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LEGAL REPRESENTATION AND THE NEXT STEPS TOWARD CLIENT CONTROL: ATTORNEY MALPRACTICE FOR THE FAILURE TO ALLOW THE CLIENT TO CONTROL NEGOTIATION AND PURSUE ALTERNATIVES TO LITIGATION

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I. INTRODUCTION

There is a broad consensus within Western ethical systems in support of the principle of autonomy; to the extent reasonably possible, individuals should control decisions that affect them.[1] Based on this principle of autonomy, doctors are subject to malpractice liability if they fail to obtain the informed consent of patients prior to medical treatment; they must inform the patients of the risks[2] of and alternatives[3] to medical treatment, and allow the patient to choose whether to undergo the treatment. However, the legal system has been slow to apply a similar duty to lawyers. While lawyers have a professional duty to allow clients to make some choices during legal representation,[4] they are not required to allow clients to make many other significant decisions.[5] It is ironic that the lawyer, who under our system of legal representation is intended to protect the client's autonomy from unjustifiable interference by the state or other individuals, can become an additional source of interference with the client's autonomy. This article addresses the question of what decisions the client should control during legal representation, and the steps that courts are likely to take in the development of a right of client control.

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1. *See infra* notes 37-47, accompanying text, and sources cited therein.

2. *See, e.g.*, Haley v. United States, 739 F.2d 1502 (10th Cir. 1984); Unthank v. United States, 732 F.2d 1517 (10th Cir. 1984); Holt v. Nelson, 11 Wash. App. 230, 523 P.2d 211 (1974); Scaria v. St. Paul Fire & Marine Ins. Co., 68 Wis. 1, 227 N.W.2d 647 (1975).

3. *See, e.g.*, Marino v. Ballestas, 749 F.2d 162 (3d Cir. 1984); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Jacobs v. Painter, 530 A.2d 231 (Me. 1987). See also the following statutes which require disclosure of alternative methods of treatment, FLA. STAT. § 768.46 (1986); ME. REV. STAT. ANN. tit. 24, § 2905 (1990); N.C. GEN. STAT. § 90-21.13 (1985).

4. *See infra* notes 28-32, cases cited therein, and accompanying text.

5. *See, e.g.*, sources cited at notes 23 and 35. Some courts and lawyer professional codes suggest that the lawyer should allow the client to choose the ends of the representation and that the lawyer should control the means used to obtain those ends. See sources cited *infra* at notes 22-23. An examination of this standard and the cases that purport to apply it reveal its weaknesses. Courts have difficulty determining what decisions are ends decisions and what decisions are means decisions, and the cases in this area do not appear to actually apply the ends/means standard. *See infra* text accompanying notes 22-36. What courts have done is to identify specific choices within legal representation that the client is entitled to make. *See infra* text accompanying notes 28-32.

At issue is the role of the lawyer. Should lawyers use their power to do what they think is best for the client or should they empower the client to do what the client chooses to do? This article will argue that, in general, clients should make the significant choices in legal representation,[6] not only

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6. Ellmann suggests that people can exercise free choice when: 1) They are aware of the decisions to be made and that they are entitled to make them; 2) They know the choices and the costs and benefits of these choices; and 3) They understand their values and emotional needs. *See* Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 727-28 (1987).

Binder & Price present a helpful model for helping the client to reach decisions. *See* D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). They suggest that lawyers enable clients to make decisions by helping them to consider "potential solutions, with their probable positive and negative consequences. . . ." D. BINDER & S. PRICE, *supra*, at 135.

Binder & Price suggest that the lawyer first identify the potential solutions to a problem. Then, for each potential solution, the lawyer should identify the legal consequences, the client should identify the psychological and social consequences, and together they should identify the economic consequences. D. BINDER & S. PRICE, *supra*, at 143-45. They suggest a simple method of enabling the client to weigh these factors:

> When the alternatives are initially presented by the lawyer, they can simultaneously be jotted down on a piece of paper. All the alternatives, including any mentioned by the client, are listed horizontally across the page. Under each alternative, there is a brief description. The description attempts to summarize the essence of the alternative in terms of its legal consequences. . . . When all the alternatives have been listed across the page, spaces are made beneath each alternative for listing the advantages and disadvantages. As the lawyer and client examine the alternatives, the lawyer jots down each consequence on the sheet of paper as each consequence is mentioned. The consequence is listed as either an advantage or disadvantage.

D. BINDER & S. PRICE, *supra*, at 184. The client can use the paper to make the decision, either in the lawyer's office or at home. D. BINDER & S. PRICE, *supra*, at 186.

The Binder & Price method appears to be very influential. Their book is in use at 90 law schools. Ellmann, *supra*, at 781. Their method is taught and advocated in other recent law school skills textbooks. *See e.g.*, D. GIFFORD, LEGAL NEGOTIATIONS, THEORY AND APPLICATIONS (1989); L. RISKIN & J. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS (1987). Bellow & Moulton present a similar model for enabling the client to make decisions. G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY 998-1017 (1978).

The lawyer should explain the alternatives and potential consequences in terms that the client can understand. This may require different language, depending on the sophistication of the client. Lawyers should avoid the problem that some medical informed consent forms create for some patients. One study found that medical informed consent forms were written in language at the undergraduate or graduate level. Grundner, *On the Readability of Surgical Consent Forms*, 302 NEW ENG. J. MED. 900 (1980), *cited in* Meisel & Roth, *Toward an Informed Discussion of Informed Consent: A Review and Critique of the Empirical Studies*, 25 ARIZ. L. REV. 265, 298 (1983).

Client counseling requires more than merely presenting the client with options and allowing the client to choose. Client counseling requires the lawyer to discuss the risks of various choices with the client. As one court said in a case in which the client initially opposed settlement and the attorney did not pursue a discussion of settlement:

> The fact the client is initially opposed to settlement does not excuse the duty to advise and counsel the client about settlement if such advice and counsel is otherwise appropriate. After all, the lawyer's superior skill and knowledge is what the client is paying for. . . . It is not uncommon for the client to have an unwarranted faith

because of the client's interest in autonomy,[7] but because client control is likely to improve the quality of legal representation that clients obtain.[8] Client control of legal representation requires an informed client and an informed client is likely to supervise an attorney's work more carefully. Client control would also improve the quality of legal representation because it would lessen the effects of attorney-client conflicts of interest that are inherent in most legal representation.[9]

A difficulty with establishing a rule of client control is identifying what choices the client should make. Even the simplest legal matter involves many choices. In representation concerning a dispute, choices include everything from whether to bring a suit to whether to cite seven or eight cases for a proposition in a memorandum. In representation concerning a business transaction, choices include everything from whether to form a partnership or corporation to what language to use in an employment contract.

This article advocates that courts require lawyers to allow clients to make those choices which a reasonable person, in what the lawyer knows or should know to be the position of the client, would want to make.[10] If a lawyer's failure to allow a client to make such decisions results in a loss to the client, the lawyer should be subject to malpractice liability.[11] Courts should also continue to identify specific choices that as a matter of law are for the client.

It is likely that the next steps in the development of the right of the client to control legal representation will be the recognition of a duty that attorneys allow clients to control the significant decisions during negotiation,[12] in both legal disputes and transactions,[13] and to allow clients to

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> in the righteousness of his position. The lawyer's job is to bring rationality, objectivity and experience to bear on the matter.

Garris v. Severson, Merson, Berke & Melchior, 252 Cal. Rptr. 204, 207 (Cal. Ct. App. 1988) (ordered not published) (citation omitted) (attorney represented both defendant and his liability insurance company).

7. *See infra* text accompanying notes 37-47.

8. *See infra* text accompanying notes 48-61.

9. *See infra* text accompanying notes 62-65.

10. *See infra* text accompanying notes 147-50.

11. A few commentators have advocated malpractice liability for the failure to allow the client to control legal representation. *See* D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 125 (1974); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 72-73 (1979) (advocates requiring lawyers "to obtain informed consent when client values or lawyer conflicts of interest are involved"); Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy* 65 N.C.L. REV. 315, 349 (1987) (advocates attorney liability for failure to provide client with adequate information, but does not advocate specific standards).

12. *See infra* text accompanying notes 155-200.

13. Most persons who seek a lawyer's counsel . . . do not do so for help in resolving a dispute. Rather, most clients present their lawyers with transactional or planning problems. These clients may want legal assistance in establishing a joint venture or in concluding another business deal; in purchasing a home or in planning an estate; in complying with government regulations or in understanding the tax implications

choose to pursue mediation and arbitration as alternatives to litigation.[14] Courts are likely to hold lawyers liable for the failure to allow the client to make these decisions for several reasons.

First, the failure to allow a client to make significant choices during negotiations and to choose mediation or arbitration could cause the client to suffer a significant loss. If a trial or negotiation of a transaction is unsuccessful, and a client, given the opportunity and sufficient information, would have made a different decision that would have benefited the client, the failure of the attorney to allow the client to make that choice has injured the client.[15]

Second, generally, a client can competently make the significant choices that arise in negotiations, and the choice whether to pursue an alternative means of dispute resolution. Unlike some choices that must be made during litigation, the major decisions related to negotiation, mediation, and arbitration generally are not urgent, nor are they so technical that the ordinary client could not make them intelligently.

Third, the imposition of civil liability on an attorney for the failure to allow the client to choose and control alternatives to litigation would build on well established precedents that give the client the right to choose whether to accept an offer of settlement[16] and precedents that give the medical patient the right to be informed about and to choose alternatives to a proposed medical procedure.[17]

Finally, courts and commentators increasingly recognize the value of alternative means of dispute resolution, both because of the great cost of litigation to the legal system and to individuals,[18] and the capacity of alternative means of dispute resolution to foster reconciliation between parties.[19] It is likely that more clients, when informed of the advantages of mediation and arbitration and given the opportunity to choose to pursue them, would do so, and that more disputes would be resolved through these methods.

> of a particular investment. In the majority of such matters, the client needs to reach an agreement or understanding with some other person or legal entity. To assist the client in achieving that type of goal, the lawyer most often will negotiate with the representative of the other person or entity to arrive at a mutually satisfactory outcome.

R. BASTRESS & J. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATION: SKILLS FOR EFFECTIVE REPRESENTATION 342 (1990).

14. *See infra* text accompanying notes 201-54.

15. For a discussion of the difficulty clients are likely to have showing the injury that an attorney's failure to allow them to choose has caused, see *infra* text accompanying notes 255-71.

16. *See* cases cited *infra* note 32, and *infra* text accompanying notes 166-82.

17. *See* cases cited *supra* note 3, and *infra* text accompanying notes 66-83.

18. *See infra* text accompanying notes 208-14 and 234-39.

19. *See infra* text accompanying notes 215-20 and 240-42.

In recent years, some commentators have objected to proposals that would push litigants toward alternative means of dispute resolution. *See* Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). This position is discussed *infra* at text accompanying notes 243-54.

Part II of this article will discuss the existing law concerning the right to control legal representation. Part III will discuss the benefits and risks of client control. Part IV will propose that courts require attorneys to allow clients to make those choices that the reasonable client, in what the attorney knows or should know is the client's position, would want to make, and that courts continue to identify specific choices that are for the client. Part V will propose that clients have the right to make some specific decisions during negotiations, and the right to be informed of and to choose whether to adopt mediation or arbitration as a means of dispute resolution. It will also discuss the advantages to the client and the legal system of alternative means of dispute resolution and the difficult causation problem that would arise when clients allege that a case would have been resolved more favorably had they been allowed to control the significant choices.

II. THE STATE OF THE LAW: AN ASPIRATION OF CLIENT CONTROL, THE UNHELPFUL ENDS/MEANS STANDARD, AND A FEW SPECIFIC CHOICES RESERVED FOR THE CLIENT

An examination of the lawyer professional codes and relevant cases reveals some confusion in the law concerning control of legal representation. The lawyer codes hold up client control as an aspiration.[20] However, those portions of the code that encourage client control do not require it.[21]

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20. Courts have disciplined attorneys in a few cases for making decisions beyond client authority. *See* Silver v. State Bar of California, 13 Cal.3d 134, 528 P.2d 1157, 117 Cal. Rptr. 821 (1974) (attorney executed settlement agreement without client's knowledge or consent); In re John P. Montrey, 511 S.W.2d 805 (Mo. 1974) (attorney settled case and permitted judgment to be entered in amount in excess of his authority and failed to inform client of facts); In re Stern, 81 N.J. 297, 406 A.2d 970 (1979) (attorney misrepresented to client that suit had been filed and secretly accepted settlement offer despite client's refusal of the offer); In re Jon H. Paauwe, 294 Or. 171, 654 P.2d 1117 (1982) (plaintiff's attorney failed to apprise clients of result of trial).

21. The ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter MODEL CODE], was adopted by the ABA in 1969 and presently regulates lawyers in about half of the states. *See* ABA/ANA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 1:3. It contains Ethical Considerations (ECs), which are aspirational norms, the violation of which will not subject an attorney to discipline, and Disciplinary Rules (DRs), the violation of which will subject the attorney to discipline. MODEL CODE, Preliminary Statement.

