] Although

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[169] *See, e.g.*, Hawkeye-Security Ins. Co. v. Indemnity Ins. Co., 260 F.2d 361, 363 (10th Cir. 1958) (insurance carrier not liable for client's decision to appeal); *In re* Parzino, 22 Wash. App. 88, 90, 587 P.2d 201, 202 (1978) (court appointed attorney may not appeal when client's guardian objects).

[170] *See, e.g.*, Arizona Title Ins. & Trust Co. v. Pace, 8 Ariz. App. 269, 271-72, 445 P.2d 471, 473-74 (1968) (client bound if reasonable person would believe attorney authorized to settle); Yanchor v. Kagan, 22 Cal. App. 3d 544, 549, 99 Cal. Rptr. 367, 370-71 (1971) (client bound by attorney promise not to recover since attorney acted under client's authority); Union Cent. Life Ins. Co. v. Anderson, 291 Ill. App. 423, 435-36, 10 N.E.2d 46, 52 (1937) (client bound by authorized settlement offer made by attorney).

[171] *See supra* text accompanying notes 103-24.

[172] *See, e.g.*, Silver v. State Bar, 13 Cal. 3d 134, 528 P.2d 1157, 117 Cal. Rptr. 821 (1974) (suspension); *In re* Dombrowski, 71 Ill. 2d 445, 376 N.E.2d 1007 (1978) (suspension); *In re* Montrey, 511 S.W.2d 805 (Mo. 1974) (suspension); *In re* Stern, 81 N.J. 297, 406 A.2d 970 (1979) (disbarment).

[173] *See, e.g.*, Rogers v. Robson, Masters, Ryan, Brumund & Belom, 81 Ill. 2d 201, 205, 407 N.E.2d 47, 49 (1980) (attorney's duty to disclose settlement intentions to client); Joos v. Auto-Owners Ins. Co., 94 Mich. App. 419, 424, 288 N.W.2d 443, 445 (1979) (same).

[174] *See, e.g.*, Daly v. Bright, 413 F. Supp. 28, 30 (E.D. Pa. 1975) (conditional acceptance by lawyer not binding on client); National Bread Co. v. Bird, 226 Ala. 40, 42, 145 So. 462, 463 (1933) (compromise of personal injury action required express client authority); Burns v. McCain, 107 Cal. App. 291, 294, 290 P. 623, 625 (1930) (client not bound by compromise despite general authority given attorney); Cole v. Myers, 128 Conn. 223, 227-28, 21 A.2d 396, 398 (1941) (compromise binding on client only when previously authorized or subsequently ratified); Garnet v. D'Alonzo, 55 Pa. Commw. 263, 265-66, 422 A.2d 1241, 1242 (1980) (improper settlement of medical malpractice action); May v. Siebert, 264 S.E.2d 643, 647 (W. Va. 1980) (attorney who withdrew only entitled to fraction of fee).

[175] *See, e.g.*, Harrop v. Western Airlines, 550 F.2d 1143, 1145 (9th Cir. 1977) (attorney may not settle without express authority); Joos v. Auto-Owners Ins. Co., 94 Mich. App. 419, 424, 288 N.W.2d 443, 445 (1979) (failure to disclose settlement offer to client malpractice); Lieberman v. Employers Ins. of Wausau, 84 N.J. 325, 341-42, 419 A.2d 417, 424-25 (1980) (attorney liable for damages from improper settlement). *The Verdict*, a popular 1982 film, depicted attorney malpractice by the failure to relay

some courts have upheld retainers that expressly permit settlement by the lawyer,[176] such agreements are construed narrowly.[177] A client's authorization for the lawyer to negotiate does not imply authorization to enter a binding agreement.[178] A retainer agreement authorizing settlement without first consulting the client may violate the lawyer's duty of loyalty to the client.[179] However, even though a lawyer is without inherent settlement authority, apparent authority may be implied from a course of dealing[180] or upheld by subsequent ratification[181] when necessary to protect a third party's reasonable reliance.

b. Lawyer Authority

Upon hiring a lawyer for litigation representation the client relinquishes control over procedural and tactical issues.[182] The cases are re-

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a good faith settlement offer to the clients.

[176] *See, e.g.*, Johnston v. Cox, 114 Fla. 243, 247, 154 So. 206, 207 (1934) (contract employing attorney to perfect title sufficient to authorize settlement); Allen v. Fewel, 337 Mo. 955, 960, 87 S.W.2d 142, 145 (1935) (client who authorizes lawyer to compromise lawsuit bound unless settlement grossly unfair).

[177] *See, e.g.*, Rushing v. Garrett, 375 So. 2d 903, 906-08 (Fla. Dist. Ct. App. 1979) (attorney's representation for land sale not binding contract); Bursten v. Green, 172 So. 2d 472, 475 (Fla. Dist. Ct. App. 1965) (authority to negotiate settlement not absolute; client must approve).

[178] *See, e.g.*, Bursten v. Green, 172 So. 2d 472, 474-75 (Fla. Dist. Ct. App. 1965) (authority to negotiate settlement not absolute; client must approve); Johnson v. Tesky, 643 P.2d 1344, 1347-48 (1982) (same).

[179] *See, e.g.*, Hayes v. Eagle-Picher Indus., 513 F.2d 892, 894 (10th Cir. 1975) (shareholder-clients' agreement to abide by majority decision violated public policy by delegating lawyer authority to act disloyally and against a client's interest).

[180] *See, e.g.*, Patterson v. Southern Ry., 41 Ga. App. 94, 96-97, 151 S.E. 818, 819 (1930) (long-term representation with lawyer handling all of certain claims; client ratified attorney's settlement by not challenging authority).

[181] *See, e.g.*, Williams v. International Ass'n of Machinists, 484 F. Supp. 917, 919-20, (S.D. Fla.) (failure to protest settlement within reasonable time), *aff'd*, 617 F.2d 441 (5th Cir. 1978), *cert. denied*, 449 U.S. 840 (1980); City of Fresno v. Baboian, 52 Cal. App. 3d 753, 757, 759-60, 125 Cal. Rptr. 332, 334, 336 (1975) (clients ratified settlement by contesting amount credited by payments to absconding lawyer); Nagymihaly v. Zipes, 353 So. 2d 943, 944 (Fla. Dist. Ct. App. 1978) (clients ratified settlement by accepting consideration and failing to repudiate agreement within reasonable time).

[182] *See, e.g.*, Zurich Gen. Accident & Liab. Ins. Co. v. Kinsler, 12 Cal. 2d 98, 104-07, 81 P.2d 913, 917-18 (1938) (attorney had implied authority to ask for jury trial); Evans v. Power County, 50 Idaho 690, 705-06, 1 P.2d 614, 620 (1931) (execution sale within scope of authority); Shores Co. v. Iowa Chem. Co., 222 Iowa 347, 349-51 268 N.W. 581, 582-83 (1936) (attorney may waive jury trial).

plete with references to the lawyer's plenary powers in litigation.[183] The advocate is principal with authority to act in the manner deemed necessary, legal, and professional.[184] Actions reasonably within the scope of the agency are binding on the client,[185] even when negligent or mistaken.[186] This power continues until the lawyer is discharged,[187] the client openly disavows the lawyer's authority,[188] or the purpose of the representation is accomplished.[189] Often a client bears the harsh consequences of her lawyer's tactical errors, inadvertence, or incompetence,[190] since courts rarely grant relief from the results of a lawyer's mistake or negligence.[191]

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[183] Overbroad dictum in Zurich Gen. Accident & Liab. Ins. Co. v. Kinsler, 12 Cal. 2d 98, 105-06, 81 P.2d 913, 917 (1938), describes the scope of an attorney's authority:

> [It] is well established law that the attorney has complete charge and supervision of the procedure that is to be adopted and pursued in the trial of an action . . . . [A]nd such acts, in the absence of fraud, will be binding on the client, though done without consulting him, *and even against his wishes* (emphasis in original, citation omitted).

