

Fall 10-1-2015

Why is There No Clear Doctrine of Informed Consent for Lawyers?

Nancy Moore

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Legal Profession Commons](#)

Recommended Citation

Nancy Moore, *Why is There No Clear Doctrine of Informed Consent for Lawyers?*, 47 *University of Toledo Law Review* 133 (2015).
Available at: https://scholarship.law.bu.edu/faculty_scholarship/248

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



WHY IS THERE NO CLEAR DOCTRINE OF INFORMED CONSENT FOR LAWYERS?

Boston University School of Law
Public Law & Legal Theory Paper No. 15-48

University of Toledo Law Review, Vol. 47, No. 1, Fall 2015

Nancy J. Moore
Boston University School of Law

This paper can be downloaded without charge at:

<http://www.bu.edu/law/faculty-scholarship/working-paper-series/>

“WHY IS THERE NO CLEAR DOCTRINE OF INFORMED CONSENT FOR LAWYERS?”

*Nancy J. Moore**

INTRODUCTION

LIKE numerous other legal ethics scholars, Susan Martyn and I have written on many of the same topics. For example, we have each published extensively on conflicts of interest,¹ confidentiality,² and other aspects of the fiduciary relationship between lawyer and client.³ These parallel interests are common in the field of legal ethics. What is less common, however, is our shared interest in medical as well as legal ethics,⁴ including our various attempts to compare ethical issues confronting both professions, sometimes borrowing from medical ethics literature to inform our legal ethics scholarship (and vice versa).⁵

* Professor of Law and Nancy Barton Scholar, Boston University School of Law.

1. See, e.g., Susan R. Martyn, *Visions of the Eternal Law Firm: The Future of Law Firm Screens*, 45 S.C. L. REV. 937 (1994); Susan R. Martyn, *Implementing a Conflicts Control System*, 40 PRAC. LAW. 15 (1994); Susan R. Martyn, *Conflict About Conflicts: The Controversy Concerning Law Firm Screens*, 46 OKLA. L. REV. 53 (1993); Nancy J. Moore, *Regulating Law Firm Conflicts in the 21st Century: Implications of the Globalization of Legal Services and the Growth of the “MegaFirm,”* 18 GEO. J. LEGAL ETHICS 521 (2005); Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497 (1998); Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541 (1997).

2. See, e.g., Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality ... and Its Exceptions ...*, 81 NEB. L. REV. 1320 (2003); Nancy J. Moore, *Mr. Prinzo’s Breakthrough and the Limits of Confidentiality*, 51 ST. LOUIS U. L.J. 1059 (2007).

3. See, e.g., Susan R. Martyn, *Back to the Future: Fiduciary Duty Then and Now*, in A CENTURY OF LEGAL ETHICS: TRIAL LAWYERS AND THE ABA CANONS OF PROFESSIONAL ETHICS 3 (Lawrence J. Fox et al. eds., 2009); Nancy J. Moore, *“In the Interests of Justice”: Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 FORDHAM L. REV. 1775 (2002).

4. See, e.g., Henry J. Bourguignon & Susan R. Martyn, *Physician-Assisted Suicide: The Supreme Court’s Wary Rejection*, 31 U. TOL. L. REV. 253 (2000); Susan R. Martyn, *Substituted Judgment, Best Interests, and the Need for Best Respect*, 3 CAMBRIDGE Q. HEALTHCARE ETHICS 194 (1994); Nancy J. Moore, *“Two Steps Forward, One Step Back”: An Analysis of New Jersey’s Latest “Right-to-Die” Decisions*, 19 RUTGERS L.J. 955 (1988).

5. See, e.g., Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980) [hereinafter Martyn, *Informed Consent*]; Nancy J. Moore, *What Doctors Can Learn from Lawyers About Conflicts of Interest*, 81 B.U. L. REV. 445 (2001); Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A “Philosophically Informed” and Comparative Approach to Legal and Medical Ethics*, 36 CASE W. RES. L. REV. 177 (1986).

For Professor Martyn, this latter interest first manifested itself in her formative article on communication and decision making within the lawyer-client relationship, entitled “Informed Consent in the Practice of Law.”⁶ In that article, she decried the inability of clients to control the course of their representation. Focusing primarily on the common law of legal malpractice in which “[the] lawyer’s performance is [typically] measured by the yardstick of skill customarily found in the profession,” she proposed “an alternative, process-oriented standard for enforcing competency in the legal profession: informed consent.”⁷ As she explained:

Informed consent is a logical standard for enforcing attorney competence because the client’s right to control the course of his representation imposes a fiduciary duty on the attorney to inform his client of all relevant facts and potential consequences and to obtain the full understanding consent of the client to the legal solution proposed.⁸

In arguing for this new standard, Professor Martyn looked not only to the philosophical and common law basis for extending existing fiduciary duties of lawyers to their clients, but also to the “legal and empirical ramifications of the [informed consent] doctrine in medical and legal practice.”⁹ After a thorough analysis of judicial developments in common law actions against both physicians and lawyers, Professor Martyn concluded by proposing a statute that would create an “action for damages resulting from professional negligence based upon a lawyer’s failure to obtain the informed consent of his client” after a finding “[t]hat the lawyer failed to disclose reasonably foreseeable choices of action in a manner permitting the client to make a knowledgeable evaluation of the legal consequences of the choices.”¹⁰

In proposing this legislation, Professor Martyn did not ignore the fact that recognition of a common law action for informed consent in the medical context has not resulted in successful awards in very many instances.¹¹ Indeed, in her view, “[t]he most positive influence of the doctrine probably has been its phenomenal impact on the day-to-day practice of medicine.”¹² Thus, her primary goal in proposing the statute was not to increase legal malpractice awards, but

6. Martyn, *Informed Consent*, *supra* note 5, at 352.

7. *Id.* at 310.

8. *Id.* For other efforts at comparing informed consent in the legal and medical professions, see generally Nancy J. Moore, *Informed Consent in the Practice of Law*, in 4 *ENCYCLOPEDIA OF PHILOSOPHY* 680 (2d ed. 2006) [hereinafter Moore, *Informed Consent*]; Robert P. Burns & Steven Lubet, *Division of Authority Between Attorney and Client: The Case of the Benevolent Otolaryngologist*, 2003 U. ILL. L. REV. 1275; Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) [hereinafter Spiegel, *Lawyer and Client Decisionmaking*].

9. Martyn, *Informed Consent*, *supra* note 5, at 310-11.

10. *Id.* at 346.

11. *See id.* at 346 & n.249 (citing nationwide survey of malpractice claims finding that only 2½% of claims alleged lack of informed consent, as well as sources finding that damage awards are even smaller because of difficulties in proving causation).

12. *Id.* at 345.

rather to “promot[e] better lawyer-client relationships, [which] may actually reduce the amount of legal malpractice litigation before a crisis occurs.”¹³

State legislatures have not adopted informed consent in legal practice statutes as Professor Martyn suggested. Their failure to do so is readily understandable: after all, most medical malpractice legislation has had the intended effect of reducing, not increasing, the availability of a malpractice action.¹⁴ What is more surprising, however, is that common law courts have not significantly expanded the availability of a legal malpractice action when the gravamen of the complaint is a lack of informed consent, rather than a failure to perform with the requisite knowledge and skill.¹⁵ What explains the failure of common law courts to clearly adopt the informed consent doctrine in the legal context to the extent they have done so in the medical context?

One reason for the lack of development of informed consent in legal practice may be the practical difficulties that patients have encountered in bringing such actions in the medical context. Many jurisdictions adhere either to the professional standard of disclosure or an objective standard for determining causation, making success in these medical actions highly problematic.¹⁶ As a result, plaintiffs’ attorneys may be reluctant to bring similar lawsuits against lawyers, preferring to rely on more traditional violations of the standard of care. Of equal importance, however, may be a factor not cited by Professor Martyn—the lack of clarity and consensus among courts and commentators concerning several separate but related concepts: the allocation of decision-making authority between lawyer and client, the lawyer’s duty to keep the client reasonably informed concerning the status of the representation, and the lawyer’s duty to fully explain matters when the client’s consent is necessary. Some of these concepts—primarily the allocation of decision-making authority—received considerable attention in a series of important articles around the time Professor Martyn’s article was published.¹⁷ Unlike Professor Martyn, however, these

13. *Id.* at 346.