EC 7-7 encourages lawyers to allow clients to make a broad range of decisions in the legal representation. It states that lawyers may make decisions:

> not affecting the merits of the cause or substantially prejudicing the rights of a client. . . . But otherwise the authority to make decisions is exclusively that of the client. . . .

MODEL CODE, EC 7-7. This appears to leave the important decisions to the client, because almost any decision in a case may affect the merits or substantially prejudice the rights of the client. *See* Spiegel, *supra* note 11, at 65. EC 7-7 gives examples of decisions that belong to the client: in civil cases, the right to accept settlement offers and the right to wave affirmative defenses, and in criminal cases, the right to decide what plea to take and whether to appeal. EC 7-7 does not discuss decisions such as what theory of the case to adopt, what witnesses to call, and what settlement offers to make, all of which arguably might substantially prejudice

The mandatory sections of the lawyer professional codes,[22] as well as

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the rights of the client.

The Model Code's aspiration of client control, however, is not backed up by its Disciplinary Rules. For a discussion of the Disciplinary Rules from the Model Code that deal with client authority, see *infra* note 22.

The ABA MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter MODEL RULES], adopted by the ABA in 1983, are applicable in most of the states that do not apply the Model Code. ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 1:3. The Model Rules do not contain Ethical Considerations. They contain Model Rules (MRs), the violation of which will subject a lawyer to discipline. The authors of the Model Rules discuss the meaning of the MRs in official comments.

MR 1.2 leaves "decisions concerning the objectives of representation" to the client. MR 1.2(a). As the discussion *infra* at text accompanying notes 24-36 indicates, the question of what is an objective (or end) of the representation is a confusing one and the objectives of the representation can be defined very narrowly. Under MR 1.2(a), the lawyer is required to "consult with the client as to the means by which [the objectives] are to be pursued." The official comment to MR 1.2 helps to define the control that should exist when lawyers "consult with the client as to the means." It says:

> In questions of means, the lawyer . . . *should* defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

MR 1.2, Official Comment [1] (emphasis added). Note that the Comment uses the term "should," rather than "must". Therefore, in the Model Rules, as in the Model Code, in general, client control is an aspiration, rather than a rule.

22. MODEL CODE, *supra* note 21, DR 7-101. The only standard in the Model Code which subjects attorneys to discipline based on their failure to allow clients to control representation, DR 7-101 states that the "lawyer shall not intentionally: (1) "[f]ail to seek the lawful objectives of his client," and that "where permissible" the attorney may use discretion to "wave or fail to assert a right or position of his client." *Id.* This provision reserves ends ("objectives") decisions for the client, but it is somewhat unclear what decisions it reserves for the lawyer. The key question is, of course, when is it "permissible" for the lawyer to "wave or fail to assert a right or position of the client," but the Disciplinary Rules do not give further explanation. "Where permissible" probably means where permitted by the substantive law of the jurisdiction. The courts in most jurisdictions state that they leave to the lawyer the "means decisions." *See infra* cases cited at note 23.

As discussed *supra* at note 21, MR 1.2 of the Model Rules leaves the "decisions concerning the objectives of representation" to the client and requires the lawyer to "consult with the client as to the means by which they are to be pursued." MODEL RULES, *supra*, MR 1.2(a). The Comment to that section explains the requirement that the lawyer consult the client concerning means. It states:

> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. . . . 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 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.

Comment [1] to MR 1.2. Under this Comment to the Model Rules, technical decisions concerning means are for the lawyer to make. As noted *supra*, note 21, the Comment states

many cases,[23] attempt to define the line between the client's decisionmaking authority and that of the attorney in terms of ends and means. The client is to choose the ends of the representation, and the lawyer is to choose the means to be used in pursuit of those ends.

There are two major problems with the ends/means division of authority. First, the ends/means line is unclear. In many cases, it will be difficult to distinguish the ends from the means. As David Luban has said:

> [The ends/means rule] assumes a sharp dichotomy between ends and means, according to which a certain result (acquittal, a favorable settlement, *etc.*) is all that the client desires, while the legal tactics and arguments are merely routes to that result. No doubt this is true in many cases, but it need not be: the client may want to win acquittal *by* asserting a certain right, because it vindicates him in a way that matters to him; or he may wish to obtain a settlement without using a certain tactic, because he disapproves of the tactic. In that case, what the lawyer takes to be mere means are really part of the client's ends.[24]

The difficulty of identifying many decisions as either ends or means decisions is illustrated by cases in which one court has identified a decision as an ends decision for the attorney while another court has identified the same decision as a means decision for the client.[25]

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that lawyers *should* allow the client to make some of the means decisions.

The Comment does not explicitly state the criteria for determining which means decisions are for the client but it gives a few examples. The examples of means decisions reserved for the client—the expense to be incurred and decisions that might adversely affect third parties—are decisions that the typical client could make intelligently and that are likely to be very important to the client. These two factors, the ability of the client to make an intelligent choice, and the importance of the means decision to the client, are probably the proper criteria for determining who should have responsibility for making decisions under the Model Rules. The ability of the client to make an intelligent choice and the importance to the client of the choice, will be most important in determining whether the reasonable client would want to make the decision at issue. This article advocates that those decisions the reasonable client would want to make should be reserved for the client. *See infra* text accompanying notes 147-50.

23. The division of the realms of client and lawyer decision making has been variously phrased as ends-means, substance-procedure, strategy-tactics, or objectives-means. Each grouping probably refers to the same basic division between the goal toward which steps are taken and the steps themselves.

C. WOLFRAM, MODERN LEGAL ETHICS 156 (1986). For cases adopting the ends/means line of client/attorney authority and criticism of them, see Spiegel, *supra* note 11, at 57-58; Strauss, *supra* note 11, at 318-20.

24. Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 459 n.9. Luban also suggests that the reason that paternalism is an issue for professionals is that they tend by the very nature of their training to view all of their client's problems as technical and professional ones. *Id.* at 454.

25. *See, e.g.*, Spiegel, *supra* note 11, at 57 n.56-58 (citing Duffy v. Griffith, Co., 206 Cal. App. 2d 780, 24 Cal. Rptr. 161 (1962); Harness v. Pacific Curtainwall Co., 235 Cal. App. 2d 485, 45 Cal. Rptr. 454 (1965)).

A second difficulty with the ends/means distinction is that clients will often have many ends,[26] and a means that is designed to meet one end may conflict with other client ends.[27] It is not sufficient that the client merely identify a priority of ends. Choices among the means employed will carry different risks as to each of the ends of the client.

An examination of the lawyer codes and some of the cases which have presented courts with the issue of client control reveals that courts often do not follow the ends/means distinction. What they have done is allot the client some of the specific choices that are commonly made during the course of legal representation.

In criminal defense cases, courts have identified several decisions that are for the client. These are summarized in the A.B.A. Standards for Criminal Justice, which states that the defendant/client is entitled to choose:

(i) what plea to enter;
(ii) whether to waive jury trial; and
(iii) whether to testify in [the defendant's] own behalf.[28]

Lawyers' professional codes and courts have identified several negotiation decisions in both civil and criminal cases that the client should make. The attorney must have client approval for any settlement offer.[29] The decision whether to accept an offer of settlement in a civil case[30] or a plea bargain offer in a criminal case[31] is for the client. In civil cases in which lawyers have failed to present settlement offers to clients, courts have imposed liability on the attorneys for failure to keep their clients properly informed and failure to allow clients to control this choice.[32]

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26. *See* Spiegel, *supra* note 11, at 41.

27. For example, a plaintiff may want to settle a case, avoid having to testify, and still get as much money as possible. Should the lawyer use negotiation tactics that are likely to gain the highest recovery, but which carry a greater risk of deadlock?

28. 1 A.B.A. STANDARDS FOR CRIMINAL JUSTICE, ch.4, Standard 4-5.2 (2d ed. 1980 & Supp. 1982) states:

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:
> (i) what plea to enter;
> (ii) whether to waive jury trial; and
> (iii) whether to testify in his or her own behalf.
> (b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.

29. *See* C. WOLFRAM, *supra* note 23, at 169-72.

30. *See* cases cited *infra* note 32.

31. *See* C. WOLFRAM, *supra* note 23, at 165 (citing Harris v. State, 437 N.E.2d 44 (Ind. 1982); People v. Whitfield, 40 Ill.2d 308, 239 N.E.2d 850 (1968); State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983)).

32. *See, e.g.*, Whiteaker v. State, 382 N.W.2d 112 (Iowa 1986); Joos v. Auto-owners Ins. Co., 94 Mich. App. 419, 288 N.W.2d 443,445 (1979), *later appealed*, Joos v. Drillock,

Many of these decisions that courts explicitly leave to the client are probably best classified as means decisions. In criminal cases, the client's end is generally acquittal or limitation of the penalty. Whether to try the case before a jury and whether the client should take the stand and testify are means choices that may determine whether the client's ends are met, and yet these decisions are reserved for the client.[33] In civil cases, the client's end is generally to receive as much, or pay as little, money as possible. An attorney's independent rejection of an offer may be a means of negotiating a good settlement, but clients are entitled to decide whether to accept a settlement offer.[34]

An examination of the cases that initially adopted the ends/means distinction between client and attorney authority may explain why courts adopted it. As Professor Spiegel has pointed out, the ends/means test was drawn initially in cases in which a third party was trying to bind the client to a decision made by the client's attorney without client authority.[35] The

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127 Mich. App. 99, 338 N.W.2d 736 (1983) (". . . an attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle."); Rubenstein v. Rubenstein, 31 A.D.2d 615, 615, 295 N.Y.S.2d 876, 877 (1968) *aff'd*, 25 N.Y.2d 751, 250 N.E.2d 570, 303 N.Y.S.2d 508 (1969) ("failure to disclose an offer of settlement and submit to the client's judgment for acceptance or rejection is improper practice"); Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (1989).

The decisions that require attorneys to pass settlement offers to clients can be explained on two grounds. First, the decision whether to accept the offer is extremely important to the client. Rejection of a settlement offer may result in litigation, in which the client may obtain a poorer result than the client would have obtained had the client accepted the settlement offer. Second, the lawyer is likely to have a conflict of interest with the client over whether or not the offer should be accepted. If the case is being handled on an hourly basis, it may be in the interest of the lawyer to reject the offer and continue the employment. If the case is being handled on a contingency fee basis, it may be in the lawyer's interest to either accept or reject the offer, depending on the terms of the contingency fee agreement, the anticipated time required if the case is tried, the amount of the offer, and the likely verdict. Rosenthal demonstrates that in automobile collision personal injury cases it is generally in the interest of plaintiffs' attorneys to settle rather than to try cases. D. ROSENTHAL, *supra* note 11, at 98. A lawyer's decisions may also be affected by the possible publicity if a case is tried. *See, e.g.*, Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (Pa. 1989), discussed *infra* in text accompanying notes 167-82 and 192.

The problem with the settlement offer rule is not that it is difficult to justify, but that it is difficult to explain why the client has the right to accept or reject a settlement offer, and does not have the right to make other key negotiation decisions. Other negotiation decisions are also important to the client and are likely to present a conflict of interest between the attorney and the client. The possibility of expanding the right of the client to make decisions in settlement negotiations to encompass the right to make other decisions related to negotiation is discussed in a later section. See *infra* text accompanying notes 155-200.

In addition to giving the client the right to make some decisions, the Model Code and the Model Rules both impose on the lawyer the responsibility to assist the client in making decisions. MODEL CODE, *supra* note 21, EC 7-8; MODEL RULES, *supra* note 21, MR 2.1.

33. *See supra* note 28.

34. *See supra* note 32.

35. *See* Spiegel, *supra* note 11, at 57-58 (citing Duffy v. Griffith Co., 206 Cal. App. 2d 780, 24 Cal. Rptr. 161 (1962) (court found that attorney had no authority to stipulate client's interest in litigation)); *see also* Harness v. Pacific Curtainwall Co., 235 Cal. App. 2d 485, 45 Cal. Rptr. 454 (1965).

courts bound the client to the decision of the attorney, labeling the decision made by the attorney a means decision.

It may be that the interests of third parties and the courts in the finality of decisions justify binding a client to some choices made by the attorney, but those interests should not be the tail that wags the dog of attorney/client decisionmaking authority. If an attorney makes a decision for the client that should have been made by the client, the interests of a third party may justify binding the client to the decision in an action with the third party, but the interests of the third party do not justify relieving the attorney of responsibility to the client. The rules governing a cause of action by the client against the attorney based on the failure of the attorney to allow the client to control decisions should protect the interests of clients in decisionmaking authority.[36]

III. Justifications for and Problems With Expanded Client Control

A. Justifications for Client Control

1. The Client's Autonomy

Courts should allow clients to control legal representation out of a concern for the client's autonomy: that is the client's right of self-determination. One of the purposes of the attorney is to protect the client's autonomy from interference by the state and other individuals,[37] and an attorney should not be another source of interference with the client's autonomy. Individual autonomy finds support in utilitarian, Kantian, and Judeo-Christian theories of ethics.[38] The attorney and the law should respect

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36. For a suggested division of decisionmaking responsibility between the client and the attorney, see *infra* text accompanying notes 147-50.

37. *See* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060 (1976).