[184] *See, e.g.*, Rosa v. Oliveira, 115 R.I. 277, 287, 342 A.2d 601, 606 (1975) (lawyer authorized to enter pretrial order, waive jury trial, and attend pretrial conferences).

[185] *See, e.g.*, Evans v. Power County, 50 Idaho 690, 705-06, 1 P.2d 614, 620 (1931) (execution of sale within scope of authority); Shores Co. v. Iowa Chemical Co., 222 Iowa 347, 349-51, 268 N.W. 581, 582-83 (1936) (waiver of jury within scope of authority). However, the lawyer's authority is limited to those matters within the scope of the proceedings. *See, e.g.*, Lyon v. Hires, 91 Md. 411, 421-22, 46 A. 985, 987 (1900) (lawyer's letter during negotiations not party admission since beyond scope of authority).

[186] *See, e.g.*, Link v. Wabash R.R., 370 U.S. 626 (1962) (affirmed dismissal based on lawyer's failure to appear at pretrial conference; client bound by acts and omissions of freely selected agent); Paras v. City of Portsmouth, 115 N.H. 63, 67, 335 A.2d 304, 307 (1975) (client bound by attorney acts, even negligence, if within scope of authority).

[187] *See* McLaughlin v. McLaughlin, 427 S.W.2d 767, 768-69 (Mo. Ct. App. 1968) (discharged attorney unauthorized to prosecute *pendente lite* suit).

[188] *See, e.g.*, Linsk v. Linsk, 70 Cal.2d 272, 280, 449 P.2d 760, 765, 74 Cal. Rptr. 544, 549, (1969) (lawyer acted outside scope of authority when stipulating over client's expressed objections that judgment could be made on basis of record).

[189] *See, e.g.*, Schwarze v. May Dep't Stores, 360 S.W.2d 336, 338-39, (Mo. Ct. App. 1962) (attorney's authority ended when first suit dismissed; client not liable for malicious prosecution arising out of attorney's later actions); Dillard v. Broyles, 633 S.W.2d 636, 643 (Tex. Ct. App. 1982) (no attorney-client relationship after sale of real estate completed).

[190] *See, e.g., infra* note 191.

[191] *Compare* Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962) (no relief from dismissal for client whose lawyer failed to appear at pre-trial conference), Blamer v. Gagnon, 19 Ariz. App. 55, 57, 504 P.2d 1278, 1280 (1973) (failure of lawyer to retain client's right to damages for personal injuries in release form binding on client), Rail-

Nevertheless, the lawyer's broad authority is justified. Effective operation of the adversary system requires that courts and litigants be able to rely and act upon the decisions made by a lawyer during litigation.[192] Societal interests in expedient, accurate, and legitimate determinations dictate the process for resolution of claims. At the conclusion of litigation, the interests in certainty and finality of judgments require that the lawyer's professional judgments be upheld. This allocation does not strip the client of all authority to act as principal in litigation. A client is entitled to competent and loyal representation and to consultation about basic procedural and tactical choices. When the lawyer's efforts at persuasion fail, a client can openly object that the lawyer is unauthorized to take specific action[193] and can ultimately discharge the lawyer. After final judgment, the client has no recourse from the lawyer's tactical decision about the conduct of the case.[194] If, however, the lawyer breaches duties of competence or loyalty, malpractice liability may ensue.[195]

A retainer to litigate a matter may impliedly authorize a lawyer to

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way Express Agency v. Hill, 250 A.2d 923, 925 (D.C. 1969) (lawyer's disregard of client's interests that results in dismissal does not entitle client to automatic relief from judgment), Henney v. Henney, 605 P.2d 503, 504-06 (Idaho 1979) (no relief from lawyer's negligence that allowed excessive support decree), State *ex rel.* Peoples Nat'l Bank & Trust Co. v. DuBois Circuit Court, 250 Ind. 38, 570, 41-42, 233 N.E.2d 177, 178 (1968) (lawyer's failure to appeal binding on client) *and* Paras v. City of Portsmouth, 115 N.H. 63, 67, 335 A.2d 304, 307 (1975) (no relief for lawyer's failure to appeal tax commission's decision denying abatement petition) *with* Citizens Bldg. & Loan Ass'n of Montgomery County v. Shepard, 289 A.2d 620, 623 (D.C. 1972) (granted Rule 60(b)(6) motion for relief of judgment based on lawyer's gross neglect and misleading assurances that lulled client into inaction) *and* Graves v. P.J. Taggares Co., 94 Wash. 2d 298, 616 P.2d 1223 (1980) (without consulting client, defense counsel withdrew jury trial demand, requested continuance, conceded vicarious liability, and did not depose plaintiff claiming soft tissue injury; judgment remanded for new trial.)

[192] *See, e.g.*, Laird v. Air Carrier Engine Serv., 263 F.2d 948, 953-54 (5th Cir. 1959) (purpose of pretrial conferences would be frustrated if lawyers lacked authority to make stipulations); Duffy v. Griffith Co., 206 Cal. App. 2d 780, 787-88, 24 Cal. Rptr. 161, 165 (1962) (attorney given broad discretion to bind client in matters pertaining to regular conduct of case).

[193] *See, e.g.*, Linsk v. Linsk, 70 Cal. 2d 272, 280, 449 P.2d 760, 765, 74 Cal. Rptr. 544, 549 (1969) (client's expressed objection to procedural stipulation rebutted presumption of lawyer authority).

[194] *See, e.g.*, Woodruff v. Tomlin, 616 F.2d 924, 930, 932-34 (6th Cir. 1980) (no malpractice liability for tactical decisions made in exercise of professional judgment).

[195] *See, e.g., id.* at 933-37 (failure to interview potential witnesses, raise relevant statutes, and advise of conflict). *See generally* Mallen, *Recognizing and Defining Legal Malpractice*, 30 S.C.L. REV. 203 (1979).

accept service of process,[196] to waive jurisdictional defects,[197] to waive technical filing errors,[198] to grant extensions of time for filing deadlines,[199] or to consent to a preliminary injunction.[200] Such implied authority is not determined in a vacuum. One must evaluate the relative importance of a decision, whether the lawyer exceeded the reasonable scope of authority, or acted contrary to express instructions. Often client acquiescence to a manner of proceeding is combined with the lawyer's presumptive authority over procedural issues so as to insulate sensitive decisions from successful challenge.[201] Thus, courts have upheld a lawyer's decision to waive jury trial,[202] to proceed in arbitration,[203] to proceed without a court reporter,[204] and to rest the case.[205] The lawyer also has inherent authority to make professional judgments about presentation of evidence[206] and choices among claims and arguments.[207]

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[196] *See, e.g.*, United States v. Bosurgi, 343 F. Supp. 815, 817-18 (S.D.N.Y. 1972) (attorney not client's agent for service of process unless expressly or impliedly authorized).

[197] *See, e.g.*, State v. Weinstein, 411 S.W.2d 267, 272 (Mo. Ct. App. 1967) (general entry of appearance).

[198] *See, e.g.*, Union Storage & Transfer Co. v. Smith, 79 N.D. 605, 612, 58 N.W.2d 782, 786 (1953) (timely filing of complaint waived when lawyer received copy before filing).

[199] *See, e.g.*, Cahaley v. Cahaley, 216 Minn. 175, 180, 12 N.W.2d 182, 185 (1943) (lawyer authorized to extend filing deadline but must do so in good faith without endangering client's substantive rights).

[200] *See, e.g.*, Rosa v. Oliveira, 115 R.I. 277, 287, 342 A.2d 601, 606 (1975) (attorney authorized to take steps deemed legal, professional, and necessary).

[201] Courts' aversion to second-guessing lawyers' professional judgments is often the basis for upholding litigation decisions. Clients' participation and acquiescence stops them from later successful challenges; otherwise losing litigants could always find bases for disputing their lawyers' choices.