14. *See id.* at 343 (internal footnotes omitted) (“In response to the malpractice crisis, proposals for a shortened statute of limitations, ceilings on medical malpractice awards, regulation of attorneys fees, and adoption of the winner-take-all system have been made and partially implemented in a number of jurisdictions. Mandatory arbitration by malpractice review boards and medical no-fault insurance have also been proposed.”). Despite recognizing that these efforts are often “legislative attempts to protect the medical profession,” Professor Martyn argues that “the statutes also have recognized the need for further sustained growth of the patient’s rights by attempting to regularize procedures that will guarantee that patients receive the information to which they are entitled.” *Id.* at 344 (internal footnote omitted).

15. Thus, the leading legal malpractice treatise has no separate section on legal malpractice cases alleging a lack of informed consent. *See generally* RONALD E. MALLIN & ALLISON MARTIN RHODES, *LEGAL MALPRACTICE* (Thomson Reuters 2015).

16. *See, e.g.,* Martyn, *Informed Consent*, *supra* note 5, at 336-40.

17. *See, e.g.,* Marcy Straus, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987); Judith Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984); Mark Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003 [hereinafter Spiegel, *New Model Rules of Professional Conduct*]; Spiegel, *Lawyering and Client*

commentators focused not only on case law, but also on professional codes of conduct for lawyers,¹⁸ perhaps because they recognized that in order to develop a robust informed consent doctrine, courts must first have a clear understanding of which decisions are for the client to make.¹⁹

Given that her goal was to change lawyers' practices—rather than to increase malpractice damage awards—it is unclear why Professor Martyn did not address the role of lawyer ethics codes in promoting enhanced client participation in the course of representation. If she had done so, she probably would have observed that, unlike much of the decision making in the medical context, it was far from clear at the time she wrote (in 1980) which decisions were clearly for clients and which were for lawyers. Indeed, in my view, it was not solely (or even primarily) the lack of a meaningful disclosure obligation that was the problem in then-existing ethics codes, but rather the lack of any clear standard limiting the lawyer's right to direct the course of the representation.²⁰ Unfortunately, that situation has not substantially improved in the 35 years since the publication of her article.²¹

From approximately 1999-2002, the American Bar Association ("ABA") Commission on Evaluation of the Rules of Professional Conduct (the "Ethics 2000 Commission") studied the ABA Model Rules of Professional Conduct and made recommendations for amendments, most of which were adopted by the ABA House of Delegates and then considered by the states.²² Professor Martyn and I both participated in the work of the Ethics 2000 Commission, she as a Commissioner and I as Chief Reporter. Thus, we may both claim some credit for amendments that somewhat improved the clarity of prior rules with respect to the allocation of decision-making authority and communication between lawyer and client.²³ But we must also take some responsibility for the lack of clarity that remains.²⁴ The Commission had well-considered reasons for limiting some of its

Decisionmaking, *supra* note 8. See also DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* (1974); DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991). A number of recent articles focus on decision making in the context of lawyers representing criminal defendants. See, e.g., Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39 (2005); Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763 (2000).

18. See, e.g., Maute, *supra* note 17, at 1055-57; Spiegel, *New Model Rules of Professional Conduct*, *supra* note 17, at 1004-07; Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 8, at 71.

19. In medicine, informed consent doctrine is applied primarily to surgery and other invasive procedures that would constitute a battery without the patient's consent; the question sometimes arises, however, whether a patient's consent is required for all treatment options, even when the procedure is noninvasive, for example, bed rest, or when one or more options are options that the physician would not recommend. Moore, *Informed Consent*, *supra* note 8, at 681.

20. See generally *id.*

21. See *id.*

22. See generally Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002).

23. See *infra* Part IV.

24. See *infra* Parts IV, V.

proposals in this area,²⁵ but, speaking for myself, I confess that I now believe that it could have (and should have) done more.

The purpose of this brief Article honoring Professor Martyn's scholarship²⁶ is to review the history of the allocation of decision making and communication in recent ABA lawyer codes, focusing on the work of the Ethics 2000 Commission and the possibility of meaningful future reform.

I. DECISION MAKING AND COMMUNICATION UNDER THE ABA MODEL CODE

In 1980, when Professor Martyn published her article, the Model Rules had not yet been adopted.²⁷ The ABA Model Code of Professional Responsibility, adopted in 1969,²⁸ had no disciplinary rules that clearly addressed either the allocation of decision-making authority between lawyer and client or the lawyer's duty to communicate with the client concerning the representation.²⁹ Rather, under the rubric of Canon 7, entitled "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law,"³⁰ the Code contained several Disciplinary Rules ("DR") that touched on the topics in a manner that sometimes raised more questions than they answered.

As for the allocation of decision making, DR 7-101(A)(1) provided that "[a] lawyer shall not intentionally ... [f]ail 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)."³¹ This rule created a distinction between the objectives and means of the representation, implying that it was for the client to establish lawful objectives and for the lawyer to determine the means by which those objectives should be carried out. As for possible exceptions, DR 7-101(B) gave the lawyer discretion both to "[r]efuse 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"³² and "[w]here permissible, [to] exercise his professional judgment to waive or fail to assert a right or position of his client."³³ The latter exception created significant ambiguity, as there was no explanation of when such an exercise of professional discretion was "permissible." Moreover, unlike DR 7-101(A)(1), this provision suggested that absent such permission,

25. *See infra* Part V.

26. Of course, Professor Martyn's published work is far more extensive than the articles I have cited here. She is the author or co-author of numerous additional articles on various topics of legal and medical ethics, as well as books for clients, practicing lawyers, and law students, and several amicus curiae briefs submitted to the United States Supreme Court. *See Susan Martyn*, U. TOLEDO C.L., <http://utoledo.edu/law/faculty/fulltime/martyn.html> (last visited Nov. 20, 2015).

27. The American Bar Association Model Rules were first adopted in 1983. MODEL RULES OF PROF'L CONDUCT Preface (2013).

28. *Id.*

29. *See, e.g.,* Uphoff, *supra* note 17, at 773-75; Maute, *supra* note 17, at 1055-57; Spiegel, *New Mode Rules of Professional Conduct*, *supra* note 17, at 1006-07.

30. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1969).

31. *Id.* at DR 7-101(A)(1).

32. *Id.* at DR 7-101(B)(2).

33. *Id.* at DR 7-101(B)(1).

lawyers would be obligated to take positions as directed by their clients, even when these positions constituted a means to an end rather than the end itself.

The ambiguity and inconsistencies of the two disciplinary rules were compounded by the seemingly contradictory direction taken in the non-binding Ethical Considerations (“EC”) under Canon 7.³⁴ EC 7-7 and 7-8 strongly pointed to a powerful role for client instruction and decision making. EC 7-7 provided:

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 [the] lawyer.³⁵

The most important means-based decisions of a representation will clearly affect the merits of a case; as a result, EC 7-7 appeared to give the lawyer authority only over relatively insignificant matters. EC 7-8 was primarily devoted to communication.³⁶ It also contained, however, a reminder that “[i]n the final analysis, ... 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.”³⁷ And further, “[i]n 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 [the] Disciplinary Rules, the lawyer may withdraw from the employment.”³⁸

Taken together, ECs 7-7 and 7-8 suggested a resounding endorsement of a client’s authority to make important decisions concerning both the objectives and the means of the representation. Of course, those sentiments were not embodied in the mandatory DRs, which were supposed to be the sole basis for lawyer discipline.³⁹ And even within the ECs, the message was inconsistent. For example, EC 7-9 provided:

In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.⁴⁰

34. Disciplinary Rules were mandatory, designed to provide a basis for lawyer discipline; Ethical Considerations were aspirational, representing “the objectives toward which every member of the profession should strive.” *Id.* at Preliminary Statement.

35. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-7 (1980).

36. *See infra* notes 43-45 & accompanying text.

37. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-8.

38. *Id.*

39. *See supra* note 34.

40. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-9 (1980).

Like DR 7-101(B),⁴¹ EC 7-9 does nothing to explain which decisions are the lawyer's to make. Nevertheless, it clearly implies that there is a broad range of decisions for which the lawyer is responsible and for which the lawyer need not seek the client's permission, unless the motive for doing so is to forego an action beneficial to the client.⁴² In other words, so long as the lawyer is acting in what the lawyer reasonably believes to be the client's interests, there are many decisions that are ordinarily the lawyer's to make.

As for communication, there is no DR that addresses a lawyer's general duty to communicate with the client concerning the course of the representation. EC 7-8 provides that "[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" and further that "[a] lawyer ought to initiate [the] decision-making process if the client does not do so."⁴³ In these two sentences, EC 7-8 acknowledges the importance of informing the client of all "relevant considerations."⁴⁴ But the remainder of EC 7-8 focuses on ensuring that the lawyer provides the client with both a recommendation and information in support of that recommendation:

A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process 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.⁴⁵

Nowhere does EC 7-8 exhort the lawyer should provide the type of information that a reasonable client would want to know or information that might lead a client to make a decision different from the one the lawyer is recommending.