38. Every moral theory has some conception of equality among moral agents, some conception according to which we are to regard others as equal to ourselves. For the utilitarian, equality is represented in the theory by the claim that in calculating utility the interests of each person are to count equally. For the natural rights theorist, all persons are assumed to have equal rights. For the Kantian, I may act only in that way that I am prepared to will all others act. For the religious moralist we are all children of God.

Corresponding to these notions of equality are various devices for preserving this fundamental equality in the process of moral reasoning. According to the utilitarian an action is justified when an impartial observer would view the action as maximizing the total amount of utility in the given community. For the rights theorist and the Kantian a justification must be acceptable to each of the individuals affected. A similar motive underlies the Golden Rule that is found in most major religious theories.

Underlying the various techniques of moral justification is a prohibition against treating others in such a way that they cannot share the purposes of those who are so treating them. And behind this is a conception of the nature of persons as

the autonomy of the client out of a desire to do good for the client and out of concern for the goodness of the client.

Respect for the autonomy of the client will be good for the client, in an instrumental sense, in that it is likely to result in choices that will work to the benefit of the client. This argument is made in the following section.[39] An additional justification for autonomy is "the intrinsic desirability of exercising the capacity for self-determination."[40] As Gerald Dworkin has said:

> [T]here is value connected with being self-determining that is not a matter either of bringing about good results or the pleasures of the process itself. This is the intrinsic desirability of exercising the capacity for self-determination. We desire to be recognized by others as the kind of creature capable of determining our own destiny. Our own sense of self-respect is tied to the respect of others—and this is not just a matter of psychology. Second, notions of creativity, of risk-taking, of adherence to principle, of responsibility are all linked conceptually to the possibility of autonomous action. These desirable features of a good life are not possible (logically) for nonautonomous creatures. In general, autonomy is linked to activity, to making rather than being, to those higher forms of consciousness that are distinctive of human potential.[41]

In addition to the fact that autonomy is likely to yield good results and that the exercise of autonomy is an important aspect of being human, autonomy provides the client with an opportunity to be good, to make moral choices and to grow in moral understanding. This aspect of autonomy

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> independent sources of moral agency. It is as distinct loci of consciousness, of purposive action, as distinct selves, that others must be respected and taken into account when each of us decides what he shall do. It is because other persons are creators of their own lives, are shapers of their own values, are the originators of projects and plans, that their interests must be taken into account, their rights respected, their projects valued.
>
> What makes an individual the particular person he is reflects his pursuit of autonomy, his construction of meaning in his life.

G. DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 110 (1988).

39. *See infra* text accompanying notes 48-61. The utilitarian justification for autonomy is based on the assumption that clients will make the choices that are most to their benefit and that when autonomous choices which are best for individual clients are multiplied by all of the choices made by all clients, client control will work to the good of the greatest number. Of course, it can be argued that many of the choices of clients that are made in legal representation will work to the detriment of others. Courts attempt to balance the conflicting interests of parties. Whether or not our legal system ultimately resolves cases in a manner for the greatest good of the greatest number is a legitimate subject of inquiry, but courts probably will be in a better position to determine the interests of the parties if attorneys pursue what their clients perceive to be the clients' interest.

40. G. DWORKIN, *supra* note 38, at 112.

41. *Id.*

is important, both for Immanuel Kant[42] and those writing from a Judeo-Christian perspective, such as Thomas Shaffer.[43]

For Kant, autonomy was the precondition of moral choice and one who acted autonomously would act morally. This conclusion followed from Kant's definition of autonomy as the absence of any influence other than reason, and his belief that moral decisions would follow automatically from reason.[44] For Kant, therefore, autonomy was more than the ability to make choices, it was freedom from any influence other than reason. Anything that interfered with one's ability to act rationally, including one's "inclinations and impulses", interfered with one's autonomy and therefore one's ability to act morally.[45] Client choice would create the possibility for autonomous, and therefore moral, choice, but the fact that the lawyer allows the client to make the choice will not, by itself, lead to client autonomy. There might be other influences that would interfere with the client's ability to make the autonomous, rational, moral choice. An attorney who has a goal of Kantian client autonomy, therefore, will seek not only to avoid influencing client choices, but will seek to assist clients in freeing themselves from their "inclinations and impulses" and other influences that might interfere with their choices.

Thomas Shaffer does not believe a moral choice will automatically flow from autonomy, but argues that autonomy, in the sense of freedom to choose, is important because it gives the client the opportunity to make a moral choice.

> [Autonomy] is not only freedom but freedom *for*. The object of law office discourse as moral discourse is to serve the goodness of

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42. *See* I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (1959) (L. Beck trans.).

43. *See* Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231 (1979).

44. [T]his "ought" [the moral law] is properly a "would" that is valid for every rational being provided reason is practical for him without hindrance [i.e., exclusively determines his action]. For beings who like ourselves are affected by the senses as incentives different from reason and who do not always do that which reason for itself would have done, that necessity of action is expressed only as an "ought."

I. KANT, *supra* note 42, at 67-68.

Kant believed that autonomy not only would lead to morality, but that it was a necessary precondition to morality. *See id.* at 59.

Since Kant believed that morality would automatically flow from autonomy, he could say that his moral principle of universality, that one must act in a way that one could will that everyone would act, is a principle of autonomy. *Id.* at 59.

45. When we present examples of honesty of purpose, of steadfastness in following good maxims, and of sympathy and general benevolence even with great sacrifice of advantages and comfort, there is no man, not even the most malicious villain (provided he is otherwise accustomed to using his reason), who does not wish that he also might have these qualities. But because of his inclinations and impulses he cannot bring this about, yet at the same time he wishes to be free from such inclinations which are burdensome even to himself.

Id. at 73.

> the client, and many of us feel that there is more to goodness than autonomy.[46]

If attorneys are concerned that the client be autonomous, then they will help clients to understand the moral, as well as the other implications of their choices.[47]

2. Better Results

Not only should the client control the representation because of the intrinsic value of client autonomy, the client should control the representation because client control is likely to yield better results than attorney control, whether we measure the results based on the subjective goals of the individual client, or based on goals held by clients generally.[48]

Client control is likely to provide more satisfying results to the individual client than attorney control because clients are likely to be the best judges of their own interests.[49] The choices a client makes may be quite different than an attorney would expect for two reasons. First, a client may have different values than the attorney.[50] For example, during negotiations, a client may prefer that an attorney engage in cooperative bargaining rather than competitive bargaining, either out of compassion for or a desire to maintain a good relationship with the opposing party.[51] Second, a client may have different risk preferences than the attorney.[52] The client might have a great fear of going to trial, and prefer negotiation tactics that avoid a risk of deadlock.

It might be suggested that with a knowledge of the client's goals, the lawyer will be able to make choices for the client, but clients will often be unable to quantify the value that they place on various goals. A client may

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46. Shaffer, *supra* note 43, at 247.

47. *See id.* at 246. For a discussion of the lawyer's role in ethical choices during legal representation, see *infra* text accompanying notes 94-101.

48. It might be argued that lawyers make better decisions than clients. As Strauss has pointed out, this argument is based on three highly questionable assumptions: 1) Lawyers understand the needs and interests of the client; 2) Lawyers will act to satisfy them; and 3) Lawyers are uniquely equipped to make them. Strauss, *supra* note 11, at 328-29.

> 49. [B]eing able to shape one's own choices and values makes it more likely that one's life will be satisfying than if others, even benevolent others, do the shaping. This is the traditional liberal argument that people are better judges of their own interests than others.

G. DWORKIN, *supra* note 38, at 111-12.

50. *See* D. BINDER & S. PRICE, *supra* note 6, at 148-49; Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 315 (1985); Spiegel, *supra* note 11, at 86 (suggesting that client is better decisionmaker because client has better knowledge of relationship between facts and client's values and objectives).

51. Competitive and cooperative bargaining are discussed *infra* at text accompanying notes 184-87.

52. *See* D. BINDER & S. PRICE, *supra* note 6, at 149-50; Spiegel, *supra* note 11, at 100.

have incompatible goals,[53] such as obtaining more money and avoiding trial, and a choice which increases the likelihood that the client will obtain one goal may create a risk that the client will fail to achieve the other goal.[54] In many cases, it will be impossible for the lawyer to determine what choices will provide maximum client satisfaction.[55]

When clients control the representation, they not only are more likely to obtain better results as judged by their subjective standards, but they are also likely to obtain better results when judged by standards shared by clients generally, such as financial benefit.[56] An empirical study conducted by Professor Rosenthal of the results in automobile personal injury cases, both those tried and those settled, found that plaintiffs who are actively involved in decisions concerning their cases obtain higher recoveries than those that allow their lawyers to control the cases.[57]

Clients that are involved in decisionmaking in their cases are likely to obtain better results for several reasons. First, they may ensure that their attorneys do not neglect their cases. Lawyers that are tempted to spend time on other matters are more likely to work on a case when a client is regularly involved in decisionmaking. Second, clients may catch mistakes that the attorney alone might overlook.[58] Attorneys may think through their cases more thoroughly when they have to explain alternatives and justify

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53. *See* D. BINDER & S. PRICE, *supra* note 6, at 149; Spiegel, *supra* note 11, at 101 (because lawyers cannot know relative weights of competing values of their clients, they cannot be sure that their decisions will satisfy clients' real needs).

54. For discussions of the subjectivity of the choices, see G. BELLOW & B. MOULTON, *supra* note 6, at 1055; D. BINDER & S. PRICE, *supra* note 6, at 148-53; G. HAZARD, ETHICS IN THE PRACTICE OF LAW 136-38 (1978).

55. D. BINDER & S. PRICE, *supra* note 6, at 149.

56. Some commentators have advocated client control of legal representation as a means of stimulating attorney competency. *See* D. ROSENTHAL, *supra* note 11, at 28; Martyn, *supra* note 50, at 310; Spiegel, *supra* note 11, at 90-92.

57. Rosenthal had a panel of experts calculate the value of 59 automobile personal injury cases. ROSENTHAL, *supra* note 11, at 36-37. The panel consisted of two experienced plaintiffs' attorneys, one insurance company adjuster, one insurance company attorney, and one attorney that had represented both plaintiffs and insurance companies. *Id.* at 37. Rosenthal did not consider two cases because there was a substantial deviation as to the value among the panel. *Id.* He evaluated the results the attorneys obtained in the remaining 57 cases based on the valuation of the expert panel. Of the plaintiffs that were actively involved in their cases, 75% received good results and 25% received poor results. *Id.* at 57. Of the plaintiffs that were not actively involved, 41% received good results and 59% received poor results. *Id.* Rosenthal found that the most important predictor of good results was follow-up demands for attention by the client. *Id.* at 46.

The Rosenthal study evaluated only the effectiveness of clients that, on their own initiative, were involved actively in their cases. It is likely that clients would be even more effective if their attorneys initiate and encourage client involvement. Clients who on their own initiative attempt to get involved in their cases are unlikely to know what involvement will most help their case. If the lawyer systematically involves the client, this is likely to result in more effective decisionmaking. For an effective method of client involvement in decisionmaking, see D. BINDER & S. PRICE, *supra* note 6, at 147-53.

58. *See* D. ROSENTHAL, *supra* note 11, at 169.

suggestions to the clients. Third, clients that are actively involved in their cases may disclose relevant factual information to their attorneys that the clients might otherwise have thought irrelevant.[59] Finally, the client and the attorney both bring distinct abilities to the attorney-client relationship, which may be lost if the attorney controls the representation.[60] The tendencies of clients toward intuition and feeling can complement the tendencies of attorneys toward a logical focus on the facts, and may help to make choices that will provide the greatest benefit to the client.[61]

3. Attorney Conflicts of Interest

An additional reason that client control may yield better results than attorney control is that, in many of the decisions that are made in legal representation, the client's goals may conflict with those of the lawyer. As to the unusual, subjective goals of the client, lawyers may have a conflict because it is in the reputational interest of the lawyer to get what the community will perceive as a successful result. If client control of a decision leads to what the community will perceive as a poor result, it may harm the lawyer's reputation.

In addition to the likelihood that the attorney's interests will conflict with the unusual goals of the client, the attorney's interests may conflict with goals that are more common to clients. Attorneys have interests which conflict with client interests in a number of common situations. For example, if a lawyer is handling a case on a contingency fee basis, one study has shown that it is generally in the lawyer's interest to get a quick settlement.[62] In such cases, the client's interests might be better served through litigation or more negotiation. If lawyers are overworked, they will be tempted to make decisions that will give them less work, and if they are underworked, they will be tempted to make decisions that will give them more work.[63] In addition, some have observed a tendency of corporate attorneys to "over-deliver" legal services, *i.e.*, to do more work than might be cost effective for the client.[64] In some situations, lawyers are tempted to handle a case in

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59. *See* Spiegel, *supra* note 11, at 103-104.

60. T. SHAFFER, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL 52-63 (1976).

61. Thomas Shaffer makes this argument based on Jung's theory of psychic function that each person operates on two spectrums, a thinking/feeling spectrum, and a sensation (reliance on facts)/intuition spectrum. *Id.* at 60-63.