[202] *See, e.g.*, Shores Co. v. Iowa Chem. Co., 222 Iowa 347, 352-53, 268 N.W. 581, 583-84 (1936) (attorneys had authority to waive jury trial for difficult case). Authority over civil jury trial demands is an open question. *Compare* Zurich Gen. Accident & Liab. Ins. Co. v. Kinsler, 12 Cal. 2d 98, 105-07, 81 P.2d 913, 915 (1938) (lawyer could demand jury trial; client's discharge of lawyer who demanded jury trial not supported by good cause) *with* Graves v. P.J. Taggares, Co. 94 Wash. 2d 298, 303-06, 616 P.2d 1223, 1227-28 (1980) (jury trial a substantive right; client must consent to withdrawal of demand).

[203] Grocery & Food Warehousemen Local No. 635 v. Kroger Co., 364 Pa. 195, 197-98, 70 A.2d 218, 219 (1950) (attorney authorized to participate in arbitration).

[204] Schleiger v. Schleiger, 137 Colo. 279, 284-85, 324 P.2d 370, 373 (1958) (lawyer authorized to try case according to best judgment).

[205] Fleener v. Fleener, 133 Ill. App. 2d 118, 122-23, 263 N.E.2d 879, 882-83 (1970) (client fully aware of attorney's decisions).

[206] *See, e.g.*, Smith v. Whittier, 95 Cal. 279, 290-94, 30 P. 529, 530-31 (1892) (counsel could stipulate to admissibility of transcript for testimony of witness in later

c. Overlap Zone and Lawyer Override

Stipulations and concessions by counsel present dilemmas and often fall within the overlap zone of authority. The lawyer's authority to make binding statements in litigation is presumed and usually upheld. Yet there are important differences among statements, the circumstances under which they are made, and their effect on a client's legitimate interests. They may simply narrow remaining areas of dispute or they may be dispositive of a client's substantial rights. Concessions may result from the lawyer's cautious deliberation, careless rambling, or representation of conflicting interests. An impatient trial court may coerce a stipulation or declare the client bound by counsel's casual remark. Sometimes a lawyer's procedural stipulation affecting the client's substantive rights is set aside because "it shocks the judicial instinct and conscience."[208] Presumptive authority over stipulations can be rebutted by a lawyer's breach of loyalty or a court's abuse of administrative power when the stipulation defeats or seriously harms the client's substantial legal rights.[209]

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trial); Nahhas v. Pacific Greyhound Lines, 192 Cal. App. 2d 145, 146, 13 Cal. Rptr. 299, 300 (Dist. 1961) (within prerogative of counsel to decide which witnesses will be called to testify); Newman v. Los Angeles Transit Lines, 120 Cal. App. 2d 685, 695, 262 P.2d 95, 101 (2d Dist. 1953) (lawyer could excuse witness, stipulate testimony would be same as prior witness).

[207] *See, e.g.*, Barthelmas v. Fidelity-Phoenix Fire Ins. Co., 103 F.2d 329, 331 (2d Cir. 1939) (lawyer waived affirmative defense in state court action to secure dismissal on other grounds); Duffy v. Griffith Co., 206 Cal. App. 2d 780, 787, 24 Cal. Rptr. 161, 165 (2d Dist. 1962) (selection of issues to pursue or abandon within lawyer's authority); *cf.* Trustees of Schools v. Schroeder, 2 Ill. App. 3d 1009, 1012-13, 278 N.E.2d 431, 433-34 (1971) (no malpractice liability for lawyer's failure to raise futile argument).

[208] Wuest v. Wuest, 53 Cal. App. 2d 339, 345, 127 P.2d 934, 937 (1942) (client not informed that stipulation precluded appeal of property division).

[209] For example, the presumption can be rebutted when counsel enters a formal stipulation over a client's expressed objections, because others cannot thereafter rely on the lawyer's implied authority. *See, e.g.*, Linsk v. Linsk, 70 Cal. 2d 272, 280, 449 P.2d 760, 765, 74 Cal. Rptr. 544, 549 (1969) (attorney acted contrary to client's instructions); Knowlton v. MacKenzie, 110 Cal. 183, 187-89, 42 P. 580, 581 (1895) (same). Relief may be obtained from a stipulation that disposes of a client's legal interests if it was attributable to a conflict of interest. *See, e.g.*, Harness v. Pacific Curtainwall Co., 235 Cal. App. 2d 485, 491, 45 Cal. Rptr. 454, 458 (1965) (no authority to stipulate away insurer's interest); Wuest v. Wuest, 53 Cal. App. 2d 339, 345-46, 127 P.2d 934, 936-37 (1942) (counsel failed to advise client of effect of waiving judge's improper pressures); Fresno City High School Dist. v. Dillon, 34 Cal. App. 2d 636, 642-44, 94 P.2d 86, 89-90 (1939) (although pleadings evidenced genuine disputes of material fact, counsel stipulated reasonableness of school regulations only issue; summary judgment

Counsel's ability to make binding concessions of fact or law is central to the authority over procedural matters. Effective judicial administration requires that litigators have authority to simplify issues, to eliminate weak claims and defenses, and to make binding stipulations on evidentiary, factual, and legal questions.[210] The trial lawyer needs discretion to make spontaneous tactical decisions "as the exigencies of combat may dictate."[211] The litigator's implied authority "to do all acts necessary and proper to the regular, orderly conduct of the case"[212] necessarily includes such statements, which are presumed to be authorized by the client.[213] A deliberate pretrial stipulation is absolutely binding for as long as it stands, although a party may be relieved of it if the court takes appropriate measures to protect the other litigants.[214]

In addition to having plenary authority over the conduct of litigation, the litigator can override an additional limited group of client choices.[215] A client is entitled only to representation within legal and ethical bounds. Upon realizing that a client expects prohibited assistance, the lawyer must try to persuade the client to make a legally or ethically correct choice. If the client refuses, the lawyer must override the client's improper choice. For example, a lawyer's responsibilities to the legal system, to the profession, and to herself confer override authority for payment of just litigation expenses[216] and rejection of frivolous claims[217]

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against discharged teacher reversed); Graves v. P.J. Taggares Co., 94 Wash. 2d 298, 303-06, 616 P.2d 1223, 1227-28 (1980) (attorney failed to inform client of stipulation on critical issues); *cf.* Roscoe Moss Co. v. Roggero, 246 Cal. App. 2d 781, 54 Cal. Rptr. 911 (1966) (reversed judgment based on counsel's alleged oral stipulation in pretrial conference that evidence meager and summary judgment proper).

[210] *See, e.g.*, FED R. CIV. P. 16.

[211] Duffy v. Griffith Co., 206 Cal. App. 2d 780, 787, 24 Cal. Rptr. 161, 165 (1962) (instructions given in reliance on defense counsel's concessions upheld).

[212] *Id.* at 791, 24 Cal. Rptr. at 167.

[213] *See, e.g.*, Equitable Trust Co. v. Washington-Idaho Water, Light & Power Co., 300 F. 601, 611 (E.D. Wash. 1924) (attorney stipulation in foreclosure valid); Rolfstad, Winkjer, Suess, McKennett & Kaiser v. Hanson, 221 N.W.2d 734, 736 (N.D. 1974) (attorney presumed to have authority from client); *cf.* Knowlton v. Mackenzie, 110 Cal. 183, 187-88, 42 P. 580, 581 (1895) (presumption ceases when court aware attorney acting contrary to client's wishes).

[214] United States v. Sommers, 351 F.2d 354, 357 (10th Cir. 1965) (modified to prevent injustice); Laird v. Air Carrier Engine Serv., 263 F.2d 948, 953 (5th Cir. 1959) (prejudice resulted from repudiation).

[215] *See supra* text accompanying notes 69-74, 136-42.