II. DECISION MAKING AND COMMUNICATION UNDER THE 1983 ABA MODEL RULES

In 1983, the ABA replaced the Model Code with the Model Rules of Professional Conduct.⁴⁶ Unlike the Model Code, the 1983 Model Rules began with a clear focus on the duties lawyers owe to their clients. Part I consisted of 16 separate rules, all under the rubric of "Client-Lawyer Relationship."⁴⁷ Included in Part I were Rules 1.2, entitled "Scope of Representation," and 1.4,

41. *See supra* notes 32-33 & accompanying text.

42. Presumably, a lawyer might want "to forego legally available objectives or methods because of non-legal factors" in circumstances where to do so would avoid harming another person or society in general. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8.

43. *Id.*

44. *Id.*

45. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1980).

46. MODEL RULES OF PROF'L CONDUCT Preamble (1983).

47. *Id.* at Table of Contents.

entitled “Communication.” Rule 1.2(a) directly addressed the allocation of decision making between lawyer and client, and Rule 1.4 spelled out the extent of the lawyer’s duty to communicate—lawyers must inform their client about decisions the client is entitled to make and keep the client informed of the status of the representation and other matters.⁴⁸

Although Rule 1.2(a) directly addressed the allocation of decision making between lawyer and client, it did not clearly state how that authority was to be divided. Continuing the Model Code’s implicit division of decisions into objectives and means,⁴⁹ Rule 1.2(a) did clearly provide that “[a] lawyer shall abide by a client’s decisions concerning the objectives of representation.”⁵⁰ However, as to the means of achieving these objectives, the rule merely stated that the lawyer “shall consult with the client as to the means by which they are to be pursued.”⁵¹ One could easily read this rule to permit the lawyer to make all decisions regarding the means of the representation,⁵² so long as the lawyer first consults with the client⁵³ and disregards any client instructions to the contrary.

Like the earlier ECs,⁵⁴ the original Comment to Rule 1.2(a) may have served merely to obfuscate, rather than clarify. It began by announcing, without explanation, that “[b]oth lawyer and client have authority and responsibility in the objectives and means of [the] representation ... within the limits imposed by law and the lawyer’s professional obligations.”⁵⁵ Left unaddressed, however, was precisely how the lawyer had authority and responsibility over the objectives of the representation, as well as how the client had authority and responsibility over the means of achieving these objectives.⁵⁶ The Comment went on to state:

Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility

48. *Id.*

49. *See supra* note 31 & accompanying text.

50. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (1983).

51. *Id.*

52. Of course, this would not include certain specified decisions that the lawyer was expressly required to permit the client to make, regardless of whether they were classified as objectives or means: “whether to accept an offer of settlement” and, in criminal cases, the “plea to be entered, whether to waive jury trial and whether the client will testify.” *Id.*

53. *But cf. id.* at R. 1.4 cmt. (stating lawyer in litigation “ordinarily cannot be expected to describe trial or negotiation strategy in detail”).

54. *See supra* notes 34-45 & accompanying text.

55. MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. (1983).

56. According to Professor Judith Maute, “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,” leaving “the parameters of the respective spheres of authority uncertain, which should facilitate genuine dialogue and compromise in close decisions.” Maute, *supra* note 17, at 1052. *See also generally* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING (4th ed. 2015).

for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.⁵⁷

The Comment did not explain, however, when a lawyer may refuse to pursue a client's objectives,⁵⁸ nor did it explain how "the client-lawyer relationship partakes of a joint undertaking."⁵⁹ Also, the significance of the distinction between "technical and legal tactical issues" and "the expense to be incurred and concern for third persons" was unclear.⁶⁰ Lawyers were told that they "should" assume responsibility for the former and that they "should" defer to the client regarding the latter; however, given that the comments were not supposed to create obligations that did not exist in the rules themselves,⁶¹ these exhortations could easily be taken as merely a suggestion of what lawyers ordinarily ought (morally) to do, not what they are required to do under penalty of discipline.

As for communication, Rule 1.4 contained two brief provisions. First, Rule 1.4(a) required a lawyer to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."⁶² Second, Rule 1.4(b) required a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁶³ These provisions were a substantial improvement of the prior Code: not only did they mandate—for the first time—that lawyers must communicate with their clients, they also provided for expansive duties both to communicate regularly and to explain matters sufficiently to permit clients to make "informed decisions" concerning the course of the representation. As for the extent of the information lawyers were required to provide, the Comment generally explained that "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so."⁶⁴

57. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt.

58. The Rules did provide elsewhere that lawyers must, or could, override certain client objectives. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (prohibiting lawyers from knowingly counseling or assisting a client in criminal or fraudulent conduct); *id.* at R. 3.3 (requiring a lawyer's duty of candor to the tribunal); *id.* at R. 3.4 (detailing the lawyer's duty of fairness to opposing parties); *id.* at R. 4.1 (providing a lawyer's duty to third persons). But the Rule 1.2 Comment quoted in the text implies a lawyer's ability to decline to pursue client-proposed objectives or means beyond the specific provisions elsewhere in the Rules. *See supra* note 57 and accompanying text.

59. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. For one commentator's discussion of how lawyer and client might operate as "joint venturers," see Maute, *supra* note 17, at 1066-69.

60. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (1983).

61. *Id.* at Preamble: Scope ("Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.").

62. MODEL RULES OF PROF'L CONDUCT R. 1.4(a).

63. *Id.* at R. 1.4(b).

64. *Id.* at R. 1.4 cmt.

III. THE RESTATEMENT OF THE LAW GOVERNING LAWYERS

In 2000, the American Law Institute (“ALI”) adopted an entirely new Restatement of the Law Governing Lawyers (“Lawyering Restatement”).⁶⁵ Unlike the ABA codes of professional responsibility, the Restatement encompasses both disciplinary and other law, such as disqualification and civil liability.⁶⁶ As a result, the ALI frequently referenced and drew upon its own Second Restatement of the Law of Agency (“Agency Restatement”).⁶⁷

Section 21 of the Lawyering Restatement, entitled “Allocating the Authority to Decide Between a Client and a Lawyer,” provides that subject to some limitations, lawyers and clients “may agree which of them will make specified decisions.”⁶⁸ In the absence of such an agreement, “[a] client may instruct a lawyer during the representation,” so long as the instruction is lawful and does not require the lawyer to violate the lawyer’s professional obligations.⁶⁹ Section 21 also provides that in the absence of either a valid prior agreement or client instructions, “a lawyer may take any lawful measure within the scope of representation that is reasonably calculated to advance a client’s objectives as defined by the client, consulting with the client as required by § 20.”⁷⁰ Section 20 provides that with respect to decisions to be made by the lawyer, the lawyer need only “consult with a client to a reasonable extent.”⁷¹ Finally, Section 22 specifies that subject to any contrary agreement:

[T]he following and comparable decisions are reserved to the client except when the client has validly authorized the lawyer to make the particular decision: whether and on what terms to settle a claim; how a criminal defendant should plead; whether a criminal defendant should waive jury trial; whether a criminal defendant should testify; and whether to appeal in a civil proceeding or criminal prosecution.⁷²

These provisions differ markedly from those of the 1983 version of Rule 1.2(a). Whereas Rule 1.2(a) could be read to require the lawyer to consult with the client prior to any action taken as a means to achieve a client’s objectives,⁷³

65. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) (“Lawyering Restatement”). Both Professor Martyn and I served as Advisers to this Restatement.

66. *Id.* at Foreword.

67. RESTATEMENT (SECOND) OF AGENCY (1958). In 2000, the American Law Institute adopted a Third Restatement of Agency, with provisions similar to the Second Restatement. RESTATEMENT (THIRD) OF AGENCY (2006). Because the Lawyering Restatement relied on the Second Restatement of Agency, I will cite to the relevant provisions there but will also indicate the analogous provisions of the Third Restatement of Agency.

68. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21(1).

69. *Id.* §§ 21(2), 22, 23.

70. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21(3) (2000).

71. *Id.* § 20(1).

72. *Id.* § 22(1).