62. *See* D. ROSENTHAL, *supra* note 11, at 96-99 ("[F]or all but the largest claims, an attorney makes less money by thoroughly preparing a case and not settling it early." *Id.* at 105); Clermont & Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 536 (1978).

63. *See* Strauss, *supra* note 11, at 329-30 (attorneys concern about their "time, profit, and other personal interests affect, perhaps subconsciously, the choices [they make] for the client").

64. There is a "tendency in corporate practice to overdeliver legal services. . . .Lawyers, especially in New York, travel like Nuns—in pairs or three at a time." *See* Spiegel, *supra* note 11, at 99 n.241 (quoting N.Y. Times, Aug. 10, 1977, at D1, col. 2).

a way that will get them favorable publicity at the expense of the client.[65] Client control may serve to counterbalance these conflicts of interest.

4. Consistency With Medical Informed Consent

As Jay Katz has pointed out, rules imposing liability on doctors for medical malpractice have preceded and provided precedent for rules imposing liability on lawyers for legal malpractice.[66] Medical malpractice first developed in the fourteenth century;[67] legal malpractice in the eighteenth century.[68] American courts originally imposed liability on doctors under a negligence theory for the failure to inform patients of the risks of and alternatives to surgery in 1960.[69] It may be that these medical informed

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65. *See, e.g.*, Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58, 64 (1989) (where court stated that there was evidence that lawyer wanted case to go to trial, rather than settle, so that he could get "a reputation as a negligence attorney").

66. Katz, *On Professional Responsibility*, COM. L.J. 380, 384 (Sept. 1975).

67. *Id.* (citing Y. B. Hill, 48 Edw. III, f.6, pl.11 (1374)).

68. *Id.* (citing Pitt v. Yalden, 98 Eng. Rep. 74 (K.B. 1767)).

69. Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960) (court stated that patient did not give informed consent to radiation treatment because her physician failed to warn of hazards involved), *reh'g denied*, 187 Kan. 186, 354 P.2d 670; Mitchell v. Robinson, 334 S.W.2d 11, 19 (Mo. 1960) (court held that "doctors owed their patients, [who are] in possession of [their] faculties the duty to inform [them] . . . of the possible serious collateral hazards or [dangers]" of shock therapy), *rev'd on other grounds*, 396 S.W.2d 668, 675.

The right of informed consent in medical malpractice cases had its origins in battery cases brought against doctors who failed to inform patients of the risks that accompanied surgery. The failure to give the patient this information negated the consent and the doctor was subject to liability for battery. *See, e.g.*, Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905), *rev'd on other grounds*, 80 N.W.2d 859; Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92 (1914), *rev'd on other grounds*, 163 N.Y.S.2d 3, 143 N.E.2d 1. Justice Cardozo stated the basis for the patient's right as follows:

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault for which he is liable in damages.

Schloendorff, 211 N.Y. at 128-130, 105 N.E. at 93-94 (operation performed after patient's express prohibition).

In the informed consent battery cases, the doctors lacked the malicious intent that generally accompanies battery and, in 1957, Professor McCoid suggested that the better basis for liability in such cases was negligence—defined as the failure of the doctor to give the patient information that a reasonable doctor would give. *See* McCoid, *A Reappraisal of Liability for Unauthorized Medical Treatment*, 41 MINN. L. REV. 381, 434 (1957). He suggested that doctors be subject to malpractice liability whenever they treat a patient without informing the patient of the risks of and alternatives to the treatment given. McCord, *supra*, at 434. This suggestion was adopted by *Mitchell* and *Natanson* in 1960. Other courts rapidly adopted negligence as the basis of liability. *See, e.g.*, Karp v. Cooley, 349 F. Supp. 827 (S.D. Tex. 1972), *aff'd*, 493 F.2d 408 (5th Cir.), *reh'g denied*, 496 F.2d 878, *cert. denied*, 419 U.S. 845 (1974); Dunham v. Wright, 302 F. Supp. 1108 (M.D. Pa. 1969), *aff'd*, 423 F.2d 940 (3d Cir. 1970); Williams v. Menehan, 191 Kan. 6, 379 P.2d 292 (1963).

In medical malpractice cases, the standard of care was traditionally established by the general practices of the profession. *See infra* notes 128-38 and accompanying text for a discussion of this rule and the comparable rule in legal malpractice cases. Most courts now

consent cases will provide a precedent for a general duty to allow clients to control legal representation. This time it should not take the courts four centuries. The following section will compare the possibility of a client control cause of action with the present medical informed consent cause of action.

a. The Interests at Stake: The Right to Control What is Done With One's Body and the Right to Control What is Done With One's Legal Rights

The duty to obtain informed consent to medical treatment protects patients' interest in autonomy and bodily integrity.[70] A duty to allow a client to control legal representation would protect clients' interests in autonomy and their legal rights. It is understandable that the right of medical informed consent would develop before a right of client control. An individual's interest in bodily integrity has been of special legal concern since the early days of the common-law.[71] Although, in general, courts have not given one's interest in control of legal rights as much protection as the interest in bodily integrity, one's legal rights often protect interests that have a high priority within our society, such as personal liberty or child custody.

One might argue that the interest at issue in most legal representation is not as important as liberty or child custody, but is merely a matter of money. Money is an important commodity, especially to those who do not have much, but the interest at stake in the client control cases is of far greater concern than the amount of money at issue. It is a matter of the client's legal rights, and who controls the pursuit of those rights. The American colonies fought the American Revolution, not because they were taxed, a mere financial matter, but because they were taxed without representation, a matter of financial *rights*. Additionally, the Constitution, legislatures, and courts in this country have taken great steps in protecting the ability of people to defend their legal rights. For example, the Section 1983 cause of action,[72] recognized by Congress, and given an expansive

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require the doctor to disclose material risks, those of which the reasonable patient would want to be informed. *See infra* note 147 and accompanying text.

The medical informed consent cases present a difficult cause-in-fact issue. Even if a doctor fails to inform a patient of risks of or alternatives to surgery and the patient suffers harm from the surgery, the failure of the doctor to give the patient the information did not cause the loss unless the patient would not have had the surgery in light of the risks or alternatives. This cause-in-fact issue is discussed *infra* at text accompanying notes 255-71 in a section which deals with the similar cause-in-fact problems that would arise in some client choice cases.

70. *See, e.g.*, Schneyer, *Informed Consent and the Danger of Bias in the Formulation of Medical Disclosure Practices*, 1976 WIS. L. REV. 124, 129 (suggesting that right to informed consent in medical cases is based on high value of personal integrity).

71. *See, e.g.*, Cole v. Turner, 6 Modern Rep. 149, 90 Eng. Rep. 958 (Nisi Prius 1704).

72. 42 U.S.C. 1983 (1988).

reading by the federal courts,[73] protects the right of citizens to pursue legal remedies. The due process clause of the Constitution protects the right of people to due process of law.[74] The issue in client control cases is the question of who controls those rights, and the possessor of the rights should have control over what is done with them.

b. The Doctor's and the Lawyer's Conflict of Interest

In both the doctor/patient and the lawyer/client relationship, the professionals are subject to conflicts of interest when presented with alternative means of handling a case.[75] It will be in the interest of doctors and lawyers to choose the method that will be most financially rewarding to them. The doctor's financial interest may push the doctor toward adopting the more intrusive, and more expensive, treatment. The lawyer's financial interest may push the lawyer who is being paid on a contingency fee basis toward a quick settlement; it may push the lawyer who is being paid on an hourly basis to spend an excessive amount of time on a case.[76]

Even doctors and lawyers who are not motivated by material rewards are subject to conflicts of interest. They may favor a choice that would be in the interest of society, but not in the interest of the individual patient or client. A doctor who is developing a new medical technology will want to use it. Similarly, a lawyer who has a good test case that may establish the rights of the poor will want to litigate it. These factors are likely to affect a professional, whether consciously or unconsciously,[77] and the conflict of interest justifies the right of patients to control their medical treatment and the right of clients to control their legal representation.

c. The Ability of the Lawyer and Doctor to Communicate and the Ability of the Client and Patient to Understand

In some respects, there may be a stronger case for client control of legal representation than for patient control of medical treatment. One objection that might be raised to imposing a duty on the doctor to obtain informed consent is that doctors are not skilled, necessarily, in the ability to communicate. They are skilled at treating disease. Lawyers, on the other hand, generally must have good communication skills. They must be able to convey to others difficult concepts in understandable language, whether

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73. *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), *remanded*, 474 F. Supp. 901, *aff'd*, 661 F.2d 940 (1981); Taliferro v. Augle, 757 F.2d 157 (7th Cir. 1985); Heyn v. Board of Supervisors, 417 F. Supp. 603 (E.D. La. 1976).

74. U.S. CONST. amend. XIV, § 1.

75. The conflict of interest lawyers have in negotiation decisions is discussed *infra* at text accompanying notes 156-61. The conflict of interest lawyers have in the choice whether to adopt mediation or arbitration is discussed *infra* at text accompanying notes 232-33.

76. *See supra* text accompanying notes 62-65.

77. *See* Schneyer, *supra* note 70, at 136-37 (arguing that fact that doctors will gain financially consciously or unconsciously will affect their judgment).

they are arguing before a judge or jury, negotiating with another attorney, or interviewing a client. These communication skills should enable the lawyer to explain to a client the risks and benefits of alternative methods of handling a case, whereas the doctor may have difficulty explaining the risks and benefits of alternative methods of medical treatment.

In addition to the fact that the lawyer may be better able to communicate than the doctor, many legal issues are more understandable to the layperson than are many medical issues.[78] For example, the factors to be considered when determining tactics during negotiation or when deciding whether to pursue an alternative means of dispute resolution are generally within the understanding of the layperson.[79] In the medical malpractice cases, however, the choice between alternative methods of medical treatment may require an understanding of much more difficult technical concepts.[80]

d. The Extent of the Loss if There is a "Poor" Choice by the Patient or Client

This article is premised on the belief that, in general, people should have a right of autonomy. There is, however, great controversy as to whether people should have the right to make choices that place them at risk of death or serious injury. Some laws prevent people from exposing themselves to risks.[81] For example, there are laws which require vehicle occupants to wear seat belts and laws which prohibit the sale of medical drugs before the approval of the United States Food and Drug Administration. However, under the doctrine of informed consent, a patient is entitled to make choices that may present great risk of loss of life.[82]

By comparison, a client's choices during legal representation generally do not create risks of the magnitude that a patient's choices during medical care create because choices made in the course of legal representation are not generally a matter of life and death.[83] It may be that, in this respect,

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78. *See* Peck, *A New Tort Liability for Lack of Informed Consent In Legal Matters*, 44 LA. L. REV. 1289, 1296 (1984).

79. This article advocates that clients be allowed to make such decisions. For a discussion of the ability of the client to understand negotiation decisions, see *supra* text accompanying notes 162-65.

80. *Cf.* Note, *Duty of Doctor to Inform Patient of Risks of Treatments: Battery or Negligence?* 34 S. CAL. L. REV. 217, 223-24 (1961) (doctors suggest that patients may not be able to understand).

81. This conflict arises in many cases, including right to die cases. *See, e.g.*, Barber v. Superior Court, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983); In re Quinlan, 70 J.J. 10, 355 A.2d 647 (Me. 1976), *cert. denied*, 429 U.S. 922; Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986); In re Guardianship of Barry, 445 So. 2d 365, 370 (Fla. Dist. Ct. App. 1984).

82. *See* Comment, *Informed Consent: The Illusion of Patient Choice*, 23 EMORY L.J. 503, 516 (1974) (discussing sanctity of life issue in medical informed consent cases).

83. In those cases in which the client is a criminal defendant charged with an offense that carries the risk of the death penalty, the choices made can be a matter of life or death. Courts have already held that the criminal defendant has the right to accept or reject plea

there is a greater justification for leaving legal choices to clients than medical choices to patients, because the loss that the client might suffer would be less if the client makes an unwise choice than the loss that the patient might suffer if the patient makes an unwise choice.

B. Objections to Client Control

1. The Risk of a Poor Choice

Several objections can be raised to client control of legal representation. One is the risk that the client will make a poor choice. An attorney might believe that a client choice is a poor choice for one of two reasons. First, the attorney might disagree with the client's goals.[84] The argument that clients do not know what goals are good for them and that they should be denied the right to make choices on that basis is paternalistic. It runs counter to the traditional liberal belief that individuals are the best judges of their own interests. Paternalism is contrary to respect for autonomy, and the argument for client autonomy is made in an earlier section.[85]

Attorneys might also argue that a client might make choices in technical matters that are not likely to achieve the goals of the client.[86] Many of the decisions that materially affect the client will require a consideration of both technical legal issues and the goals of the client. Choices made during legal representation should be both technically wise and consistent with the client's ends.

There are two ways to make a wise technical choice that is consistent with the goals of the client. The lawyer can attempt to determine the goals of the client, so that the lawyer can make technical decisions in light of the client's goals, or the lawyer can explain the risks of the alternatives to the client and allow the client to make the decision in light of the client's goals. The lawyer should allow the client to choose either of these two methods, but generally, the second method is preferable. Clients are likely to have multiple goals, some of which may justify different choices. In many cases, it will be unlikely that the client can quantify the importance of each goal

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bargain offers. *See supra* note 31. This article proposes that the client in a criminal case be entitled to determine whether to initiate plea bargain discussions. The choice by the client to pursue a plea bargain, of course, would be a choice for a less risky alternative, unlike a case in which the patient might choose a risky option.