[216] *See, e.g.*, Florida Bar v. Wagner, 212 So. 2d 770, 773 (Fla. 1968) (lawyer disciplined for mismanaged funds; lawyer "should make every effort to persuade his client to permit . . . immediate payment of just and undisputed bills" for litigation-related expenses); *cf.* State v. Blawie, 31 Conn. Super. Ct. 552, 558, 334 A.2d 484, 487 (1974)

and false evidence.[218] Members of the legal profession have a collective interest in enhancing its image to fulfill their responsibilities effectively. An individual lawyer's legitimate economic interests may further justify overriding certain client choices.[219]

3. Criminal Defense

Agency principles also determine the basic allocation of authority in criminal defense representation. The client has principal authority over substantive rights and the lawyer has principal authority over strategy and tactics.[220] However, a defendant's sixth amendment right to effective assistance of counsel creates a hybrid relationship, with most decisions located in the overlap zone. The lawyer must provide competent, unbiased information on the law and alternative courses of action before the client can make binding decisions.[221] Counsel has a greater responsibility to consult the client about trial strategy than in civil litigation.[222] Concern for the defendant's liberty and constitutional rights further limits the lawyer's authority.[223] The validity of many decisions depends upon the lawyer fulfilling these high duties of information and consultation. Thus decisions are often the result of consensus or compromise.

If convicted, the defendant has obvious incentives to challenge litigation decisions, either on direct appeal or collateral review. Because re-

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(lawyers liable for disbursal in derogation of valid lien), *appeal denied*, 168 Conn. 651, 333 A.2d 70 (1975).

[217] *See, e.g.*, *In re* Bithon, 486 F.2d 319 (1st Cir. 1973) (suspension for pattern of frivolous appeals); Hoppe v. Klapperich, 227 Minn. 224, 243, 28 N.W.2d 780, 791 (1947) (lawyer liable for malicious prosecution); *cf.* Kirsch v. Duryea, 21 Cal. 3d 303, 309-10, 578 P.2d 935, 939-40, 146 Cal. Rptr. 218, 222-23 (1978) (no malpractice liability for nonconsensual withdrawal when claim deemed meritless).

[218] *See, e.g.*, *In re* A, 276 Or. 225, 239, 554 P.2d 479, 487 (1976) (lawyer must dissuade client from offering false or deceptive evidence; if it is offered, lawyer must encourage disclosure of falsity to court and withdraw if consent is refused).

[219] Florida Bar v. Wagner, 212 So. 2d 770, 772-73 (Fla. 1968).

[220] *See, e.g.*, Shiflett v. Commonwealth, 447 F.2d 50, 53 (4th Cir. 1970) (attorney failed to advise client of right to appeal as indigent); State v. Barley, 240 N.C. 253, 255, 81 S.E.2d 772, 773 (1954) (attorney entered plea over client's objections).

[221] *See, e.g.*, Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974) (conviction reversed when attorney failed to advise client adequately); Milligan v. State, 177 So. 2d 75, 77 (Fla. Cir. Ct. 1965) (attorney should present alternatives to client).

[222] *See, e.g.*, United States v. Moore, 554 F.2d 1086, 1091-92 (D.C. Cir. 1976) (not informing client of certain allegations unreasonable).

[223] *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 772 (1970) (constitutional right to counsel requires that defendant not be left to mercies of incompetent counsel).

versals risk chaos in the administration of justice, courts are reluctant to second-guess counsel's good faith strategic and tactical decisions.[224] A defendant who acquiesces in counsel's decisions may waive substantial constitutional rights.[225] Typically, the criminal defendant is denied relief from counsel's good faith decisions in the absence of a compelling showing of incompetence or actual prejudice.[226] Therefore, authority over specific decisions is best demonstrated when a client raises timely objection, allowing the trial judge an opportunity to remedy the conflict.[227] The reviewing court must then assess the relative importance of the disputed decision and its possible consequences.[228]

a. Client Authority

The Constitution vests authority for specific decisions with the defendant. The first choice is whether to waive or accept the assistance of counsel.[229] That decision is critical, for in accepting counsel's assistance, the defendant relinquishes much control over the conduct and strategy of the defense.[230] The lawyer's broad authority is only justified by the

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[224] *See, e.g.*, Strickland v. Washington, 104 S. Ct. 2052, 2065-66 (1984) (habeas corpus standards for ineffective assistance; avoid distortion of hindsight evaluation, evaluate from counsel's perspective at trial); United States v. Clayborne, 509 F.2d 473, 479 (D.C. Cir. 1974) (no reversal unless clear proof of actual prejudice); United States v. Radford, 452 F.2d 332, 335 (7th Cir. 1971) (must demonstrate defendant denied a fair trial); State v. McDonald, 50 Wis. 2d 534, 538-39, 184 N.W.2d 886, 888 (1971) (no reversal when attorney made deliberate strategic choice).

[225] *See, e.g.*, United States v. Radford, 452 F.2d 332, 335 (7th Cir. 1971) (jury trial waiver); State v. Albright, 96 Wis. 2d 122, 133-35, 291 N.W.2d 487, 492-93 (1980) (whether to testify).

[226] *See, e.g.*, United States v. Clayborne, 509 F.2d 473, 479 (D.C. Cir. 1974) (tactical decisions such as whether to cross-examine merit great deference); United States v. Radford, 452 F.2d 332, 335 (7th Cir. 1971) (failure to cross-examine unreviewable unless denied fair trial).

[227] *Compare* State v. Barley, 240 N.C. 253, 255, 81 S.E.2d 772, 773 (1954) (judgment vacated since nolo contendere plea entered over client's objection) *with* Morris v. Slappy, 103 S. Ct. 1610, 1615 (1983) (after trial began defendant unsuccessfully moved for continuance based on appointed counsel's hospitalization; habeas corpus denied).

[228] *Compare* Boykin v. Alabama, 395 U.S. 238, 243-44 (1969) (automatic appeal for capital cases; reversed guilty plea entered without defendant's knowing and voluntary waiver) *with* Dale v. City Court of Merced, 105 Cal. App. 2d 602, 606, 234 P.2d 110, 113-14 (1951) (in misdemeanor case, defendant's counsel could withdraw personal plea of not guilty and enter guilty plea).

[229] *See, e.g.*, Faretta v. California, 422 U.S. 806, 814 (1975) (reversible error to deny defendant right to proceed pro se).

[230] *See id.* at 820-21.

client's consent at the outset of representation.[231] Thereafter, the client is constitutionally entitled to decide whether to plead guilty,[232] to request a jury trial,[233] or to appeal.[234] These are personal rights that cannot be waived by counsel. A defendant is entitled to a lawyer's reasonably competent assistance so that waiver is a voluntary, informed decision.[235] The defendant also has a constitutional right to decide whether to testify, but counsel may effectively waive that right unless the client makes timely objection on the record.[236]

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[231] *See id.* If counsel is appointed, economic realities dictate that defendant consent only to the fact of representation, and not to the specific lawyer. *See* Morris v. Slappy, 103 S. Ct. 1610, 1617 (1983) (rejecting broad proposition that the "Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel"). The representation must be unhampered by conflicts with the lawyer's interests. *See, e.g.*, United States v. Harpole, 263 F.2d 71, 83 (5th Cir. 1959) (white appointed lawyers refused to work with retained black lawyer who wanted to file pretrial motions challenging racial composition of petit jury and grand jury); Johns v. Smyth, 176 F. Supp. 949, 954 (E.D. Va. 1959) (counsel did not suggest appropriate instructions, have defendant testify, or argue case to jury; admitted conscience did not allow him to adopt customary trial procedures). The lawyer must refuse representation if there is a conflict with the interests of her other clients. *See, e.g.*, United States v. Marshall, 488 F.2d 1169, 1191 (9th Cir. 1973) (attorney representing multiple defendants raised inconsistent defenses).

[232] *See, e.g.*, Jones v. Barnes, 103 S. Ct. 3308, 3312 (1983) ("[A]ccused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (guilty plea waived right to jury trial).

[233] *See, e.g.*, Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279-80 (1942) (defendant proceeding pro se entitled to waive jury trial).

[234] *See, e.g.*, Anders v. California, 386 U.S. 738, 744 (1966).