73. See *supra* notes 55-61 & accompanying text. See also *Ethics 2000 Commission Report on the Model Rules of Professional Conduct Rule 1.2*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule12.html (last visited Nov. 24, 2015); *Model Rule 1.2: Reporter’s Explanation of Changes* ¶ 4, A.B.A.,

the Lawyering Restatement expressly provides that the lawyer is impliedly authorized to “take any lawful measure within the scope of representation that is reasonably calculated to advance a client’s objectives”⁷⁴ and that the lawyer need only consult the client “to a reasonable extent.”⁷⁵ On the other hand, if a client instructs the lawyer, the lawyer is almost always required to abide by that instruction, even when the decision concerns the means rather than the objectives of the representation—the only alternative for a lawyer with a fundamental objection to a client-dictated course of action is to withdraw, where permissible.⁷⁶ Finally, the Lawyering Restatement rejects the Model Rules’ distinction between the objectives and the means of the representation, preferring to identify decisions reserved to the client as those that “are so vital to a client that a reasonable client would not agree to abandon irrevocably the right to make the decisions with the help of the lawyer’s advice.”⁷⁷

Section 20 of the Lawyering Restatement addresses “A Lawyer’s Duty to Inform and Consult with a Client.”⁷⁸ Drawn largely from the 1983 Model Rules,⁷⁹ it requires lawyers: to “keep a client reasonably informed about the matter and [to] consult with a client to a reasonable extent concerning decisions to be made by the lawyer,”⁸⁰ to “promptly comply with a client’s reasonable requests for information,”⁸¹ and to “notify a client of decisions to be made by the client ... [and] explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁸²

IV. THE ETHICS 2000 AMENDMENTS

The Ethics 2000 Commission was established in 1997 to undertake a comprehensive study of the ABA Model Rules of Professional Conduct and to recommend amendments to the ABA House of Delegates.⁸³ The Commission reported to the House of Delegates in 2002. Among the changes it recommended were numerous amendments to both Rules 1.2(a) and 1.4, all of which were adopted by the House of Delegates.⁸⁴ One of the purposes of these amendments was to clarify the issues of decision making and communication by more clearly

http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule12rem.html (last visited Nov. 24, 2015) [hereinafter *Reporter’s Explanation of Changes, R. 1.2*].

74. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21(3) (2000).

75. *Id.* § 20(1).

76. *See id.* § 21 cmt. d (“A lawyer may, after obtaining any required court permission, withdraw from the representation if the instructions are considered repugnant or imprudent”).

77. *Id.* § 22 cmt. b.

78. *Id.* § 20.

79. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20, Reporter’s Note cmt. c (2000).

80. *Id.* § 20(1).

81. *Id.* § 20(2).

82. *Id.* § 20(3).

83. Love, *supra* note 22, at 441.

84. *Id.* at 447.

differentiating among several separate but related topics: the allocation of decision making between lawyer and client; the lawyer's duty to keep the client reasonably informed, and the lawyer's duty to fully explain matters when the client's consent is required. In addition, the Commission sought to address some apparent inconsistencies between the 1983 Model Rule provisions and the Lawyering Restatement.

A. *The Allocation of Decision-Making Authority*

Rule 1.2(a)⁸⁵ primarily addresses the allocation of decision-making authority and only tangentially references communication with the client. It maintains the 1983 rule's requirement that "a lawyer shall abide by a client's decisions concerning the objectives of [the] representation" but then states that "*as required by Rule 1.4, [a lawyer] shall consult with the client as to the means by which they are to be pursued.*"⁸⁶ The purpose of adding the highlighted language was to put all of the rules regarding the lawyer's duty to communicate in Rule 1.4.⁸⁷ Substantively, in Rule 1.4, the Commission adopted the Lawyering Restatement's clarification that a lawyer is not required to consult the client as to every action the lawyer takes in carrying out the client's objectives,⁸⁸ no matter how insignificant. Rather, Rule 1.4 now states that lawyers need only "*reasonably consult with the client about the means by which the client's objectives are to be accomplished.*"⁸⁹

In addition, Rule 1.2(a) now expressly provides that "[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."⁹⁰ This change avoided any possible interpretation of the 1983 rule as requiring lawyers to consult a client before taking any action on the client's behalf.⁹¹ Such an interpretation was obviously absurd—no one would disagree that lawyers may, at the very least, take such innocuous actions as making calls and drafting letters to schedule routine interviews and depositions without first obtaining the client's approval. To that extent, the Commission expressly adopted the Lawyering Restatement's recognition of a lawyer-agent's implied authority to take some actions on behalf of a client-principal, reasonably consulting the client either before or after taking such action, depending on the circumstances.

But in three important respects, the Commission did not go as far as the Lawyering Restatement. First, unlike the Restatement,⁹² the Commission

85. Rule 1.2 itself is now titled "Scope of Representation and Allocation of Authority Between Client and Lawyer." See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002). Rule 1.2 thus gives even more prominence to the subject of the allocation of decision-making authority.

86. *Id.* at R. 1.2(a) (emphasis added).

87. See *Reporter's Explanation of Changes, R. 1.2, supra* note 73, ¶ 3.

88. See *supra* note 84 & accompanying text.

89. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (2002) (emphasis added).

90. *Id.* at R. 1.2(a).

91. See *Reporter's Explanation of Changes, R. 1.2, supra* note 73, ¶ 4.

92. See *supra* Part III.

maintained the traditional distinction between the objectives and means of the representation. Although the Commission apparently never contemplated eliminating the reference to the client's right to decide the objectives of the representation, it did consider specifying additional "important" decisions that were for the client to make—regardless of whether they are characterized as objectives or means—such as "whether to file a lawsuit, or appeal an adverse judgment, or to waive any constitutional right."⁹³ In addition, the Commission was asked to consider following the Restatement in "supplement[ing] its laundry list of decision[s] with a general reference to 'other comparable decisions'" or using some other "'catchall' phrase."⁹⁴ The Commission could not agree as to which decisions to add to the list⁹⁵ and did not adopt any "catch-all" phrase as an alternative approach to supplementing the existing list of important decisions that are the client's to make.⁹⁶

Second, concerning the lawyer's implied authority to act on the client's behalf, the Commission did not adopt the Lawyering Restatement's provision that "a lawyer may take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives."⁹⁷ Instead, borrowing the term "impliedly authorized" from Model Rule 1.6,⁹⁸ the Commission provided that "[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."⁹⁹ The term "impliedly authorized" is not defined in either Rule 1.6 or Rule 1.2, and its proper interpretation is therefore subject to debate.¹⁰⁰ Perhaps it means implied-

93. Memorandum, Talking Points Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer 4-5 (undated) (memorandum obtained from the files of Commission Reporter Carl Pierce) (on file with author). *See also* Memorandum from Carl A. Pierce, Co-Reporter on Model Rule 1.2, Discussion Questions to the Ethics 2000 Commission 3-4 (July 28, 1998) (on file with author).

94. *See* Memorandum from Pierce, *supra* note 93, at 4.

95. Memorandum, Talking Points Rule 1.2, *supra* note 93, at 5.

96. I could not find any indication of why the Commission failed to adopt the proposal to add a general "catch-all phrase" such as "comparable decisions." In my view, however, adoption of such a standard, although appropriate in a Restatement, would be inappropriate for a disciplinary standard because it is so vague; moreover, any attempt to specify which additional decisions are for clients to make is inconsistent with the Commission's decision to leave open the question of how disagreements between lawyers and clients over means decisions are to be resolved. *See supra* note 94 & accompanying text.

97. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21(3) (2000).

98. *See Reporter's Explanation of Changes, R. 1.2, supra* note 73, ¶ 4 ("The new sentence in paragraph (a) parallels the reference in Rule 1.6(a) to the lawyer's implied authority to reveal information relating to the representation.")

99. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002).

100. The Rule 1.2 Comment says nothing other than that "[w]ith respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation." *Id.* at R. 1.2 cmt. 1. The Rule 1.6 Comment is more expansive in providing several examples, although it makes no effort to supply a general standard for determining when disclosures are impliedly authorized. *See id.* at R. 1.6 cmt. 5 ("In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice,

in-law,¹⁰¹ which could be as broad as the Restatement provision authorizing “any lawful measure within the scope of [the] representation that is reasonably calculated to advance a client’s objectives.”¹⁰² But it could also mean implied-in-fact, in which case the lawyer would be authorized to take only such action as the lawyer reasonably believes the client would approve without prior consultation.¹⁰³ The Reporter’s Explanation of Changes for the 2002 amendment states merely that “[t]he scope of the lawyer’s implied authority is to be determined by reference to the law of agency.”¹⁰⁴ It is unclear whether the Commission had the specific Lawyering Restatement’s broad provision in mind when it gave this explanation or whether the Commission was merely indicating an intent to reference general agency law, whatever that law happens to be.¹⁰⁵

disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.”).