84. The term "goal" here is used in the broadest possible sense to mean anything that the client desires. It includes "goals" that the cases and lawyer professional codes would not normally consider to be an end of the representation. *See supra* notes 22-23. For example, the client's desire not to embarrass an opposing witness would be a goal, as used here, though the lawyer codes would not consider this an end of the representation.

85. *See supra* notes 37-47 and accompanying text.

86. For a discussion of whether the lawyer should control decisions in light of the lawyer's greater technical knowledge, see Speigel, *supra* note 11, at 100-04.

in a way that will enable the lawyer to make the choice that yields maximum client satisfaction.[87]

In most cases, lawyers can explain choices in a manner that will enable clients to make intelligent choices. Lawyers are skilled at presenting technical information in understandable language. There will be limits, however, to the ability of the client to understand technical legal information. Studies of medical informed consent practices show that at some point, patient understanding diminishes as doctors present more information.[88] The issue of how much information to give a client is complicated because the point at which additional information becomes counterproductive will vary from client-to-client, depending on the sophistication of the client, and will vary from issue-to-issue, depending on the technical difficulty of the issue. In a later section, this article advocates that the right of the client to control legal representation should vary with the complexity of the issue and the sophistication of the client; that the client should be entitled to make those choices which a reasonable person, in the position which the lawyer knows or should know the client to be in, would want to make.[89]

2. The Urgency of Some Decisions

A second objection that can be made to client control of legal representation is that, especially in litigation, many decisions must be made quickly and it would be very difficult to have the client make them. Many decisions must be made in the heat of trial and it would create a great burden on the court system, and in some cases harm the interests of the client, to have to recess a trial to enable the client to make the decisions. For these reasons, the right of the client to choose should not extend to decisions that must be made in the heat of a trial. However, many of the issues that arise during a trial should be anticipated by the attorney and discussed with the client prior to trial.[90]

This article proposes that the client have the right to make the significant decisions in negotiation[91] and the right to choose to pursue mediation or arbitration.[92] These decisions generally are not urgent and the client can resolve them without damaging the interests of the client or the legal system.

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87. *See* D. BINDER & S. PRICE, *supra* note 6, at 148-49.

88. *See* Smith, *Myocardial Infarction—Case Studies of Ethics in the Consent Situation*, 8 SOC. SCI. MED. 399 (1974), *cited in* Martyn, *supra* note 50, at 315.

The duty to warn in products liability cases creates the same difficulty. At some point, additional warnings dilute the effectiveness of prior warnings. *See* Twerski, Weinstein, Donaher, & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 514-16 (1976).

89. *See infra* text accompanying notes 147-50.

90. For a discussion of the decisionmaking authority a client should generally have, see *infra* text accompanying notes 147-50.

91. *See infra* text accompanying notes 155-200.

92. *See infra* text accompanying notes 201-54.

3. The Risk of Illegal and Unethical Decisionmaking

It might be argued that if courts give clients the right to control the representation, they will make illegal and unethical choices. "Illegal choices" here refers to choices that violate the law or the lawyer codes of professional conduct. "Unethical choices" refers to choices that violate broader ethical standards. The problem of the risk of illegal choices is easily resolved. Client control of the representation should not lead to illegal choices. Under the lawyer codes of professional conduct, the lawyer is and should be required to refuse any requests that violate the law or the lawyer codes.[93]

The more difficult problem concerns choices that are not prohibited by law or the lawyer codes, but which raise ethical concerns. Examples are whether an attorney should subject an opposing witness to degrading cross-examination that might undercut the credibility of the witness, and whether in negotiation of a settlement an attorney should take advantage of the fears of the other party that litigation would reveal embarrassing information. Even the basic question of whether to assert a legal claim that would work to the disadvantage of another person involves an ethical choice. Almost all legal representation raises ethical issues.[94]

As to whether the lawyer or the client should control ethical choices that arise in legal representation, several points are worth making. First, it may be very difficult to determine what is the proper ethical choice. Recall that these are choices that the lawyer professional codes have not resolved. The choices are likely to be difficult, and people disagree over what is ethical. That is not to say that there are not objective ethical standards, but only that no one has a perfect ability to discern those standards or to determine how they should apply.

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93. The ABA Model Rules and Model Code encourage client decisionmaking, see *supra* text accompanying notes 20-22, but prohibit the lawyer from taking actions that are illegal or would violate the professional rules. MODEL CODE, *supra* note 21, DR 7-102(A)(8); MODEL RULES, *supra* note 21, MR 1.16(a)(1).

94. [L]aw office conversations are almost always moral conversations. This is so because they involve law; law is a claim which people make on one another—a claim resting on obligation, a moral claim—and one upon which they may seek the sanction and coercion of the state. In this derivative sense, a conversation about rights and duties is by definition a moral conversation. A conversation of this sort also usually involves issues on what to do about rights and duties, and of consequences to third persons. Often the moral content is implicit—whether to file a claim for damages for physical injury, whether to probate one's father's will—but moral content is always present. The claim for damages or the distribution of a dead person's property rests on normative considerations as well as objective rules. And when one takes advantage of the rule, he has decided that he ought to take advantage of it. He might have decided that he ought not. Law office choices and decisions often involve consideration of the social effect of what clients do, and of an effect on the character of a particular institution, such as a family or a business within the civil community. If it is possible for a serious conversation, between a lawyer and a client, in a law office, to be without moral content, I cannot think of an example.

Shaffer, *supra* note 43, at 232.

Second, clients may make decisions that are more ethical than those attorneys would make. We should not assume that clients will necessarily make a self-serving choice.[95] Clients have ethical values and may act in accord with them.[96] In fact, it is possible that lawyers make choices on behalf of a client that are less ethical than the client would make for himself. When attorneys are faced with ethical issues that are not controlled by the law or professional rules, it is likely that they will make the choices that they perceive as most beneficial to the client, irrespective of the ethical implications. It may even be that the lawyer's duty to zealously represent a client[97] requires lawyers to make choices that would benefit the client. Were clients to control these choices, they might not make the self-serving choice.

Finally, if the client controls decisions that have ethical implications, this does not mean that the lawyer has no role in these decisions. The lawyer's role should be to aid the client in making an informed choice, and this should include helping the client to consider ethical, as well as legal and financial implications of a decision.[98] Lawyers may be able to see ethical implications of decisions that would escape the client. The professional rules encourage lawyers to raise and discuss the moral implications of decisions

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95. Robert Bastress appears to make this assumption when he states that clients "do not prescribe moral choices according to some world view that takes into account competing values." Bastress, *Client Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97 (1985). Bastress advocates that lawyers make an independent ethical judgement about choices that arise in legal representation, discuss the ethical implications of the choices with the client, and withdraw if the client fails to satisfy the lawyer's ethical concerns. *Id.*

96. *See* T. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 39 (1985); Fried, *supra* note 37, at 1088. Fried says:

> [The lawyer should not] assume that the client is not a decent, moral person, has no desire to fulfill his moral obligations, and is asking only what is the minimum that he must do to stay within the law. On the contrary, to assume this about anyone is itself a form of immorality because it is a form of disrespect between persons. Thus in very many situations a lawyer will be advising a client who wants to effectuate his purposes within the law, to be sure, but who also wants to behave as a decent, moral person.

Id.

97. MODEL CODE, *supra* note 21, DR 7-101(A), states:

> 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. . . .

Professor Simon argues that, when confronted with an ethical issue, lawyers are likely to make the client-serving choice. *See* Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 53-59 (1978).

98. Thomas Shaffer contrasts three views of professional responsibility. The ethics of role would say that the role of the attorney is as advocate only and that, except for the restrictions of the attorney codes, the attorney should not be involved in the ethical choices of the client. The ethics of isolation would say that the attorney should not do anything for the client that violates the attorney's ethical standards and that the attorney should withdraw when the client makes what the attorney believes to be an unethical choice. The ethics of care would say that the attorney should engage the client in ethical discourse about the decisions and help the client to see the ethical implications of the choices to be made, but that the client should control the choice. *See* Shaffer, *supra* note 43.

with their clients,[99] and many clients will want their lawyers to help them to make ethical decisions.[100] In the end, if the lawyer believes that the client's decision clearly is unethical and the lawyer does not want to participate further, the lawyer can withdraw from the representation.[101]

4. Clients May Want Lawyer Control

Many attorneys do not leave significant choices to the client,[102] and apparently many clients have not demanded this right. The fact that clients, who in most cases are paying the bills, have not demanded the right to control legal representation might generate two very different reactions. One might argue, as Richard Epstein has argued as to medical patients,[103] that clients have not demanded control because they do not want control. Or, one could argue that clients that do not control legal representation do not realize that they should control it.[104] This article will take the position that the client should be permitted to allow the attorney to control the representation, but only after the attorney presents the opportunity for and explains the advantages of client control.

First, there is the argument that clients generally do not want the right to control the representation. Richard Epstein suggests that the fact that market forces have not produced a contractual right of informed consent in the doctor/patient relationship indicates that patients do not want such

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99. MODEL CODE, *supra* note 21, EC 7-8, states:

> 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.

MODEL RULES, *supra* note 21, MR 2.1, states:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral . . . factors, that may be relevant to the client's situation.

100. As Charles Fried has said:

> [I]n very many situations a lawyer will be advising a client who wants to effectuate his purposes within the law, to be sure, but who also wants to behave as a decent, moral person. It would be absurd to contend that the lawyer must abstain from giving advice that takes account of the client's moral duties and his presumed desire to fulfill them. Indeed, in these situations the lawyer experiences the very special satisfaction of assisting the client not only to realize his autonomy within the law, but also to realize his status as a moral being.

Fried, *supra* note 37, at 1088.

101. MODEL RULES, *supra* note 21, MR 1.16(b)(3), states:

> [A] lawyer may withdraw from representing a client . . . if . . . a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.

102. One study found that 30% of the attorneys believe that the lawyer should be in charge, 52% believe that the lawyer should obtain client consent for important decisions, and only 18% believe that the client sets the limits. *The Lawyer-Client: A Managed Relationship?*, 12 ACAD. MGMT. J. 76 (March 1969), *cited in* D. ROSENTHAL, *supra* note 11, at 113, n.29.

103. Epstein, *Medical Malpractice: The Case For Contract*, 1976 AM. B. FOUND. RES. J. 87, 127.

104. *See supra* note 6 for the theory of Binder & Price.

a right;[105] if patients wanted the right to make choices in medical care, this right would have emerged from doctor/patient negotiations.[106] The same argument could be made concerning the legal profession; broader client control has not emerged because clients have not demanded such a right.

However, it is likely that ordinary medical patients and legal clients do not think it appropriate to question the decisions of a professional.[107] It may be that patients and clients have not chosen to control medical treatment and legal representation because doctors and lawyers have not presented them with these options.[108]

Binder and Price suggest counseling methods that would deter clients from allowing lawyers to influence them.[109] They suggest that when a client has difficulty making a decision, "providing the client with the option of choice by the lawyer should usually be a last resort,"[110] and that when clients ask them for their opinion, "lawyers should refrain from stating what they would do."[111] Binder and Price want attorneys to actively discourage the client from allowing the attorney to control the representation because of a legitimate concern that the client has come to the attorney with preconceived notions that the attorney should make the decisions. However, as one commentator has suggested, Binder and Price would have the attorney "unilaterally, manipulatively impose the goal of full participation."[112]

The right of client control is based on the assumption that, with sufficient information, the client can make intelligent choices in the representation. Client control should extend to the right to have the attorney make some choices. Attorney control of choices during legal representation does not violate the client's autonomy as long as the client makes an informed choice for attorney control.[113] The attorney, however, should make

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105. *See* Epstein, *supra* note 103, at 95, 127.

106. *See id.* at 95. Epstein has argued that the amount of information that the doctor should give the patient should be decided as a matter of contract. *See id.* at 95, 127.

107. *See* Spiegel, *supra* note 11, at 79.

108. A Canadian study of 1025 adults found that for 50%, the quality they most desired in a lawyer is that the lawyer explain the details of their case. *See* Martyn, *supra* note 50, at 308 n.4.

109. Binder & Price suggest a method of attorney/client decisionmaking that in many respects is advocated in this article. *See* D. BINDER & S. PRICE, *supra* note 6.

110. *Id.* at 154.

111. *Id.* at 186.

112. Ellmann, *supra* note 6, at 743. Ellmann is also critical of what he suggests are Binder & Price's manipulative techniques for obtaining from the client information that the client might be reluctant to give. *Id.* at 735. Ellman states that "(l)awyers who seek to implement the principle of client decision-making fully should offer their clients less intimacy, but more advice." *Id.* at 754.