[235] *See, e.g.*, Mason v. Balcom, 531 F.2d 717, 724 (5th Cir. 1976) (guilty plea); United States v. Goodwin, 531 F.2d 347, 350 (6th Cir. 1976) (testify); Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974) (guilty plea); *cf.* State *ex rel.* Arbogast v. Mohn, 260 S.E.2d 820, 824-25 (W. Va. 1979) (defendants not advised of right to elect sentencing scheme; guilty pleas not knowing, intelligent, and voluntary). A necessary corollary is that a lawyer may not be required to represent a defendant when not competent to do so; a lawyer should properly advise the client when she feels incompetent to handle the matter. *See* Easley v. State, 334 So. 2d 630, 632 (Fla. Dist. Ct. App. 1976).

[236] *See, e.g.*, People v. Wheeler, 260 Cal. App. 2d 522, 524, 67 Cal. Rptr. 246, 248 (1968) (attorney entered stipulation regarding testimony without client's consent); State v. Albright, 96 Wis. 2d 122, 133, 291 N.W.2d 487, 492 (1980) (counsel may waive defendant's right to testify in absence of express disapproval).

b. Lawyer Authority

Defense counsel has hybrid authority over the litigation process. In both criminal and civil litigation the lawyer is master of the suit.[237] Criminal defense counsel, however, has a specific duty to consult with the client, conferring promptly and as often as necessary to elicit information and determine what defenses are available, and to discuss potential strategies and tactical decisions fully with the client.[238] Decisions about what witnesses to call, whether and how to conduct cross-examination, jury selection, trial motions, and "all other strategy and tactical decisions are the exclusive province of the lawyer after consultation with the client."[239] The lawyer must act as a diligent, conscientious advocate in exercising this authority,[240] be adequately prepared,[241] and have no conflicting loyalties.[242]

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[237] *See, e.g.*, Moreno v. Estelle, 717 F.2d 171, 177 (5th Cir. 1983) (defense attorney must make professional decisions concerning plausibility of defense and its potential for success at trial); United States v. Marshall, 488 F.2d 1169, 1192 (9th Cir. 1973) (competent counsel is master of suit); *In re* Wetzel, 150 Mont. 487, 492-93, 437 P.2d 7, 10 (1968) (attorney must observe legal guidelines, whether or not client approves).

[238] *See, e.g.*, United States v. Moore, 554 F.2d 1086, 1091 (D.C. Cir. 1976).

[239] *See* Winter v. State, 210 Kan. 597, 602-03, 502 P.2d 733, 738 (1972) (adopting A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION STANDARD 5.2(b) CONTROL AND DIRECTION OF THE CASE (approved draft 1971)); *see also* Salazar v. Estelle, 547 F.2d 1226 (5th Cir. 1977) (selection and questioning of witnesses); United States v. Clayborne, 509 F.2d 473 (D.C. Cir. 1974) (cross-examination); United States v. Radford, 452 F.2d 332 (7th Cir. 1971) (cross-examination); Mitchell v. United States, 259 F.2d 787 (D.C. Cir. 1958) (objections); *In re* King, 133 Vt. 245, 336 A.2d 195 (1975) (objections, choice of witnesses, closing arguments, best grounds for appeal); State v. Darnell, 14 Wash. App. 432, 542 P.2d 117 (1975) (objections, trial demeanor, questioning of witnesses).

[240] *See* United States v. Moore, 554 F.2d 1086, 1089 (D.C. Cir. 1976) (counsel's informed tactical decision against filing suppression motion and pursuing collateral facts at trial; not ineffective assistance); *see also* Hudson v. State, 493 F.2d 171, 172-73 (5th Cir. 1974) (appointed counsel for capital offense first met client morning of trial, informed of deal with prosecutor, and when client insisted on pleading not guilty, lawyer informed jury of the bargain, prosecution offered no evidence; conviction vacated).

[241] *See, e.g.*, United States v. Goodwin, 531 F.2d 347, 348-49 (6th Cir. 1976).

[242] *See, e.g.*, United States v. Eaglin, 571 F.2d 1069, 1085-86 (9th Cir. 1977) (absent unforeseen conflicts at trial, defendant's formal consent to joint representation precludes as ground for appeal); United States v. Marshall, 488 F.2d 1169, 1193 (9th Cir. 1973) (joint representation; counsel conceded appellant's guilt in claiming co-defendant's entrapment; conviction reversed).

3. Hybrid Authority: Overlap Zone and Client or Lawyer Override

Most criminal cases are disposed of by plea bargains. The defendant pleads guilty to a reduced charge in return for the prosecutor's recommendation of an agreed punishment. Although essential to the operation of the criminal justice system, plea bargaining involves substantial risks of coercion. Lawyers frequently persuade their clients to accept proffered bargains because they are convinced it is in their clients' best interests. The advice of counsel may also be colored by a desire to maintain positive relations with the courts and prosecutors, to preserve a win-loss record, or to make a profit from the representation. Because of these inherent pressures and the consequences of guilty pleas, defendants often later challenge their validity.

A guilty plea is tantamount to conviction; all that remains is judgment and sentencing.[243] It waives a defendant's privilege against self-incrimination, the right to jury trial, and the right to confront one's accusers.[244] The record must reflect that the defendant made a voluntary and knowing plea, understanding its consequences.[245] A lawyer may not enter a plea inconsistent with her client's expressed desire to plead not guilty.[246] Conversely, the lawyer may not insist on trial, depriving the client of an opportunity to accept a plea bargain; an offer by the prosecution must be conveyed.[247] The defendant must receive reasonably effective assistance of counsel before a valid guilty plea can be entered.[248] The lawyer must take the time to become familiar with the facts and law and to advise the client of available alternatives and defenses.[249] A defendant who receives only perfunctory, assembly-line

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[243] *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 242 (1969); United States v. Caston, 615 F.2d 1111, 1115 (5th Cir. 1980).

[244] Jones v. Barnes, 103 S. Ct. 3308, 3312 (1983).

[245] Boykin v. Alabama, 395 U.S. 238, 242-44 (1969).

[246] *See* Brookhart v. Janis, 384 U.S. 1, 7 (1966) (habeas corpus for defendant whose counsel elected "prima facie trial" which was practical equivalent of guilty plea); State v. Barley, 240 N.C. 253, 255, 81 S.E.2d 772, 773 (1954) (attorney not authorized to enter plea over client's wishes). *But see* Dale v. City Court, 105 Cal. App. 2d 602, 606, 234 P.2d 110, 113 (1951) (statute distinguished between felonies and misdemeanors before inferior courts; withdrawal of not guilty and entry of guilty plea within lawyer's scope of authority).

[247] *See, e.g.*, People v. Williams, 47 Ill. 2d 239, 240-41, 265 N.E.2d 107, 108-09 (1970) (while defendant has constitutional right to be advised of offer to accept guilty plea to a reduced charge, defendant has burden of proving there was such an offer); People v. Whitfield, 40 Ill. 2d 308, 311-12, 239 N.E.2d 850, 852 (1968) (denial of opportunity to accept plea bargain entitled defendant to postconviction relief).

[248] *See, e.g.*, Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974).

[249] *See, e.g.*, Mason v. Balcom, 531 F.2d 717, 724-25 (5th Cir. 1976) (invalid guilty

representation has not made a knowing and voluntary waiver, and may set aside the guilty plea.[250]

One case suggests the extreme circumstances in which a lawyer may justifiably override a client's choice of plea. *People v. Merkouris*[251] came before the California Supreme Court on automatic appeal of a death penalty judgment. Over defendant's objection, but supported by a psychiatric report, counsel entered a plea of not guilty by reason of insanity. Under the bifurcated trial procedure, the jury first determined that defendant was guilty of first degree murder. Counsel was ready for the next stage, to present the insanity defense, when the trial judge permitted defendant to withdraw the plea, thereby ending the trial. The supreme court reversed, holding that the trial court abused its discretion by permitting defendant to withdraw the insanity plea over his counsel's implicit objection. The court found the defendant's concern that the plea implied guilt, expressed after the guilty verdict, indicated he misunderstood the gravamen of his predicament.[252] Mentally disabled clients should be given the opportunity to consider and reach conclusions about their well being in the same manner as other clients.[253] Raising the insanity defense can profoundly affect one's dignity and freedom of movement. In all but the gravest of circumstances, such as those in *Merkouris* in which the death penalty was a clear possibility, defense counsel should respect the client's choice to forego this defense.[254]

Notwithstanding counsel's broad authority over the conduct of the defense, the client may have override power in at least one procedural

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plea; ineffective counsel ignored viable defense); Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974) (same).