101. Contract law distinguishes between agreements that are “implied-in-fact” and agreements that are “implied-in-law”: implied-in-fact contracts require evidence of actual mutuality of assent between the parties, whereas implied-in-law contracts require no such evidence but represent duties imposed by law. *See, e.g.,* Willard L. Boyd III & Robert K. Huffman, *The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 CATH. U. L. REV. 605, 606-07 (1991). These terms are not common outside of contract law, but I believe they are helpful in conveying the distinction between what I take to be the broad interpretation of implied authority in the Lawyering Restatement and a possibly narrower interpretation of “impliedly authorized” in both Model Rule 1.2 and 1.6.

102. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21(3) (2000). *See, e.g.,* HAZARD & HODES, *supra* note 56, § 6.04, at 6-16 & n.9 (stating that the term “impliedly authorized” in Rule 1.2(a) means that a “lawyer has general authority to take any lawful action ‘reasonably calculated to advance the client’s objectives’” and that the addition of the term in 2002 “was obviously influenced by the quoted Restatement text” (internal footnote omitted)). *But see infra* note 103 (same commentators suggesting a different, narrower interpretation). One of the examples in the Rule 1.6 Comment—admitting a fact that cannot properly be disputed, see MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 5—appears to support the implied-in-law interpretation, as it would permit a lawyer to disclose information adverse to a client that the client might not wish to have disclosed. Of course, if the lawyer reasonably believes that the client would object to disclosure, then the lawyer should probably consult the client prior to making the disclosure, and if the client continues to object, then the lawyer could advise the client of the option of avoiding disclosure by either dismissing the complaint or settling the case.

103. *See* HAZARD & HODES, *supra* note 56, § 6.04, at 6-14 (“[E]ven where there has been no explicit discussion between lawyer and client, the circumstances (including past dealings), may be such that the lawyer can readily judge that a particular decision or action ... would meet with the client’s approval.”). *See also* MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 5 (authorizing intra-firm disclosures “unless the client has instructed that particular information be confined to specified lawyers”); ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 08-453 (2008) (stating intra-firm disclosures are impliedly authorized because clients typically want to take advantage of the expertise of other lawyers in the firm). Under the implied-in-fact interpretation, the lawyer’s authority would be more circumscribed and would prevent the lawyer from unilaterally taking action that could have a significant effect on the client’s matter as to which a reasonable client would probably want to be consulted because of either significant risk, significant cost to the client, or significant impact on third persons.

104. *Reporter’s Explanation of Changes, R. 1.2, supra* note 73, ¶ 4.

105. The Commission apparently rejected an earlier proposal to conform Rule 1.2(a) to the Lawyering Restatement by authorizing the lawyer to take “action on behalf of the client that is reasonably calculated to accomplish the client’s objectives.” *See* Working Draft of Model Rules of Prof’l Conduct R. 1.2, *Reporter’s Observations* at 7 (Proposed Rule 1.2—Draft No. 3 Dec. 1999)

Third, the Commission declined to adopt the Lawyering Restatement's provision requiring lawyers to abide by lawful client instructions as to both the objectives and means of the representation.¹⁰⁶ Rather, the Commission explained in the Comment that when a lawyer and client disagree about the means of the representation, and the lawyer is unable to obtain a "mutually acceptable resolution of the disagreement," the "Rule does not prescribe how such disagreements are to be resolved."¹⁰⁷ The Comment does, however, remind the lawyer that "[o]ther law ... may be applicable and should be consulted by the lawyer."¹⁰⁸ In addition, the Comment mentions both the lawyer's ability to withdraw and the client's ability to discharge the lawyer, as provided by Rule 1.16.¹⁰⁹ As noted in the Reporter's Explanation of Changes, the Commission declined to require a lawyer to abide by client instructions or "to specify the lawyer's duties when the lawyer and client disagree about the means to be used to accomplish the client's objectives."¹¹⁰ It apparently did so, as explained in the Comment, "[b]ecause of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons"¹¹¹

B. Communication

As discussed above, the original version of Rule 1.4 contained two provisions. Rule 1.4(a) required a lawyer first to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information," and Rule 1.4(b) required a lawyer to "explain a matter to the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."¹¹² These provisions were not

(on file with author) [hereinafter Working Draft No. 3] (reporting that "The Commission asked [Reporter Carl Pierce] to conform the references to implied authority to Rules 1.2(a) and 1.6(a)" but that Reporter Pierce was recommending the Restatement language as an alternative). Although there is no indication that the Reporters undertook further research concerning the law of agency on this point, it is noteworthy that if they had done so, they would have discovered that the Lawyering Restatement did not accurately restate the Agency Restatement, either as to the scope of the lawyer's implied authority to act on the client's behalf or the lawyer's duty to follow all lawful client instructions. *See infra* note 152 & accompanying text. Moreover, there is much case law, particularly in criminal cases, generally giving lawyers decision-making authority with respect to the means of the representation. *See infra* note 156 & accompanying text.

106. Reporter Carl Pierce at one point proposed adding the Restatement language to the text of Rule 1.2(a). *See* Working Draft No. 3, *supra* note 105, at 1 (proposing a new sentence stating, "A lawyer shall abide by the client's instructions, if any, as to the means by which the client's objectives are to be pursued.").

107. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 2 (2002).

108. *Id.*

109. *Id.*

110. *Reporter's Explanation of Changes, R. 1.2, supra* note 73, ¶ 5.

111. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 2. *See also* Memorandum, Talking Points Rule 1.2, *supra* note 95, at 2. In addition, case law did not support the Restatement's broad grant of authority to instruct clients as to the means of the representation, particularly in litigation. *See infra* note 156 & accompanying text.

112. *See supra* text accompanying notes 63-64.

controversial. Nevertheless, although it left Rule 1.4(b) intact, the Commission made significant revisions to Rule 1.4(a) and the Comment, the purpose of which was to put all of the lawyer's general duties to communicate in one place and to clarify several aspects of these duties.

The Commission reorganized and expanded Rule 1.4(a) by separating the duty to keep a client reasonably informed about the status of a matter¹¹³ from the duty to promptly comply with reasonable requests for information¹¹⁴ and by adding three additional duties of communication: (1) to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent ... is required by these Rules;"¹¹⁵ (2) to "reasonably consult with the client about the means by which the client's objectives are to be accomplished;"¹¹⁶ and (3) to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."¹¹⁷ The first additional duty of communication is new. The remaining two additional duties are transferred from the original Rule 1.2(a) and (e), respectively,¹¹⁸ with the previously discussed qualification that the lawyer's duty to consult about the means of the representation is now expressly limited to consultation that is *reasonably required*.¹¹⁹

For the reasons I have already explained, the Commission believed it was important to clarify not only that lawyers have some inherent authority to act for clients with respect to the means by which the client's objectives are to be achieved,¹²⁰ but also that lawyers need not always consult clients before they act.¹²¹ The revised Comment [3] to Rule 1.4 makes this latter point directly:

In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial [and] when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf.¹²²

113. See MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(3) (2002).

114. *Id.* at R. 1.4(a)(4).

115. *Id.* at R. 1.4(a)(1).

116. *Id.* at R. 1.4(a)(2).

117. *Id.* at R. 1.4(a)(5).

118. See *Ethics 2000 Commission Report, Model Rule 1.4: Reporter's Explanation of Changes* ¶¶ 3, 6, A.B.A., http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule14rem.html (last visited Nov. 25, 2015).

119. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (2002). See also *supra* text accompanying note 116.

120. See *supra* text accompanying notes 63-64.

121. See *supra* text accompanying notes 113-117.

122. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 3.

In addition, the revised text of Rule 1.4 clearly separates two concepts: Rule 1.4(a) instructs lawyers *when* they must communicate with their clients, whereas Rule 1.4(b) addresses the *type of explanation* that is required to permit the client to make “informed decisions.”¹²³ What is confusing, however, is that the term “informed consent”—a new term introduced by the Commission for use throughout the Rules¹²⁴—appears in the former provision but not in the latter. Thus, Rule 1.4(a) requires a lawyer to “promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules.”¹²⁵ The Rules that expressly require a lawyer to obtain the client’s “informed consent” are those pertaining to: (1) limiting the scope of the representation (Rule 1.2(c))¹²⁶; (2) disclosing otherwise confidential information (Rule 1.6);¹²⁷ and (3) undertaking representation burdened by a conflict of interest (Rules 1.7-1.12; Rule 1.18).¹²⁸ Nowhere do the Rules require a lawyer to obtain the client’s “informed consent” with respect to general decision making under Rule 1.2(a), which concerns the objectives and some of the means of representation, including important matters such as whether to accept or reject a settlement offer.¹²⁹

Neither the Comment nor the Reporter’s Explanation of Changes explain this limited use of the term “informed consent” in Rule 1.4.¹³⁰ There is legislative history indicating that the Commission considered and rejected a proposal to include a reference to “informed consent” in Rule 1.2(a); however, the proposal would not have used that term for determining the objectives of the

123. This organization is mirrored in the comment, which contains paragraphs under the separate captions “Communicating with Client” and “Explaining Matters.” *Id.* at R. 1.4 cmt.