113. Gerald Dworkin makes the following argument:

> Someone who wishes to be the kind of person who does whatever the doctor orders is as autonomous as the person who wants to evaluate those orders for himself. This view differs from others in the literature. R. P. Wolff, for example, says (in the context of the citizen and the state) "[t]he autonomous man . . . may

it clear to clients that they have the right to control the significant decisions in the representation, and they should explain to clients the advantages of client control.[114]

5. The Additional Expense of Client Choice

Client choice is likely to add to the cost of legal representation.[115] The lawyer will have to spend time educating the client on the law and the implications of the various options. Is the benefit of client control worth the cost of the extra attorney and client time involved?[116] As with other questions in the representation, the client should resolve this question. As argued in the prior section,[117] clients should be able to decide what issues they will control. The lawyer should inform the client about the advantages of client control and the additional expense that it will require. It is the client that will bear the expense of the representation, and the client should decide whether the added expense of client control is worth it.[118]

IV. Potential Directions For the Development of Client Control: A Broadened General Standard or the Continued Identification of Specific Choices For the Client

As noted previously,[119] courts have purported to adopt an ends/means standard for determining what choices are for the client and what choices

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> do what another tells him, but not because he has been told to do it. . . . By accepting as final the commands of the others he forfeits his autonomy. but his conception of autonomy not only has the consequence that no government is legitimate but also that such values as loyalty, objectivity, commitment, and love are inconsistent with being autonomous.

G. Dworkin, *supra* note 38, at 108-09 (quoting R. Wolf, In Defense Of Anarchism 14 (1970)).

114. *See supra* text accompanying notes 48-65.

115. *See* Schultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 Yale L.J. 219, 294 (1985); *see also supra* note 67.

116. Spiegel argues that the benefits of client control are greater than the additional cost in time and money. *See* Spiegel, *supra* note 11, at 111-12.

117. *See infra* text accompanying notes 109-14.

118. In contingency fee cases the lawyer's share of the recovery might be adjusted to pay for the additional time required. In situations in which an insurance company, the government, or someone else provides an attorney for the client, the client should still have the right to control the representation. For the reasons argued in prior sections, client control is an important aspect of competent representation, and courts should require those who provide attorneys for others to provide competent representation.

Mark Spiegel poses the problem of non-fee-paying clients who make unreasonable demands on their lawyers. He suggests, "open confrontation with the choices involved," Spiegel, *supra* note 11, at 122-23, but does not suggest a standard by which the lawyer, or ultimately a court, might resolve the issue if the client does not agree with the lawyer. The general standard that is proposed herein, which would allocate to the client those choices which the reasonable client, in the position that the lawyer knows or should know the client to be in, would want to make, would resolve the problem in a fair manner, if, in such cases, the hypothetical reasonable client is assumed to be a fee-paying client.

119. *See supra* notes 22-23.

are for the lawyer, but it is a standard which they often ignore and which would be difficult to apply if they did not. The significant development of the right of client control has resulted from the identification of specific choices that are for the client.[120]

If courts decide to expand the right of the client to control legal representation, there are two directions that they can take. Courts can identify, as they have done in medical malpractice informed consent cases, an intelligible general standard for determining which decisions are for the client, or they can continue to identify specific decisions that are for the client.[121] This section will discuss the advantages and disadvantages of adopting a general standard as opposed to the continued development of specific rules. It will propose that courts both create a general standard for identifying decisions that the client should make and continue to identify specific decisions that, as a matter of law, are for the client.

A. Advantages of a General Standard Rather Than Merely Identifying Specific Choices That Are For Clients

The identification of specific choices that are for clients, without the identification of a workable general standard, has several weaknesses. First, the identification of specific decisions for clients fails to take into consideration the individual characteristics of clients. If courts limit themselves to identifying specific choices that are for clients, the choices assigned to clients will be limited to the choices that can be made by the least sophisticated client. This is illustrated by the choices that courts presently reserve for clients. The choices[122] are those which almost any client would be able to make. Courts cannot reserve more difficult questions for every client because not every client would be able to make them. Clients have different levels of sophistication. More sophisticated clients who want to control more sophisticated questions should be entitled to do so. A general standard can be formulated to take into consideration the characteristics of the individual client.

A second problem with rules that identify specific choices for clients is that they do not take into consideration the facts of specific cases. They do not give the client the right to make choices that may in a particular case be very important to the client. Consider the "Long Black Veil" case, which was posited by David Luban. A criminal defendant does not want to call an alibi witness, the wife of his best friend, at trial because at the

120. *See supra* text accompanying notes 28-32.

121. As discussed *supra* in text accompanying notes 22-32, although the courts and lawyer codes speak in terms of an ends/means standard of client/attorney decisionmaking authority, what they actually do is identify specific choices that are reserved for the client, irrespective of the ends/means standard.

122. *See supra* notes 28-32 and accompanying text.

time of the crime he was in bed with her.[123] Courts have not allowed clients to determine what witnesses will be called,[124] but it seems here, given the importance of the decision to the client, that the client should have the right to make the decision.[125] Courts may not want to reserve the decision of what witnesses to call for the client in every case, but a general standard which reserved for clients those decisions which a reasonable person in the position the lawyer knows or should know the client to be in,[126] would allow the client to make such a decision.

Finally, the failure of the courts to identify an intelligible general standard makes it difficult for an attorney to determine who should make choices that courts have not identified previously as choices for the attorney or the client. For example, in a Pennsylvania Supreme Court case, Rizzo v. Haines, an attorney was held liable for the failure to inform the client of the opposing attorney's statement of his settlement authority and the judge's opinion of the case's settlement value.[127] No prior case had identified this as information that the client was entitled to have, nor the choice to make a counter-offer as a choice the client was entitled to make. The lack of a workable general standard for determining what decisions are for clients makes it difficult for attorneys to decide what information and choices they must give to clients.

B. What General Standard?

If courts are to adopt a meaningful general standard for determining what choices the client is entitled to make, there are several possibilities. First, the courts could hold attorneys to the standard of the practice of others in the profession. This is the standard to which courts generally hold attorneys[128] and physicians[129] in malpractice cases.

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123. Luban, *supra* note 24, at 456. The hypothetical is based on the M.J. Wilkin and D. Dill song:

The judge said, "Son, what is your alibi?
If you were somewhere else then you won't have to die."
I spoke not a word, though it meant my life
For I had been in the arms of my best friend's wife.

Id.

124. *See supra* note 28.

125. In Luban's opinion: "paternalistic action on the part of lawyers is unjustified" and lawyers should not override "their clients' competently held values in the name of their clients' interest." Therefore, in the case of the "Long Black Veil", the client should decide "[w]hat things are worth dying for?" Luban, *supra* note 24, at 489.

126. Such a standard is proposed *infra* at text accompanying notes 147-50.

127. 520 Pa. 484, 555 A.2d 58 (1989). *See also infra* text accompanying notes 167-82.

128. *See, e.g.*, Spiegel, *supra* note 11, and cases cited therein.

129. Courts hold the doctor to the standard of the ordinary member of the profession within the community. *See* PROSSER AND KEETON ON THE LAW OF TORTS 185-186 (5th ed. 1984) [hereinafter PROSSER & KEETON], and the plaintiff must establish the ordinary standard through expert testimony. *Id.* at 188.

Though some courts apply the standard of the profession in medical informed consent cases,[130] several courts have held that the practice of the profession should not determine whether the doctor has given sufficient disclosure.[131] The District of Columbia Circuit Court of Appeals, in *Canterbury v. Spence*, has given the most thorough justification for not allowing the medical profession to determine what the doctor should reveal in informed consent cases,[132] and its reasoning is instructive for cases concerning control of legal representation.

First, the court points out that the circumstances of each patient is unique, and therefore, no standard practice within the medical profession could meet the needs of each patient.[133] The same argument applies to the question of client choice. Each client is unique, and therefore, no standard practice within the legal profession limiting the specific choices that are for the client would be sufficient to protect the interests of clients.

A second justification that the *Canterbury* court gives for not allowing the medical profession to set the standard of informed consent is that the question of what information patients need to make an informed choice is not a matter of professional expertise.[134] Unlike the standard of care in many other medical malpractice cases, the issue of what information the patient needs to make a reasonable choice is not so complex[135] that a layperson is not qualified to determine it. This argument also applies in the

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130. *See, e.g.*, Cross v. Huttenlocher, 185 Conn. 390, 440 A.2d 952 (1981); Di Filippo v. Preston, 53 Del. 539, 173 A.2d 333 (1961); Wallace v. Garden City Hosp. Osteopathic, 111 Mich. App. 212, 314 N.W.2d 557 (1981), *rev'd*, 417 Mich. 907, 330 N.W.2d 850 (1983); Bivens v. Detroit Osteopathic Hosp., 77 Mich. App. 478, 258 N.W.2d 527 (1977), *rev'd*, 403 Mich. 820, 282 N.W.2d 926 (1978). However, some of the courts that apply the standard established by the profession do not limit the standard to the practice of those within the local community, as they do in other medical malpractice cases. *See, e.g.*, Sinz v. Owens, 33 Cal.2d 749, 205 P.2d 3 (1949); Tallbull v. Whitney, 172 Mont. 326, 564 P.2d 162 (1977); King v. Williams, 276 S.C. 478, 279 S.E.2d 618 (1981); Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967); Hundley v. Martinez, 151 W.Va. 977, 158 S.E.2d 159 (1967).

131. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 792 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) (court held that lay witness testimony can competently establish that physician should have disclosed particular risk information); Aiken v. Clary, 396 S.W.2d 668 (Mo. 1965). *See also* Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972).

132. The *Canterbury* court's discussion of whether the medical profession should set the informed consent standard is discussed in Schneyer, *supra* note 70, at 150-56.

133. We cannot gloss over the inconsistency between reliance on a general practice respecting divulgence and, on the other hand, realization that the myriad of variables among patients makes each case so different that its omission can rationally be justified only by the effect of its individual circumstances.

Canterbury, 464 F.2d at 784.

134. *Id.* at 784-85.

135. *See, e.g.*, Note, *Physician's Duty to Warn of Possible Adverse Results of Proposed Treatment Depends Upon General Practice Followed by Medical Profession in the Community*, 75 HARV. L. REV. 1445, 1447 (1962) ("highly complex skills are not involved"). *But see* Note, *Physician Has a Duty to Inform Patient of Risk Inherent in Proposed Treatment*, 109 U. PA. L. REV. 768, 772 (1971) (medical profession is best qualified to set standard).

client control cases. The question of what choices a reasonable client would want to make is not generally a question which requires technical legal judgment.

Additionally, the *Canterbury* court suggests that members of the medical profession have a bias in favor of retaining control and the law should not allow them to determine what information they will convey.[136] Lawyers also are likely to have a bias in favor of retaining control of legal representation.[137] The custom of the legal profession as to client decisionmaking authority should be treated as custom generally is treated; it should merely be admitted into evidence,[138] and should not establish the controlling standard.

Bellow and Moulton present another possible standard for the allocation of decisionmaking authority. They state that attorneys make "technical decisions" and that clients make "decisions that affect the client's inmost concerns."[139] They offer two justifications for such a dividing line, each of which seems to focus on a different aspect of the word "technical." First, they suggest that some issues "are too 'technical' for a layperson."[140] Here, "technical" is used in the sense of "difficult." Though the difficulty of the decision is an important factor in determining whether the client should make it, some difficult questions may be so important to the client that the client should make them, even though they require the lawyer to give the client a substantial explanation.

Second, Bellow and Moulton state that:

> In the giving of legal advice . . . a distinction is recognized between the "important" decisions—those which affect the client's inmost concerns—and decisions which involve more or less technical aspects of the client's problem.[141]

Here "technical" appears to mean those decisions that merely implement the client's choices, and is contrasted with those decisions that "affect the client's inmost concerns." Although the importance to the client of the decision is a very relevant factor in deciding whether a decision should be allocated to the client, there are problems with an "inmost concerns"/technical standard. One objection is suggested by the term, "inmost con-

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136. *Canterbury*, 464 F.2d at 784. Schneyer suggests that this is the most influential argument of the court. *See* Schneyer, *supra* note 70, at 155.

137. As Judge Learned Hand said concerning another profession, the law should not allow the custom of a group to establish the standard of care because "a whole calling may have unduly lagged in the adoption of new and available devices." The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

138. *See* PROSSER & KEETON, *supra* note 129, at 193-95.

139. G. BELLOW & B. MOULTON, *supra* note 6, at 1030-31. It is not clear whether they advocate this as a standard or merely describe what they perceive to be the prevailing practice. Spiegel has suggested that the Bellow & Moulton test is vague. *See* Spiegel, *supra* note 11, at 123 n.345.

140. G. BELLOW & B. MOULTON, *supra* note 6, at 1030.

141. *Id.* at 1031.

cerns." The proposed standard appears to be entirely subjective. Courts should not require attorneys to allow clients to make decisions that are important to the client unless attorneys know or should know of the importance of the decision to the client.[142] Also, an "inmost concerns"/technical standard would not resolve whether the lawyer or the client should make many of the choices that arise. Many issues are merely of some concern to the client and involve some technical difficulty; this standard does not identify who should make such choices.

Mark Spiegel suggests that courts allocate the responsibility for decisionmaking based on the interests of the client, the attorney, and society.[143] The lawyer codes, of course, protect some of the interests of society by limiting the options of the client. As to choices involving the interests of society that the professional codes does not resolve, Spiegel suggests, as argued herein, that lawyer control might result in decisions that are less in the interest of society than client control.[144] As between the lawyer[145] and the client, an interests standard apparently would leave almost all decisions to the client, because the client will have the greater interest in almost all decisions in legal representation.[146] However, an interests rule would be impractical in light of the many decisions that must be made in the course of legal representation.