[250] *Compare* Mason v. Balcom, 531 F.2d 717, 725 (5th Cir. 1976) (lawyer appointed immediately prior to plea did not spend time familiarizing himself with facts or relevant law, and did not explore possible defenses; habeas corpus granted) *with* Murray v. State, 384 F. Supp. 574, 577 (S.D. Fla. 1974) (nolo contendere plea entered with client's consent after several conferences with lawyer who conducted reasonable investigation into facts supporting charge, advised client of alternatives and possible consequences; denied habeas corpus).

[251] 46 Cal. 2d 540, 297 P.2d 999 (1956).

[252] *Id.* at 555, 297 P.2d at 1009..

[253] *See generally* MODEL RULE 1.14 (1983), *infra* Appendix C; *see supra* text accompanying notes 58-62.

[254] *See* Singer, *The Imposition of the Insanity Defense on an Unwilling Defendant*, 41 OHIO ST. L.J. 637 (1980); *see also* Frendak v. United States, 408 A.2d 364, 378 (D.C. Ct. App. 1979) (court may not impose insanity defense upon defendant who intelligently and voluntarily waives defense).

area, waiver of speedy trial rights. In *People v. Johnson*,[255] the California Supreme Court held that when an indigent defendant is in custody awaiting trial, the state must provide appointed counsel who can bring the case to trial within the statutory period.[256] Conflicting trial obligations of overburdened public defenders and appointed counsel do not constitute good cause for delay unless occasioned by an extraordinary, nonrecurring situation.[257] Though procedural in nature, a continuance request affects a defendant's personal constitutional right to a speedy trial. Counsel should be precluded from seeking and obtaining a continuance over the client's contemporaneous objection. A continuance request motivated by counsel's workload is the result of conflicting responsibilities. Such a conflict of interest should not, absent consent, operate to waive an accused's substantive legal rights.[258]

Defense counsel is an officer of the court vested with the responsibil-

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[255] 26 Cal. 3d 557, 606 P.2d 738, 162 Cal. Rptr. 431 (1980) (Tobriner, J., Mosk and Newman concurring, Bird, C.J., concurring and dissenting to ruling that actual prejudice required for reversal on appeal). The case was decided under California's speedy trial act, which requires trial within 60-day period unless statutory exceptions apply. *But see* McArthur v. State, 303 So. 2d 359, 361 (Fla. Dist. Ct. App. 1974) (continuance motion; accused did not know or consent to waived statutory speedy trial right; relief denied).

[256] 26 Cal. 3d 557, 570-71, 606 P.2d 738, 746, 162 Cal. Rptr. 431, 439 (1980).

[257] *See id.*; *see also* Sanchez v. Superior Court, 131 Cal. App. 3d 884, 889-90, 182 Cal. Rptr. 703, 706-07 (1982) (unavailability of counsel for codefendant caused by state's failure to provide necessary personnel not "good cause" to overcome defendant's statutory speedy trial right; relief granted).

[258] Morris v. Slappy, 103 S. Ct. 1610 (1983), suggests another situation when an accused may have authority to override counsel's trial decision. Public defender Goldfine initially represented accused, supervised extensive case investigation, and apparently established a good working relationship with him. Shortly before trial Goldfine was hospitalized and another public defender, Hotchkiss, was substituted. From the start of the trial, defendant objected that Hotchkiss lacked adequate time to prepare; Hotchkiss informed the court that he felt prepared. On the third day of trial, 11 days after the reassignment, defendant first asserted a right to continued representation by Goldfine. *Id.* at 1613-14. The Supreme Court unanimously rejected the defendant's habeas claim. Justice Burger's majority opinion rejected "the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel," as it interpreted the court of appeals' holding. *Id.* at 1617. Four Justices concurred in the result, although rejecting its broad holding, resting their decisions on defendant's failure to make a timely motion for continuance. *Id.* at 1619-20, 1625. The outcome might be different if a defendant makes a timely motion for continuance based on counsel's unavailability and defendant's desire to continue the defense with an established client-lawyer relationship. *Id.* at 1619-20 (Brennan, J., joined by Marshall, J., concurring); *id.* at 1625 (Blackmun J., joined by Stevens, J., concurring).

ity to further expedient and accurate determinations.[259] The duty of candor requires the lawyer to override an accused's choice to offer false or perjured testimony. The integrity of the adversary system "can be maintained only if both prosecution and defense counsel present reliable evidence to guide the trier of fact. Honesty and candor are essential to the fair and impartial administration of justice."[260] A lawyer properly considers this duty of candor when exercising the authority to select witnesses,[261] and may not knowingly present perjured testimony whether the witness is the client or another person.[262]

Client perjury is defense counsel's most serious ethical problem. The duty of candor toward the tribunal and the obligation to provide effective assistance are in direct conflict. The lawyer's duty of disclosure is hotly debated and courts' prescribed solutions vary. Under the Model Rules, defense counsel is subject to the same constraints as other advocates and must rectify the client's perjury. The right to counsel does not encompass assistance in committing perjury; the lawyer is professionally and legally obligated to avoid complicity in the commission of perjury or falsification of evidence.[263]

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[259] Baseless objections and dilatory tactics "work to the disadvantage of the client, [and] also lower the standards of the profession and bring disrepute upon the court." State v. Darnell, 14 Wash. App. 432, 437, 542 P.2d 117, 120 (1975) (quoting *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958)).

[260] People v. Schultheis, 638 P.2d 8, 11 (Colo. 1981) (en banc) (defense attorney not required to withdraw from case upon client's insistence on calling certain witnesses attorney knew would give perjured testimony or false evidence).

[261] *See, e.g., In re* Branch, 70 Cal. 2d 200, 210-11, 449 P.2d 174, 181, 74 Cal. Rptr. 238, 245, (1969); People v. Schultheis, 638 P.2d 8, 12 (Colo. 1981); *see also* People v. Weston, 114 Cal. App. 3d 764, 778, 170 Cal. Rptr. 856, 864 (1981) (allowing witness to testify falsely contravenes professional ethics and is relevant in determining whether to call additional witnesses); Herbert v. United States, 340 A.2d 802, 804 (D.C. 1975) (conscientious decision of defense counsel not to use perjurious alibi did not deny defendant of effective assistance of counsel); *see generally* Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 DEN. L.J. 75, 78-79 (1981) (ethical problems encountered when attorney knows defendant intends to offer perjured testimony).

[262] *See, e.g., In re* Branch, 70 Cal. 2d 200, 212, 449 P.2d 174, 183, 74 Cal. Rptr. 238, 247 (1969) (refusal to offer testimony without investigating its veracity permissible when circumstances indicate it would be perjured); People v. Schultheis, 638 P.2d 8, 13 (Colo. 1981) (attorney must refuse to use fabricated evidence); Thornton v. United States, 357 A.2d 429, 438 (D.C. 1976) (lawyer must refuse to allow client to testify if testimony will be false); People v. Lewis, 75 Ill. App. 3d 560, 565-66, 393 N.E.2d 1380, 1384 (1979) (attorney must disclose information if client testifies in deceptive manner); State v. Trapp, 368 N.E.2d 1278, 1282 (Ohio App. 2d 1977) (attorney must withdraw if client insists on offering perjured testimony).

[263] MODEL RULE 3.3 comment (1983).