124. See *Ethics 2000 Commission Report, Model Rule 1.0: Reporter’s Explanation of Changes* ¶ 5, A.B.A., http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule10rem.html (last visited Nov. 25, 2015) [hereinafter *Reporter’s Explanation of Changes, R. 1.0*].

125. MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(1) (2002). This provision is apparently intended to require the lawyer to promptly inform the client of any decision the client must make, including both general decision making and circumstances in which the client’s informed consent is required by another Rule. See *id.* at R. 1.4 cmt. 2. Paragraph (a)(1) applies to any decision required to be made by the client, including whether to accept an offer of settlement under Rule 1.2(a)). *Id.* Nevertheless, although the wording is awkward, the Commission does not appear to have expressly intended the term “informed consent” to apply in circumstances other than those under those Rules where the term is used. See *infra* notes 130-131 & accompanying text.

126. MODEL RULES OF PROF’L CONDUCT R. 1.2(c).

127. *Id.* at R. 1.6(a).

128. *Id.* at Rs. 1.7-1.12, 1.18.

129. See *supra* text accompanying note 125.

130. Comments [5] and [6] to Rule 1.4, captioned “Explaining Matters,” do not explain the limited use of the term “informed consent.” These paragraphs, which are taken primarily from the original Rule 1.4 Comment, address a wide range of explanations required by a lawyer’s duty to communicate, including the duty to consult with the client regarding the means of the representation, as well as the duty to inform the client as to decisions that are for the client to make. MODEL RULES OF PROF’L CONDUCT R. 1.4 cmts. 5-6 (2002). The only mention of the phrase “informed consent” comes in a single sentence: “In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).” *Id.* at R. 1.4 cmt. 5.

representation but only for the specified decisions that are for the client to make, which would have included settlement decisions.¹³¹

What is the significance of the Commission's use of the term "informed consent" in Rule 1.4(a) but not in either Rule 1.4(b) or in Rule 1.2(a)? Prior to the 2002 revisions, the Model Rules required "consent after consultation" in the Rules addressing limited representation, confidentiality, and conflicts-of-interest.¹³² The Commission recommended deleting that term in favor of "informed consent" because it believed that "'consultation' is a term that is not well understood and does not sufficiently indicate the extent to which clients must be given adequate information and explanation in order to make reasonably informed decisions."¹³³ In addition, "[t]he term 'informed consent,' *which is familiar from its use in other contexts*, is more likely to convey to lawyers what is required under the Rules."¹³⁴ Given that Rule 1.4(b) did not use the ambiguous term "consent after consultation" and referred explicitly to the client's right to make "informed decisions,"¹³⁵ the Commission may have assumed that there was no need to adopt the term "informed consent" in Rule 1.4(b). Similarly, because Rule 1.2(a) did not use the term "consult after consultation," the Commission may also have determined that the current Rule 1.4(b) standard was sufficient to alert lawyers to the type of explanation required for decision making under Rule 1.2(a).¹³⁶

131. See Working Draft of Model Rules of Prof'l Conduct R. 1.2, at 1 (Proposed Rule 1.2—Draft No. 1b July 15, 1999) (on file with author) (proposing that "[a] lawyer shall abide by a client's decisions concerning the objectives of [the] representation" and that a lawyer "shall consult with and secure the client's informed consent as to (i) in a civil matter, whether to file a complaint or an answer, whether to settle the matter, and whether to file an appeal; and (ii) in a criminal case, how to plead, whether to waive jury trial, whether to testify, and whether to file an appeal; and (iii) whether to take an action that the lawyer reasonably believes will entail substantial cost for which the client will be responsible, subject the client to a substantial risk of civil or criminal liability, or have a substantial adverse effect on another person") (italics and redlining omitted). Reporter Carl Pierce, the author of the memorandum, explained that "[a] member of the commission [had] suggested that a lawyer be required to secure 'informed consent' as to the decisions specified in Paragraph (a)(2)." *Id.* at 7. That unnamed commissioner may have been Professor Martyn, although neither she nor I can remember whether it was she who made that suggestion.

132. See MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1983) (limited representation); *id.* at R. 1.6(a)(1) (confidentiality); *id.* at Rs. 1.7-1.12 (conflicts of interest).

133. Reporter's Explanation of Changes, R. 1.0, *supra* note 124, ¶ 5.

134. See *id.* (emphasis added).

135. MODEL RULES OF PROF'L CONDUCT R. 1.4(b) cmt. (2002). See also *supra* text accompanying note 123.

136. The only indication of the Commission's reason for rejecting the proposal to include the term "informed consent" in connection with the client decisions specified in Rule 1.2(a) is the following statement in a Reporter's memorandum:

Having considered this suggestion, the Reporters are recommending that the concept of informed consent only be used when the lawyer is asking the client to relinquish a protection that otherwise would be afforded by the Rules of Professional Conduct This was the limited purpose for which the requirement of informed consent ... was developed.

An unintended consequence of the Commission's decision, however, is that lawyers looking for guidance in the context of decision making under Rule 1.4(b) will not be referred to Rule 1.0(e), which provides an expansive definition of the term "informed consent." Indeed, this definition appears to be precisely what Professor Martyn had in mind when she urged the adoption of informed consent doctrine for legal as well as medical practice. Thus, the text of Rule 1.0(e) defines the term as "denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."¹³⁷ And the Comment further provides:

The lawyer must make reasonable efforts to ensure that the client ... possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client ... of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's ... options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client ... to seek the advice of other counsel.... In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client ... is experienced in legal matters generally and in making decisions of the type involved, and whether the client ... is independently represented by other counsel in giving the consent.¹³⁸

Unfortunately, there is no such expansive guidance under Rule 1.4(b). Neither the Rule nor the Comment expressly refers, as does Rule 1.0(e), to communication concerning both "the material risks of and reasonably available alternatives"¹³⁹ to the lawyer's proposed course of action. Indeed, the sole general guidance given in the Comment is that "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so" and that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for

Working Draft of Model Rules of Prof'l Conduct R. 1.2, at 10 (Proposed Rule 1.2—Draft No. 2 July 29, 1999) (on file with author) [hereinafter Working Draft No. 2]. The memorandum went on to conclude:

[T]he validity of the client's consent [with respect to Rule 1.2(a) decisions can] be measured by reference to the lawyer's compliance with the requirements in Rule 1.4 that a lawyer keep the client reasonably informed about the representation and explain matters to the extent reasonably necessary to permit the client to make informed decisions with respect to the representation.

Id.

137. MODEL RULES OF PROF'L CONDUCT R. 1.0(e).

138. *Id.* at R. 1.0 cmt. 6. Similar language appears in the Comment to Restatement § 20, which also limits the use of the term "informed consent" to specific types of decisions, such as conflicts of interest. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. a (2000).

139. MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2002).

information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of [the] representation."¹⁴⁰ Indeed, as these two sentences clearly indicate, the Comment discussion under the caption "Explaining Matters" does not differentiate between the type of explanation mandated when the lawyer is required merely to "consult" the client, as with respect to means decisions,¹⁴¹ and the type of explanation required to permit the client to make "informed decisions."¹⁴² As a result, neither the Rule nor the Comment clarify that a heightened level of disclosure and explanation is required whenever a decision is the client's to make.

V. SHOULD THE COMMISSION HAVE DONE MORE?

I have identified three areas in which the current versions of Model Rules 1.2 and 1.4 arguably provide lawyers with insufficient guidance: (1) the failure to define "impliedly authorized" or at least to provide some indication as to the nature and scope of the lawyer's authority to make decisions without first consulting the client; (2) the failure to provide a basis for determining who has the ultimate authority to make decisions as to the means of the representation when the lawyer and client cannot resolve their disagreement; and (3) the failure to require "informed consent" or its clear equivalent for lawyers providing information in the context of all decisions that are the client's to make.