The law of medical informed consent may give help in the development of a general standard for identifying the choices that the client should make. Most courts require that doctors disclose "material risks."[147] In Canterbury v. Spence, the court said:

> A risk is . . . material when a reasonable person, in what the physician knows or should know to be the patient's position, would

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142. The general standard that is advocated herein would hold attorneys responsible only if they know or should know of the importance of the choice to the client. *See supra* text accompanying notes 147-50.

143. *See* Spiegel, *supra* note 11, at 117-23. Rather than replace the ends/means standard with "another definitional categorization," Spiegel suggests that courts "begin to consider specific lawyering decisions and allocate them either to the lawyer or client in accordance with" their interests. *Id.* As argued *supra* at text accompanying notes 121-26, the problem with merely allocating specific decisions to the client or lawyer is that this does not take into consideration the individual characteristics of the client or the case. A general standard that does take into consideration individual characteristics of the client is suggested *infra* at text accompanying notes 147-50.

144. *See* Spiegel, *supra* note 11, at 120-21.

145. Spiegel suggests that lawyers' interests are protected by their right to withdraw from representation. *See id.* at 126-32.

146. Spiegel suggests that some decisions will be for the attorney under this division of authority. "Even if the client chooses the witnesses to be called at trial, the lawyer still determines the order of proof and the details of eliciting testimony, including the framing of questions." *See id.* at 125. What questions to ask a witness may, however, be very important to the client. One of the client's goals may be to maintain a good relationship with a witness.

147. Canterbury v. Spence, 464 F.2d 772, 792 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 23 Cal. App. 3d 313, 100 Cal. Rptr. 98 (1972); Berkey v. Anderson, 1 Cal. App. 3d 790, 82 Cal. Rptr. 67 (1969); Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972).

> be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy."[148]

This materiality standard establishes the information that the doctor must convey to the patient. It can be used to formulate a standard, not only for the information that lawyers should convey to the client, but also the choices that the lawyer should allow the client to make. Courts should require lawyers: 1) to do a reasonable amount of client interviewing to determine if the client has any special needs or interests; 2) to allow the client to make those choices which a reasonable client, in what the lawyer knows or should know the position of the client to be, would want to make; 3) to enable the client to make the choices intelligently;[149] and 4) to communicate to the client in a manner that will enable the client to comprehend the choices that he or she must make.[150]

In determining what decisions a reasonable client in the position of the client would want to make, the attorney should take into consideration the following factors: 1) the effect that the choice may have on the client; 2) the complexity of the matter to be resolved; 3) the sophistication, experience, intelligence, and knowledge of the client; and 4) the interest that the client expresses. Each of these factors is important in determining the importance to the client of control over choices and the ability of the client intelligently to make those choices.

Note that the standard for determining what choices the client should make is objective in some respects and subjective in others. The standard is objective in that the lawyer is only required to allow the client to make those choices that a reasonable client would want to make. This limits, to some extent, the autonomy of the client, but such a limitation is necessary so that a lawyer will be able to comply with the standard. The standard should not require the lawyer to be a mind reader. The proposed standard is subjective in that the lawyer must attempt to determine whether there are special characteristics of the client that would lead the client to want to make choices that an ordinary client would not want to make. Attorneys cannot avoid responsibility on the basis that they made the choice that a reasonable client would have made.

C. The Continued Identification of Specific Choices For the Client

Though, as argued in a previous section,[151] there are advantages to a general standard for determining the choices that are for the client, there are also advantages to the identification of specific choices that are for the

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148. Canterbury v. Spence, 464 F.2d at 787 (quoting Waltz & Scheuneman, *Informed Consent in Medical Malpractice*, 55 CALIF. L. REV. 1396, 1407-10 (1967)).

149. Binder & Price provide a helpful method for enabling the client to make informed decisions. D. BINDER & S. PRICE, *supra* note 6.

150. *See* Simpson, *Informed Consent: From Disclosure to Patient Participation in Medical Decisionmaking*, 76 NW. U.L. REV. 172, 183 (1981).

151. *See supra* text accompanying note 122-27.

client. When courts identify specific choices that are for the client as a matter of law, attorneys do not have to wrestle with whether clients should make these choices, nor does the finder-of-fact, in a malpractice action, have to wrestle with whether or not the attorney should have allowed the client to make them.[152]

Courts are not limited to either establishing a general standard for decisions that are for the client or identifying specific choices that are for the client. They can do both. They should require an attorney to allow a client to make choices which a reasonable client, in the position that the attorney knows or should know the client to be in, would want to make. Courts should supplement such a general standard with rules of law that require the lawyer to allow the client to make choices in specific situations.[153] They should continue to reserve specific choices for the client which are generally of great importance to clients and which clients generally are capable of making.[154] The following section identifies several choices as likely next steps in the development of the client's right to control legal representation.

V. NEXT STEPS TOWARD CLIENT CONTROL: THE CLIENT'S RIGHT TO CONTROL NEGOTIATION AND TO PURSUE ALTERNATIVES TO LITIGATION

As argued in the prior section, attorneys should have a duty to allow clients to make those decisions that a reasonable client, in what the attorney

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152. In medical informed consent cases, courts have not generally identified specific choices that are for the patient. It would be more difficult for courts to do so in the medical informed consent cases than in the client choice cases for three reasons. First, the choices that courts explicitly give to clients in legal representation are major choices that arise very often. With only a few rules, courts have been able to take care of a great many of the client choice cases that arise. Courts could not do this in medical cases. There are innumerable medical procedures that doctors perform, and courts would have difficulty listing a few specific rules that would identify what choices the patient should have in a substantial number of cases.

A second reason that courts might be more hesitant to adopt rules of law specifying the disclosure required in medical informed consent cases is that judges are not experts in the medical field. However, most of them have been practicing attorneys. They can determine from their own experience what legal representation questions would be appropriate for the client.

Finally, it would be difficult to establish specific standards for the medical profession because the risks of and alternatives to medical procedures are always changing. What is reasonable disclosure one day will be unreasonable in light of newly developing alternatives to treatment. This can be contrasted with legal representation, in which the risks of a jury trial or a criminal defendant taking the stand probably have not changed substantially since early common-law days.

153. Whether or not courts adopt a general standard, they will probably continue to identify choices that lawyers must allow clients to make. As argued *infra* at text accompanying notes 183-200, courts should explicitly require that the following decisions be made by the client: what style and strategy to adopt in negotiation, whether to make settlement offers, what offers to make, when to make them, and whether to pursue mediation or arbitration of a dispute.

154. *See infra* text accompanying notes 28-32.

knows or should know to be the position of the client, would want to make. However, the right of client control has developed to this point as the right of the client to decide specific issues that arise during representation, and, whether or not courts recognize a broad general right on the part of the client to make significant choices within legal representation, courts should continue to identify specific choices that are for the client.

It is likely that the next steps in the development of a duty to allow clients to control representation will be the recognition of duties to allow the client to make significant decisions concerning negotiation and to allow the client to choose alternatives to litigation. First, during negotiation, in addition to the right to choose to accept or reject a settlement offer, the client should have the right to choose the style and strategy of negotiation, when to make settlement offers, and what to offer. Second, the client should be allowed to choose whether to attempt to resolve disputes through mediation or arbitration. Each of these choices presents potential benefits and risks to clients and clients should be informed of the risks and benefits of each option and allowed to make the choices in light of them.

A. The Client's Right to Control Negotiation

1. The Interests of the Client in Negotiation Decisions

The outcome of negotiations is generally of great importance to clients in legal representation, whether the lawyer is negotiating a transaction or the resolution of a dispute. In negotiation of a transaction, if a favorable agreement is lost because the lawyer does not involve the client in decision-making, then the client has lost the benefit of the favorable agreement. In negotiation of a dispute, avoiding litigation can have several potential advantages to the client. It can limit uncertainty, speed resolution, and enable the parties to tailor a settlement to meet their special needs.[155] If an attorney fails to negotiate a settlement that could have been obtained had the client controlled the negotiation, the case is tried, and the client loses, the client has lost the benefit that the client would have had if the parties had settled.

Many decisions that are made during negotiation are likely to affect the outcome. Some choices enhance the likelihood that a settlement, if obtained, will be favorable to a client, but also create a greater risk of deadlock. It is the client that will suffer the most significant loss if there is a bad settlement or if there is a deadlock, and the client should control the significant decisions during negotiation.

2. Negotiation and the Lawyer's Conflict of Interest

Courts require a lawyer that is representing both a defendant in a civil case and the defendant's liability insurance company to provide the defen-

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155. *See* Dunlop, *The Negotiations Alternative in Dispute Resolution*, 29 VILL. L. REV. 1421, 1423 (1984).

dant with a substantial amount of information that will affect the decision whether or not to settle. The attorney must:

> advise and counsel a client as to all facts, circumstances and consequences which are necessary to enable the client to make an informed decision on matters such as the likelihood of an excess verdict and the desirability of attempting settlement within the policy limits.[156]

This duty is based on the conflict of interest between the insurance company and the defendant, both of whom are clients of the attorney.[157] However, this is not the only situation in which a conflict of interest is likely to interfere with an attorney's decisionmaking during negotiation. Often, there is a conflict of interest between the lawyer and the client in negotiation decisions, and the lawyer should always have the responsibility to allow the client to make significant negotiation decisions.[158] Conflicts of interest between the lawyer and the client during negotiation are both likely to arise and likely to affect the lawyer's actions.

Several types of conflicts of interest are likely during negotiation of a dispute because lawyers have a great interest in whether or not a case is litigated, and the lawyer's interest often differs from that of the client. First, the financial arrangements between the attorney and the client may create a conflict of interest. If lawyers are handling a case on a contingency fee basis, it is generally in their interest to get a quick settlement, even if substantial negotiation or litigation might generate a larger recovery for the client.[159] Second, the workload of the attorney may create a conflict of interest. If lawyers are overworked, it will be in their interest to settle cases quickly, whereas if they are underworked and they are employed on an hourly basis, it will be in their interest to negotiate for a longer period of time or litigate.[160] Third, potential publicity from the trial of a case may create a conflict of interest. In some cases, it may be in a lawyer's interest

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156. Garris v. Severson, Merson, Berke & Melchior, 252 Cal. Rptr. 204, 206 (Cal. Ct. App. 1988) (Order not published).

See also C. WOLFRAM, *supra* note 23, at 430 (citing Rogers v. Robson, Masters, Ryan, Brumund & Belom, 81 Ill.2d 201, 407 N.E.2d 47, 49 (1980) (although defense lawyers were employed by company, insured was also their client; as such, lawyers owed duty to client independent of insurance policy to obtain client's permission to settle claim); *accord* Lieberman v. Employers Ins. of Wausau, 84 N.J. 325, 419 A.2d 417 (1980)).

157. *See* C. WOLFRAM, *supra* note 23, at 430 (citing Rodgers v. Robson, Masters, Ryan, Brumund & Belom, 81 Ill.2d 201, 407 N.E.2d 47, 49 (1980)).

158. A previous section discussed the risk that lawyers will have conflicts of interests with their clients that will affect the results of the representation. *See supra* text accompanying notes 62-65.

159. *See* D. ROSENTHAL, *supra* note 11, at 96-99 ("[F]or all but the largest claims, an attorney makes less money by thoroughly preparing a case and not settling it early." *Id.* at 105); *see also* Clermont & Currivan, *supra* note 62, at 536.

160. *See* Strauss, *supra* note 11, at 329-30 ("[t]he attorney's concern about his or her time, profit, and other personal interests affect, perhaps subconsciously, the choices made for the client.").

to litigate a case and get some publicity, rather than negotiate a settlement.[161] In cases that lawyers are likely to lose, they may be tempted to settle rather than risk negative publicity. Finally, the interest of the lawyer in developing a reputation for handling cases in a certain manner may run counter to the interest of the client. For example, a lawyer may want to develop a reputation for hardball negotiation, and may not want to undercut that reputation by taking a conciliatory approach, even when a conciliatory approach would be in the interest of the client.

In addition to the likelihood that the lawyer and client will have a conflict of interest in negotiation, a conflict of interest is more likely to influence the attorney's actions in negotiation than in litigation. Whereas litigation takes place in public, in front of the client, the judge, and, in some cases, the press, negotiation generally take place in private between the attorneys. During negotiation, the client is not present to oversee the behavior of the attorney, and attorneys do not risk bad publicity from a performance that is influenced by their own interests. An attorney for the opposing side is likely to be more than happy to quietly take advantage of an attorney that is ineffective because of a conflict of interest. The effects of these conflicts of interest can be diminished if the client has the right to make the significant negotiation decisions.

3. The Ability of the Client to Make Negotiation Decisions

It may be that there is justification for leaving much of the decisionmaking authority with the lawyer in litigation, where many of the decisions are technical or urgent,[162] but negotiation decisions, generally, are not so technical or urgent as litigation decisions. Negotiation choices may be difficult, but, generally, the client can understand the risks and benefits of the alternatives.[163] The lawyer should play an important role in explaining the likelihood of various results under the alternatives, but lawyers should allow clients to make the choices in light of their own values and risk preferences.