The client may try to deceive the court by feigning incompetence to stand trial, or by testifying falsely. In both cases the lawyer is professionally obligated to assert her role as principal and override the client. In the competency hearing, the lawyer has first-hand knowledge and experience relating to the central issue and must seek a fair determination of fitness.[264] One can argue that client demeanor in the client-lawyer relationship is not the kind of information or communication on which the confidentiality rules are premised, or that the client has waived the attorney-client privilege by raising the competency issue. One court has held that an accused is not denied effective assistance of counsel when the lawyer states an opinion that the client is able to cooperate in the defense and understands enough about the incident to forego the insanity defense.[265]

Under the Model Rules, if the false evidence has not yet been offered, the lawyer must try to persuade the client to refrain from perjury and, if unsuccessful, petition to withdraw. When a client testifies falsely, the lawyer must confidentially remonstrate with the client to allow rectification; if unsuccessful, the lawyer should seek withdrawal or make disclosure to the court. In those jurisdictions holding that an accused is entitled to assistance in testifying, even if the attorney knows the testimony is false, counsel's professional obligations are subordinate to the constitutional interpretation.[266]

Criminal appeals present difficult authority questions because of inherent conflicts between a defendant's autonomy and liberty interests and the lawyer's professional judgment and responsibilities to the legal system. As a constitutional matter, the client has authority over whether to appeal.[267] The lawyer must inform the client of any appeal rights and her professional judgment about the grounds and probable results of appeal. Failure to provide this information violates counsel's professional obligations and the defendant's constitutional rights.[268] A

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[264] *See, e.g.*, People v. Lewis, 75 Ill. App. 3d 560, 566, 393 N.E.2d 1380, 1384 (1977).

[265] *See id.*

[266] *See* MODEL RULE 3.3 comment (1983).

[267] *See, e.g.*, Jones v. Barnes, 103 S. Ct. 3308, 3312 (1983) (accused has ultimate authority to decide whether to appeal); Fay v. Noia, 372 U.S. 391, 439 (1963) (same).

[268] *See, e.g.*, United States v. Neff, 525 F.2d 361, 363 (8th Cir. 1975) (counsel should advise client of merits and probable results of appeal); Pires v. Commonwealth, 373 Mass. 829, 836-38, 370 N.E.2d 1365, 1368-69 (1977) (failure to inform of appeal right violated professional obligations); *see also* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION STANDARD 8.2 APPEAL (Approved Draft 1971).

lawyer may limit the scope of representation by refusing to handle the appeal. However, once she agrees to file the appeal, she must follow through or face discipline for unilaterally deciding not to proceed.[269] Appeal rights may be reinstated if the client did not receive effective assistance of counsel.[270] Although the client decides whether to appeal, counsel may refuse to argue every colorable issue the client suggests,[271] and may withdraw from a frivolous appeal if appropriate safeguards are taken.[272] In *Jones v. Barnes*,[273] decided at the close of the 1982 Term, the United States Supreme Court denied habeas corpus relief to a defendant who claimed ineffective assistance of counsel because the public defender refused to argue on appeal every nonfrivolous issue defendant suggested. Justice Burger's majority opinion defined the appellate advocate's role: counsel should support the appeal to the best of her ability, which requires the authority to exercise professional judgment in selecting the strongest arguments.[274]

Jones v. Barnes may be a serious defeat for indigent defendants and others unable find a lawyer willing to raise all their desired arguments. Nevertheless, *Jones* is determinative of a lawyer's authority only for constitutional purposes and does not address the lawyer's ethical responsibilities. There are strong arguments that "as an *ethical* matter, an attorney should argue on appeal all nonfrivolous claims upon which [the] client insists."[275] The lawyer properly should advise the client of

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[269] *See In re* Benoit, 10 Cal. 3d 72, 87-88, 514 P.2d 97, 107, 109 Cal. Rptr. 785, 795 (1973) (breach of professional duty); Florida Bar v. Dingle, 220 So. 2d 9, 10-11 (Fla. 1969) (attorney negligent for not informing client of intention to withdraw).

[270] *See, e.g., In re* Benoit, 10 Cal. 3d 72, 89, 514 P.2d 97, 108, 109 Cal. Rptr. 785, 796 (1973) (constructive filing of habeas corpus writ allowed because of attorney's failure to file in time in spite of explicit promise and defendant's reliance); *In re* Grubbs' Appeal, 403 P.2d 260, 261 (Okla. Crim. App. 1965) (allowed delayed appeal when appointed counsel abandoned without consultation); *cf.* Pires v. Commonwealth, 373 Mass. 829, 370 N.E.2d 1365 (1977) (reinstatement denied because appeal would have been frivolous).

[271] *See, e.g.*, Jones v. Barnes, 103 S. Ct. 3308, 3312 (1983) (no constitutional right to compel appointed counsel's pursuit of nonfrivolous issues on appeal); Holcomb v. Murphy, 701 F.2d 1307, 1309 (10th Cir.) (failure of counsel to raise issues defendant wanted asserted did not constitute denial of right to effective assistance of counsel), *cert. denied*, 103 S. Ct. 3546 (1983).

[272] *See, e.g.*, Polk County v. Dodson, 454 U.S. 312, 323 (1981); Anders v. California, 386 U.S. 738, 744 (1967).

[273] 103 S. Ct. 3308 (1983).

[274] *Id.* at 3312-14. The opinion expressly left open the availability of habeas corpus to review claims that counsel declined, and whether the lawyer's refusal of those claims constitutes "cause" for a procedural default. *Id.* at 3314 n.7.

[275] *Id.* at 3314 (Blackmun, J., concurring) (emphasis in original).

the course most likely to succeed and then acquiesce in the client's choice of nonfrivolous claims.[276]

A difficult appeal problem occurs when defense counsel decides after filing an appeal that it is wholly frivolous. A lawyer is prohibited from clogging the courts with frivolous appeals,[277] but that duty conflicts with the duty to support the appeal to the best of one's ability.[278] The problem becomes acute when appointed counsel for an indigent defendant seeks to withdraw. Chances for replacement counsel are remote; if the court permits the lawyer to withdraw, the appeal probably will be dismissed soon thereafter.

Although a court is entitled to candor from the advocates appearing before it, the court alone is responsible for determining the merits of each case. Defense counsel must conscientiously evaluate all possible arguments in order not to invade the court's province.[279] If any contentions are colorable, the lawyer should proceed with the appeal, raising without disparagement the client's other contentions and frankly admitting the absence of supporting authority.[280] A motion to withdraw is warranted only after the lawyer determines, after careful and conscientious examination of the record and applicable law, that the appeal is wholly frivolous. If counsel and court diligently follow this procedure, the client should receive the assistance to which she is ethically entitled.[281]

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[276] *Id.*; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE 21-3.2, at 21-42 (2d ed. 1980).

Defense counsel's function is to protect the defendant's dignity and autonomy by *assisting* with choices. The Constitution "does not require clients to be wise." Jones v. Barnes, 103 S. Ct. 3308, 3317-18 (1983) (Brennan, J., dissenting). Most defendants are likely to accept their counsel's professional judgment, but for those who do not, the law should respect their choices. "[Clients] are capable of making informed judgments about which issues to appeal, and when they exercise that prerogative their choices should be respected unless they would require lawyers to violate their consciences, the law, or their duties to the court." *Id.* at 3319 (Brennan, J., dissenting).

[277] *See, e.g.*, Polk County v. Dodson, 454 U.S. 312, 323 (1981); Nickols v. Gagnon, 454 F.2d 467, 472 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972).

[278] *See* Anders v. California, 386 U.S. 738, 744 (1967). In civil litigation, the lawyer is permitted to withdraw, without risk of malpractice liability, when she ceases to believe the claim has merit, providing necessary precautions are taken. Values of candor, fairness, and efficient judicial administration take precedence, with a sense that market forces will protect the civil client's valid claims. *See supra* notes 112-14, 122-24 & 217 and accompanying text.

[279] *See* Gallegos v. Turner, 256 F. Supp. 670, 676 n.5 (D. Utah 1966), *aff'd*, 386 F.2d 440 (10th Cir. 1967), *cert. denied*, 390 U.S. 1045 (1968).