A. "Impliedly Authorized"

In my view, the Ethics 2000 Commission should have provided additional guidance to lawyers concerning what actions are "impliedly authorized."¹⁴³ However, I do not believe that the Commission should have adopted the Lawyering Restatement's provision authorizing lawyers to take any lawful measure "reasonably calculated to advance a client's objectives,"¹⁴⁴ because that provision is not supported by general agency law. The Reporter's Note for the Lawyering Restatement's broad grant of implied authority to lawyers does not cite any authority for this provision in the Agency Restatement.¹⁴⁵ Indeed, the Agency Restatement's provision on the implied authority of agents provides greater support for the implied-in-fact interpretation of the term "impliedly authorized" than for the Lawyering Restatement's broader provision. Thus, Section 33 of the Agency Restatement states that "[a]n agent is authorized to do, and to do only, *what is reasonable for him to infer that the principal desires him to do* in the light of the principal's manifestations and the facts as he knows or

140. *Id.* at R. 1.4 cmt. 5.

141. *Id.* at R. 1.4(a)(2).

142. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(1), (b) (2002).

143. *See supra* note 90 and accompanying text.

144. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 cmt. e (2000).

145. *Id.* § 21, Reporter's Note, cmt. e (discussing a lawyer's authority in the absence of an agreement or instruction, the Reporter's Note cites only to Rule 1.2(a) of the 1983 Model Rules, as well as to several secondary sources).

should know them at the time he acts.”¹⁴⁶ The Comment further explains that “[t]he implicit, basic understanding of the parties [as] to the agency relation is that the agent is to act only in accordance with the principal’s desires as manifested to him” and that an agent can only do “what he reasonably believes the principal desires him to do.”¹⁴⁷ It is, perhaps, arguable that clients ordinarily want lawyers to take whatever lawful measures are “reasonably calculated to advance [their] objectives.”¹⁴⁸ However, in my view, most clients would not want their lawyer to act unilaterally—that is, without first receiving the client’s permission—if that action entails either significant risk, substantial expense, or the potential for serious harm to third persons. Under this view, a lawyer would have no implied authorization to act unilaterally whenever there is reason to believe the client would not want the lawyer to do so, even when the lawyer reasonably believes that an action is either desirable or necessary to achieve the client’s goals.

Proponents of the Lawyering Restatement’s approach might argue that there is no significant difference between implied-in-fact and implied-in-law provisions because under the Restatement, the lawyer ordinarily must consult the client before taking these types of actions and must also follow the client instructions when the client disagrees with the lawyer’s proposed conduct.¹⁴⁹ But many—perhaps even most—clients will hesitate to “instruct” the lawyer, even when the client disagrees or has significant reservations. Thus, although the Restatement appears to provide strong protection for client decision making, it will work that way only with relatively sophisticated or strong-willed clients, leaving the average individual client at the mercy of the lawyer with respect to any decision that is not clearly for the client to make.

B. *Resolving Lawyer-Client Disputes over Means-Decisions*

The Lawyering Restatement is clear on the question of who has authority to decide when lawyers and clients disagree over decisions not clearly reserved for the client. So long as the client’s proposed course of action is lawful and does not require the lawyer to violate the lawyer’s professional obligations, Section 21

146. RESTATEMENT (SECOND) OF AGENCY § 33 (1958) (emphasis added). *See also id.* § 33 cmt. b (“An agent is a fiduciary under a duty to obey the will of the principal as he knows it or should know it.”); RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006) (“An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.”); *id.* § 2.02(3) (“An agent’s understanding of the principal’s objectives is reasonable if it accords with the principal’s manifestations and the inferences that a reasonable person in the agent’s position would draw from the circumstances creating the agency.”).

147. RESTATEMENT (SECOND) OF AGENCY § 33 cmt. a.

148. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 cmt. e (2000).

149. *See id.* (“Because a lawyer is required to consult with a client and report on the progress of the representation, . . . a client ordinarily should be kept sufficiently aware of what is occurring to intervene in the representation with instructions as to important decisions.”).

provides that “[a] client may instruct a lawyer during the representation.”¹⁵⁰ Citing the Agency Restatement’s Section 385, the Comment to Section 21 explains that a client is permitted to do so “just as any other principal may instruct an agent.”¹⁵¹ But this is not an accurate description of what Section 385 of the Agency Restatement provides. According to that section, “[u]nless 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.”¹⁵² The Comment then explains what is meant by “reasonable directions”:

In determining whether or not the orders of the principal to the agent are reasonable, the customs of business with regard to such agency, business or professional ethics ... and other similar facts are considered. The agent cannot properly refuse to obey on the ground that the obedience will be injurious to the principals’ affairs On the other hand, unless the contract of agency prescribes the manner of performance and the extent of obedience to be required, it is generally understood that the employer will not interfere with the method of conducting proceedings which are customarily left in the control of an agent. Thus, in the absence of a special agreement, ... an attorney is in complete charge of the minutiae of court proceedings and can properly withdraw from the case, subject to control by the court, if he is not permitted to act as he thinks best.¹⁵³

Although it might be thought that a lawyer’s control of the “minutiae of court proceedings”¹⁵⁴ is quite limited, the illustration suggests otherwise. The illustration states that a lawyer is under no duty to obey a client’s direction “to violate a proper but nonobligatory agreement which [the lawyer], with [the client’s] consent, had made with opposing counsel,” regardless of the content of such an agreement.¹⁵⁵

Similarly, the case law concerning the extent of a lawyer’s authority to disregard client instructions over the means of the representation does not support the Lawyering Restatement’s provision. Although some courts require lawyers to follow client instructions, many courts deciding who has the authority to make a particular decision rely on a distinction between “procedural decisions (*i.e.*, affecting the means of representation) and substantive ones (*i.e.*, affecting the subject matter or the objectives of the representation),” although even these

150. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21(2).

151. *Id.* § 21 cmt. d.

152. RESTATEMENT (SECOND) OF AGENCY § 385(1) (1958) (emphasis added). *But see* RESTATEMENT (THIRD) OF AGENCY § 8.09(2) (2006) (“An agent has a duty to comply with all lawful instructions received from the principal and persons designated by the principal concerning the agent’s actions on behalf of the principal.”). The Reporter’s Note to Section 8.09(2) does not address the change from a duty to obey “reasonable” instructions to a duty to obey “lawful” instructions. In any event, the case law in cases involving attorneys does not support Section 8.09(2) as it applies to lawyers. *See infra* notes 158-162 & accompanying text.

153. RESTATEMENT (SECOND) OF AGENCY § 385 cmt. a.

154. *Id.*

155. *Id.* § 385 cmt. a, illus. 2.

courts “do not uniformly adhere to this model.”¹⁵⁶ As a result, “the contours of the line between lawyer and client authority are hazy” in case law,¹⁵⁷ as well as under rules of professional conduct, making it difficult for anyone to specify what “agency law” requires with respect to the allocation of decision-making authority between lawyer and client.

In my opinion, the Ethics 2000 Commission rightly determined that given the indeterminacy of case law, it would be inappropriate for rules of professional conduct to attempt to determine which means decisions are for clients to decide and which are for lawyers, even over the objection of the client. The Commission must have hoped that case law would eventually adopt more certain standards, which could then be incorporated into professional codes. Unfortunately, that has not been the case. Most of the case law concerns ineffective assistance of counsel claims in criminal cases,¹⁵⁸ where courts have struggled “to find and apply consistent rules of allocation.”¹⁵⁹ Of course, criminal trials differ from civil trials because of the unique aspects of a constitutional claim to ineffective assistance of counsel.¹⁶⁰ Additionally, both criminal and civil trials differ from transactional matters because of the obvious interests of courts and adversaries.¹⁶¹ As a result of these varied interests and the paucity of cases in the context of civil litigation and transactional matters,¹⁶² we

156. Arnold I. Siegel, *Abandoning the Agency Model of the Lawyer-Client Relationship: A New Approach for Deciding Authority Disputes*, 69 NEB. L. REV. 473, 474 (1990). See also, e.g., Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 8, at 49-65 (discussing two lines of cases—one making the subject matter/procedure distinction and the other requiring the lawyer to follow client instructions—and concluding that, even with respect to the first line of cases, “this case law generally is of little assistance in determining which decisions are to be made by an attorney and which are reserved for his client”).

157. Siegel, *supra* note 156, at 474.

158. See, e.g., Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 8, at 51 (finding “clients usually lose suits against attorneys for not carrying out the client’s tactical instructions”). Also, cases citing subject matter or procedure rules—which often reject instruction rules in tactics cases—consist of “a few malpractice cases and a large number of cases in which the client asserts his lawyer’s lack of authority in order to escape liability to a third party (the state in a criminal case or the adverse party in a civil action).” *Id.* For a discussion of the numerous decisions in the criminal context, see generally Johnson, *supra* note 17; Uphoff, *supra* note 17.