[280] *See id.* at 676 n.6.

[281] *See also* Anders v. California, 386 U.S. 738, 744-45 (1967). Upon concluding

CONCLUSION

The diversity among lawyers, clients, and representation contexts precludes any uniform decisionmaking model for all situations. A client-lawyer relationship can be intensely personal or it can be a detached business transaction. The relationship may be between relative equals or between parties with wide disparities in their levels of sophistication. The joint venture model, unlike the traditional paternalist and instrumentalist models, is versatile enough to accommodate the legitimate needs and interests of specific relationships and the public interest. Moreover, neither client nor lawyer can be truly autonomous because of differences in knowledge and because of their mutual dependency. The Model Rules recognize this interdependence by creating a normative framework that uses information, consultation, and collaboration, requiring final location of authority only for unresolved disputes. Successful client-lawyer relations initially define mutual expectations and revise those expectations as the relationship evolves.

The restatement format implies that the Model Rules reflect that which is already the law. Yet the debates preceding their adoption show the absence of a strong consensus on certain issues within the legal profession. Although Rules 1.2 and 1.4 were not the subject of serious controversy, they too are both a restatement of law and a normative directive. Most reported cases on allocation of authority arise out of alleged breaches in the client-lawyer relationship and involve reliance by courts and third persons on the validity of the disputed decision. While the collection of cases includes many aberrant relationships, it describes the general boundaries of authority consistent with the means-objectives framework of the Rules and the joint venture model developed here.

The Rules, however, are genuinely normative in two ways. First, they provide a reorientation from the traditional authority models and prescribe the functional equivalent of the informed consent doctrine for normal client-lawyer relationships. Second, they allocate authority and the override prerogative so as to achieve a more appropriate balance

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that an appeal is wholly frivolous, the lawyer, after conscientious examination, should so advise the court and request permission to withdraw. The request must be accompanied by a brief stating anything in the record that could arguably support the appeal. The client must be given a copy and the opportunity to raise any points to the court. Then the court, after full examination of the proceedings, determines whether the case is wholly frivolous. If so, it may grant the motion and dismiss the appeal or proceed to a decision on the merits. If any points are arguable and not frivolous the court must afford the defendant counsel to argue the appeal.

between the legitimate interests of the client, the lawyer, and the public.[282]

The scant case law arising out of nonlitigation representations fully supports the client's broad authority to direct and control the lawyer's actions within legal bounds. For these representations, the Rules primarily fill the gaps left by case law. Their greatest impact may be to encourage dialogue about the client's ultimate objectives so that the lawyer can tailor the services rendered accordingly.

Cases in the civil litigation context support the means-objectives framework and joint venture model most clearly. The cases confer principal authority over the litigation process on the lawyer so that she can protect legitimate public interests in just, expedient, and accurate dispute resolution. The cases also reflect an ambivalence toward procedural decisions that threaten clients' substantive interests. The Model Rules incorporate the case law's substantive-procedural allocation and expand it by requiring significant communication and consultation regarding client objectives and the means by which they are pursued.

The cases involving representation of criminal defendants describe a communication and decisionmaking process consistent with the Rules' framework and the suggested joint venture model. In defenses against serious criminal charges, the Rules may be largely descriptive of normal client-lawyer relations. However, for representations involving lower stakes, the Rules may be truly normative.

Any change in norms creates some difficulties. Lawyers have had rigorous schooling that emphasizes objective, analytical skills and that traditionally eschews the "softer" fields of psychology and counseling. The Model Rules give law schools added incentive to provide training in interpersonal skills. Practicing attorneys must increase their sensitivity to the wide range of client concerns raised by legal matters. As individuals with our own value systems and professional concerns, we must be conscious that each client-lawyer relation is multifaceted, interdependent, and dynamic. As fiduciaries for our clients we cannot assume the responsibility of second-guessing what is in their best interests.[283] The legal profession's continued legitimacy as representatives for clients

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[282] *See generally* Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 705-06, 735-43 (1977).

[283] *See generally* Katz, *On Professional Responsibility*, 80 COM. L.J. 380, 383-85 (1975) (advocates informed consent in attorney-client relationships). For general discussions of the importance of counseling skills to the legal profession, see Appel & Atta, *The Attorney-Client Dyad: An Outsider's View*, 22 OKLA. L. REV. 243 (1969); Freeman, *The Role of Lawyers as Counselors*, 7 WM. & MARY L. REV. 203 (1966).

demands that we earn their trust and confidence. As Professor Jay Katz writes, to do so, we must:

> [L]earn how to communicate better with those who seek our assistance, and how to obtain their consent to the oft perilous and uncertain voyages into the unknown which is such an inherent aspect of the life of law . . . . Legal . . . encounters do not necessarily proceed under favorable winds; the likelihood of encountering treacherous currents is always there; indeed, how to navigate them is precisely what makes our professional lives so exciting and challenging; our . . . client passengers must be better prepared for this voyage.[284]

[284] Katz, *supra* note 283, at 385.

APPENDIX A

SELECTED CANONS OF PROFESSIONAL ETHICS

> As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

Canon 24; *see also* Canons 16, 18, 31, and 44 (lawyer is responsible for participating in questionable transactions, claims, or conduct). Only Canon 7 provides for the client's final determination of a disputed matter. These canons state:

7. Professional Colleagues and Conflicts of Opinion.

> A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.
>
> When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to cooperate effectively. In this event, it is his duty to ask the client to relieve him.
>
> Efforts, direct or indirect, in any way to encroach upon the professional employment of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

16. Restraining Clients from Improprieties.

> A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

18. Treatment of Witnesses and Litigants.

> A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional mat-

ters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the grounds that it is what the client would say if speaking in his own behalf.

31. Responsibility for Litigation.

No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising as to questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

44. Withdrawal from Employment as Attorney or Counsel.

The right of an attorney or counsel to withdraw from employment, once assumed, arises only from a good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligation as to fees or expenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer. So also when a lawyer discovers that his client has no case and the client is determined to continue it; or even if the lawyer finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, the attorney should refund such part of the retainer as has not been clearly earned.

APPENDIX B

SELECTIONS FROM THE ABA CODE OF PROFESSIONAL RESPONSIBILITY

EC 7-7

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. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

EC 7-8

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. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. 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. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client

for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

APPENDIX C

SELECTED MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.4 Communcation

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Model Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or

fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fullfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 1.14 Client Under a Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

APPENDIX D

VARIABLE	LAWYER	OVERLAP ZONE	CLIENT
PRESUMPTIVE SPHERES OF AUTHORITY			
REPRESENTATION CONTEXT			
Office lawyering (nonlitigation)	Competent Process		Lawful objectives
Civil litigation	Procedures/tactics (with consultation)	Some	Substantial rights
Criminal defense	Procedures/tactics (with significant consultation)	Most (mutual decisions)	Plea, jury trial, appeal, other objectives & substantial rights (with significant consultation)
DECISION TYPE			
Traditional litigation allocation	Procedures/tactics	Some (*e.g.*, important stipulations)	Substantial rights, outcome-related
Third party reliance	Justified reliance (*e.g.*, apparent authority, ratification, acquiescence, finality of judgments)		Reliance unjustified
Legal and moral risk	Professional obligations and reputation (e.g., duties of candor, fairness, rejection of frivolous claims)	Occasional override authority (typically lawyer override)	Outcome-related Legal, moral, financial consequences Individuality (autonomy, dignity, responsibility)

VARIABLE	LAWYER	CLIENT
FACTORS REBUTTING PRESUMPTIVE SPHERES		
LAWYER-CLIENT RELATIONSHIP		
Formation	Emergency (immediate action required)	Routine
Expected duration and progress	Continuing (apparent authority)	One-time
CLIENT IDENTITY Degree of sophistication affects extent of required information	Adequate information	Inadequate information
TIMING ISSUES		
Deliberation time	None; instantaneous judgment call	Opportunity and basis for advance consultation
When client objects	Delayed (Monday morning quarterback)	Contemporaneous