159. Johnson, *supra* note 17, at 115-16. After surveying an array of allocation decisions, the author concludes: “There are many decisions for which there is no national consensus about proper allocation, and in too many jurisdictions, courts have failed to maintain consistent allocation rules.” *Id.* See also, e.g., Uphoff, *supra* note 17, at 764 (“In the absence of a strong professional consensus regarding the proper allocation of decisionmaking power in the attorney-client relationship, criminal practitioners are given considerable latitude to decide for themselves how to resolve decisionmaking disputes with their clients.”).

160. *But see*, e.g., Alaska Bar Ass’n, Ethics Op. 2006-2 (2006) (finding a criminal defense lawyer need not follow client instructions on raising mental health issues). The court followed an Alaska Court of Appeals decision on ineffective assistance of counsel, declining to distinguish between constitutional and ethical standards. *Id.*

161. See, e.g., Johnson, *supra* note 17, at 48 (factors predicting courts’ allocation rulings in criminal cases include “the objective of avoiding disruption of the litigation process”); *id.* at 123-39 (discussing courts’ interest in reliable verdicts).

162. According to Professor Spiegel, “The probable explanation for the failure to raise the issue of allocation of authority in many cases is simply that the attorneys’ actions were the product of

seem to be no closer today than we were in 2002 to any consensus regarding the proper allocation of decision-making authority between lawyer and client.

It is regrettable that the Commission was not in a position to offer clear rules or even standards with respect to the allocation of authority when lawyers and clients disagree, but I continue to concur in the Commission's decision to refrain from any attempt to do so. Perhaps the Commission could have provided more guidance by including more discussion of "other law" that a lawyer should look to deciding whether to persist in a course of action over a client's objection,¹⁶³ including references to the two lines of cases distinguishing between subject matter and procedure or requiring lawyers to follow client instructions.¹⁶⁴ Other than this, however, I am at a loss to know what more the Commission could have done without creating confusing inconsistencies between the disciplinary rules and "other law."

C. *When Is a Client's "Informed Consent" Required?*

As I mentioned earlier, the Commission considered and rejected a Reporter's proposal to include a reference to the term "informed consent" in Rule 1.2(a), although this proposal would have used the term only for the specified decisions that are for the client to make (such as accepting settlement offers) and not for the more general determination of the objectives of the representation.¹⁶⁵ No explanation was given other than that the Reporter recommended "that the concept of informed consent only be used when the lawyer is asking the client to relinquish a protection that otherwise would be afforded by the Rules of Professional Conduct," such as disclosing confidential client information and representing conflicting interests.¹⁶⁶ Limiting the use of "informed consent" to such situations might not have been significant if Rule 1.4(b) had clearly specified that a heightened standard for disclosure was necessary to assist a client in making "informed decisions" when the decision is the client's to make, including a description of "the material risks of and reasonably available alternatives" to either the lawyer's or the client's proposed course of conduct.¹⁶⁷ But Rule 1.4(b) does not do so, and the Comment fails to distinguish between consultation over the means of the representation and communication designed to assist clients in making "informed decisions."¹⁶⁸

In retrospect, I would have urged the Commission to adopt the term "informed consent" for all decisions that are the client's to make for precisely the

inadvertence rather than any deliberate decision." Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 8, at 53. In addition, as in medical informed consent cases, there are difficulties in proving causation and damages. *Id.* at 51.

163. *See supra* text accompanying notes 113-119.

164. *See supra* note 156 and accompanying text.

165. *See supra* text accompanying notes 123-137.

166. Working Draft No. 2, *supra* note 136, at 10. *See also supra* text accompanying notes 132-136.

167. *See supra* note 139 and accompanying text.

168. *See supra* text accompanying notes 123-129.

reasons that the Commission gave in preferring that term over the phrase “consent after consultation” in certain Rules. The term “informed consent” is “familiar from its use in other contexts,” specifically medical practice, and thus “is more likely to convey to lawyers what is required under the Rules.”¹⁶⁹ In addition, it is a defined term under the Model Rules, and the definition, including the expansive Comment, provides a clear and detailed explanation of the nature of the required communication.¹⁷⁰ There is nothing I can think of that I would add or subtract in using this definition for all client decision making under Rule 1.2(a).

CONCLUSION

If “other law” does not clearly allocate decision making between lawyer and client and is unlikely to do so given the paucity of cases raising the issue, then shouldn’t the rules of professional conduct provide better guidance for lawyers? One way of doing so would be for jurisdictions to adopt the Lawyering Restatement’s provision that requires lawyers to obey all lawful client instructions. Most other laws do not require lawyers to do so; nevertheless, such a rule would not be inconsistent with cases that permit lawyers to make certain means or procedural decisions because these cases typically protect lawyers who accede to their clients’ wishes,¹⁷¹ at least when it would not be obviously incompetent for them to do so.¹⁷² And isn’t the Lawyering Restatement clearly correct, as a matter of ethics and morality, that clients *should* have the right to make decisions in matters that affect them because lawyers who disregard lawful client instructions are failing to respect the client’s dignity and autonomy?¹⁷³

If only it was so simple. But as many courts and commentators have recognized, there are interests at stake other than those of the client: the interests of courts and adversaries in efficient trial management; the interests of lawyers in professional autonomy, professional identity, and “a craft interest in not being forced to do substandard work;”¹⁷⁴ and the public’s interest in preventing lawyers

169. *Reporter’s Explanation of Changes, R. 1.0, supra* note 124, ¶ 5. *See also supra* text accompanying note 134.

170. *See supra* text accompanying notes 132-137.

171. *See, e.g., Uphoff, supra* note 17, at 789 (“[C]ourts rarely will fault defense counsel for carrying out the strategic wishes of her client.”).

172. Lawyers are required under the Rules of Professional Conduct to provide competent representation to clients. *See* MODEL RULES OF PROF’L CONDUCT R. 1.1 (2013).

173. *See, e.g., Johnson, supra* note 17, at 57-60 (discussing supporters of the position that criminal defendants should be the presumptive decision-makers, at least when there are no “compelling reasons of efficient trial management” that apply). *See also* *Jones v. Barnes*, 463 U.S. 745, 763-64 (1983) (Brennan, J., dissenting) (“The role of the defense lawyer should be above all to function as the instrument and defender of the client’s autonomy and dignity in all phases of the criminal process.... I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime.”).

174. Spiegel, *Lawyering and Client Decisionmaking, supra* note 8, at 113 (1980). *See also id.* at 113-20; Uphoff, *supra* note 17, at 769 (noting that even “[c]ommentators advocating [a] client-centered approach recognize that lawyers must be provided the professional discretion to make numerous tactical decisions ... without the client’s consent or input” and concluding that “[t]ime,

from “approach[ing] the limits of ethical behavior because of their perceptions of clients’ wishes.”¹⁷⁵ And even with respect to the client’s own interests, there are those who firmly believe that a client’s long-term interests are frequently best served by permitting lawyers to make certain tactical and strategic decisions, even when client values may be implicated.¹⁷⁶

The allocation of decision-making authority between lawyer and client involves highly contested issues that, in my view, should not be resolved by fiat. Although I believe that the current rules can be usefully clarified in some respects, I am satisfied the Ethics 2000 Commission rightfully declined to resolve the question of who decides when the lawyer and client fundamentally disagree over the means of the representation. I understand that the failure to do so may reduce the likelihood that common law courts will adopt the informed consent doctrine in legal practice to the same extent that they have done so in medical practice. This is not because clients are not entitled to make fully informed decisions, but rather because there continues to be uncertainty about which decisions are theirs to make.

common sense, and respect for professional autonomy preclude the client from making all of the myriad decisions involved in a criminal case”).

175. Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 8, at 120-23.

176. *See, e.g.*, Johnson, *supra* note 17, at 42 (“[I]n general, lawyers know the best course of defense better than do defendants.”). This view is also espoused by commentators who would identify themselves as embracing a client-centered point of view. *See, e.g.*, Uphoff, *supra* note 17, at 834 (“Agreeing to a tactic that is harmful to one’s own case is difficult for most lawyers to swallow, especially for those criminal defense lawyers who feel that the deck is already stacked against their clients.... It is particularly hard to watch a client you have fought for and care about injur[e] himself.”); *id.* at 824 (“There is another reason I personally find it difficult to empower my clients to make foolhardy decisions. At bottom, most defendants ... are not as interested in their freedom of choice as they are in their freedom. That is, if most clients were asked which they valued more—freedom of choice or winning at trial—most clients would select winning. Many clients just lack confidence in their lawyers and the strategic choices those lawyers are making.”) (internal footnote omitted).