In many situations, the client may have advantages over the attorney in making negotiation decisions. The client may know the opposing party and have a better understanding than the attorney of how that party is likely to react to various strategic behavior. The client also may have a better knowledge of some aspects of the subject over which the parties are negotiating. This knowledge may enable the client to think of creative means of arranging a deal or settling a case that will benefit both sides.[164]

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161. *See, e.g.*, Rizzo v. Haines, 520 Pa. 484, 487, 555 A.2d 58, 64 (1989) (court found that lawyer wanted case to go to trial, rather than settle, so that he could get "a reputation as a negligence attorney").

162. *See supra* text accompanying notes 86-90. However, as this article argues *supra* at text accompanying note 90, the client should be involved in many litigation-related decisions.

163. For a discussion of some of the negotiation decisions that courts should reserve for clients, see *supra* text accompanying notes 183-200.

164. An initial decision that attorneys often do not even consider is the question of who

These abilities justify client control of negotiation decisions.[165]

4. Beyond the Settlement Offer Precedent

Courts have established that lawyers must have client authority before they make settlement offers and that they must present settlement offers to clients.[166] This right is justified by the importance of the decision to the client and the likely conflict of interest between the lawyer and the client. The settlement offer rules, however, do not sufficiently protect the interest of clients in controlling settlement choices. There are many other choices that are made during negotiation that are important to the client.

A decision by the Pennsylvania Supreme Court in 1989 suggests a willingness on the part of courts to broaden the choices attorneys must give to clients during negotiation. In *Rizzo v. Haines*,[167] the plaintiff had been injured when a Philadelphia police car struck the plaintiff's car in the rear.[168] The plaintiff was paralyzed.[169] Plaintiff, represented by an attorney, brought suit against the city of Philadelphia.[170] During the course of a settlement conference, the trial judge suggested a settlement figure of $550,000.[171] Plaintiff's attorney immediately rejected this figure.[172] Later, during the course of the trial, the attorney for the city told plaintiff's attorney, "Look, I've got more than 550, what do you really want," to which plaintiff's attorney's only reply was "$2 million," the amount of the plaintiff's previously rejected offer.[173] The plaintiff's attorney never discussed the judge's suggested settlement figure or the city attorney's statement of authority with the plaintiff.[174] "[T]here was also evidence that [plaintiff's attorney] considered the opportunity to try the case to be a cornerstone in building his reputation as a successful plaintiff's attorney."[175] The case was tried and the jury awarded the plaintiff a verdict of $450,000.[176]

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does the negotiating. In recent years, there has been a growing interest in having direct negotiation between the parties to a business dispute. Such negotiations can yield superior results to those conducted by the lawyers because the parties to the dispute are more familiar than their attorneys with their business and can respond more quickly and creatively to proposals. They can look at the complete business picture, unconstrained by the parameters imposed by legal doctrine. *See* Lieberman & Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 429-30 (1986).

165. It is unlikely that an attorney will be held liable for the failure to present the option of client negotiation to a client because the practice has probably not yet received sufficient publicity for a court or jury to conclude that the reasonable attorney would present such an option to the client.

166. *See supra* cases cited at note 32.

167. 520 Pa. 484, 555 A.2d 58 (1989).

168. Rizzo v. Haines, 520 Pa. 484, 488, 555 A.2d at 60 (1989).

169. *Id.*

170. *Id.*

171. *Id.* at 492, 555 A.2d at 62.

172. *Id.*

173. *Id.*

174. *Id.* at 494, 555 A.2d at 62-63.

175. *Id.* at 495, 555 A.2d at 63.

176. *Id.*

The plaintiff brought a malpractice suit against his attorney. In the trial against the attorney, the city attorney revealed that he had had authority to settle the initial suit for $750,000.[177] For the malpractice cause of action, the trial court awarded the plaintiff $300,000,[178] which represented the difference between the verdict obtained in the original trial and the city attorney's settlement authority. The Pennsylvania Supreme Court affirmed the trial court's order, which stated that:

> [Plaintiff's attorney] did not properly discuss [the City's] inquiry-offer with the plaintiff. He did not properly disclose [the trial judge's] recommendation or [the city attorney's inquiry]. He did not comply with a duty to properly inform plaintiff and to assure that plaintiff heard and understood.[179]

The Pennsylvania Supreme Court also pointed to a policy justification of encouraging settlement as one of the grounds for its decision.[180]

Though the court cited the rule that the lawyer should convey settlement offers to a client,[181] that rule, by itself, does not explain the decision. The city's attorney never gave the plaintiff's lawyer an offer of $550,000,[182] much less $750,000. The city's attorney merely stated that he had authority to settle for $550,000 and requested a counter-offer. The court expanded the right of clients to be informed of settlement offers to include the right to be informed of the judge's settlement recommendation, statements by the other side of their settlement authority, and requests of the other side for a counter-offer.

Rizzo, however, suggests far more than that the attorney merely must report to the client the judge's recommendations and the opposing attorney's statements of authority and requests for counter-offers. If the plaintiff's attorney had merely told the plaintiff, "The judge suggested settlement at $550,000, the city attorney said he has authority to offer that much, but that is not enough money and I said that wasn't enough," it is unlikely that the parties would have reached settlement. However, if plaintiff's attorney had informed plaintiff of the judge's and city attorney's statements and had allowed plaintiff to control the settlement negotiations, it is

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177. *Id.* at 494, 555 A.2d at 62.

178. *Id.* at 489, 555 A.2d at 61.

179. *Id.* at 497, 555 A.2d at 64.

180. The court stated:

> "[v]oluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustments of matters in dispute, as for the most wholesome of reasons they certainly should. When the effort is successful, the parties avoid the expense and delay incidental to litigation of the issues; the court is spared the burdens of a trial and the preparation and proceedings that must forerun it.

Id. at 498, 555 A.2d at 65 (quoting Rothman v. Fillette, 503 Pa. 259, 267, 469 A.2d 543, 546 (1983), which quoted Autera v. Robinson, 419 F.2d 1197, 1199 (D.C. Cir. 1969)).

181. *Id.* at 499, 555 A.2d at 66.

182. *Id.*

reasonable to assume that the parties would have settled. Implicit in the court's judgement may be a requirement that clients control significant negotiation decisions.

5. What Negotiation Decisions For the Client?

Cases have clearly established that the client has the right to choose whether or not to accept settlement offers from the opposing side,[183] and that clients must approve of settlement offers that their attorneys make. Other decisions during negotiations are also sufficiently important that they should be made by the client.

Assuming that a client wants to attempt to negotiate an agreement or a settlement, a basic question concerning the conduct of the negotiation will be what style and strategy to adopt. The style of negotiation is the interpersonal behavior of the negotiator in dealing with the other side, and may be either competitive or cooperative.[184] Both competitive and cooperative styles of negotiation can be successful. One study found that:

> [E]ffective competitive lawyers are dominating, forceful, attacking, aggressive, ambitious, clever, honest, perceptive, analytical, convincing, and self-controlled. Effective cooperative lawyer-negotiators, on the other hand, were found to be trustworthy, fair, honest, courteous, personable, tactful, sincere, perceptive, reasonable, convincing, and self-controlled.[185]

Though each style can be effective, each carries its own strengths and risks. Competitive bargainers are less likely to give away too much, however a competitive style "generates tension and encourages negotiator mistrust" and creates a greater risk of deadlock.[186] A cooperative style may not yield terms that are as favorable to the client, but a cooperative style reduces the risk of deadlock, requires less negotiation time, and generally produces a higher joint outcome for the parties.[187] The client should have the right to choose the negotiation style.

Whereas the style of negotiation involves the manner of interpersonal behavior with the opponent, the selection of a strategy controls the substantive choices. There are two types of negotiation strategies, adversarial and problem-solving.[188] Whereas an adversarial strategy assumes that there is a given pie to be divided and that any concession to the other side will

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183. *See* cases cited *supra* at note 32.

184. *See* R. BASTRESS & J. HARBAUGH, *supra* note 13, at 390.

185. *Id.* at 391 (citing G. WILLIAMS, EFFECTIVE NEGOTIATION AND SETTLEMENT (1981) (study of lawyer-negotiators in Denver and Phoenix)).

186. *Id.* at 392 (citing G. WILLIAMS, *supra* note 185).

187. *Id.*

188. Adversarial and problem-solving strategies can be used in combination with either a competitive or cooperative bargaining style. *See id.* at 393-97; Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 818 (1984).

be a loss to the client, problem-solving negotiation attempts to resolve conflict in a manner that will create a bigger pie and enable both parties to win.[189] Problem-solving negotiators attempt to discover the needs of both of the parties and, together, create solutions that meet those needs.[190] Bastress and Harbaugh contrast adversarial and problem-solving strategies as follows:

> Adversarials proceed linearly to develop their plans, concentrating on creating and defending positions along the bargaining continuum. Planning by problem solvers, on the other hand, focuses on identifying needs and brainstorming to develop solutions for mutual gains. Adversarials engage in positional argument while problem solvers tend to explore interests. Adversarials make offers to which they appear to be committed. Problem solvers advance proposals that invite opponents to accept, reject, or modify based on how the proposals intersect with their interests. Adversarials are more likely to restrict information flow, problem solvers are more inclined to exchange data. Adversarials reject the opponents' offers summarily and make concessions along the continuum. Problem solvers explain why solutions are acceptable or unacceptable in whole or in part based on a needs analysis. They also seldom make concessions, as their adversarial colleagues do, but instead shift to another proposal that more completely addresses the parties' mutual problems.[191]

Adversarial and problem-solving strategies each have potential benefits and risks for the client. Problem-solving negotiation can help both parties if it enables the parties to develop a creative solution that is mutually beneficial. If the parties want to have a continuing relationship, it may be important to each of them that the other benefit from the ultimate resolution of the dispute. However, if the problem is such that the client's only goal is to obtain as much as possible of a pie of a given size, then adversarial bargaining is likely to produce the greater gain.[192] If a party attempts problem-solving and fails to produce a creative solution to the problem, that party may have revealed weaknesses to the other side that will be damaging. The choice of what strategy to employ during negotiation carries with it risks and benefits for the client, and the client should have the right to choose the negotiation strategy.

When to make offers and what offers to make are significant choices during negotiation,[193] especially when the lawyer applies an adversarial

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189. *See* R. BASTRESS & J. HARBAUGH, *supra* note 13, at 381; FISHER & URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981); Menkle-Meadow, *supra* note 188, at 783-85 & 809-13.

190. *See* Menkle-Meadow, *supra* note 188, at 801-17.

191. R. BASTRESS & J. HARBAUGH, *supra* note 13, at 383.

192. *See id.* at 402.

193. Rosenthal found that less than 20% of attorneys discuss the initial settlement demand with the client. *See* D. ROSENTHAL, *supra* note 11, at 113.

negotiation strategy.[194] The closer a party's offer is to a reasonable settlement figure, the more likely it is that a case will be settled, but the less favorable the final settlement figure is likely to be.[195] The party to make the first concession usually does worse in negotiation,[196] and small, infrequent concessions are likely to yield the most favorable results.[197] However, toughness in granting concessions may result in deadlock.[198] Before attorneys make offers, they must obtain client approval,[199] but the right of the client is merely the right to veto any proposed offer. Courts should require lawyers to inform clients of the risks and potential benefits of various offers and allow the client to choose when to make offers, and what offers to make.[200]

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194. Rather than focusing on offers and counter-offers the problem-solving negotiator proposes multiple solutions to the problems of the parties and then discusses with the opponent how each of them might meet the needs of the parties. *See* R. BASTRESS & J. HARBAUGH, *supra* note 13, at 501. Once the parties have agreed on the general outline of an agreement, however, they may shift to adversarial exchanges of offers and counter-offers to determine the final terms.

195. *See id.* at 497-99 (unreasonable initial offers maximize client's return, but create "an extraordinarily high incidence of deadlock"); *id.* at 520 ("a grudging approach to the size and the number of concessions results in the maximum payoff to the negotiator," but extreme levels of toughness create a risk of deadlock).

196. *See* G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: NEGOTIATION 115 (1981) and studies cited therein.

197. *See id.*

198. The failure to make a concession could lead to a failure to settle because it carries with it:

> (b) the danger that the opponent will become discouraged and end the negotiation prematurely;
>
> (c) the danger that one's own side or the opponent will become so committed to an unviable position that agreement is impossible;
>
> (d) the danger that further maneuvering now will leave too little time in the future to work out an agreement.

Pruitt, *Indirect Communication and the Search for Agreement in Negotiation*, 1 J. APPLIED. SOC. PSYCHOLOGY 205 (1971), *quoted in* G. BELLOW & B. MOULTON, *supra* note 196, at 108.

> If [an initial demand] is high enough it will (i) protect counsel from underestimations of his or her opponent's minimal settlement point; (ii) conceal counsel's own minimal settlement point; and (iii) permit counsel to make concessions (and demand counterconcessions) which still perform these concealment/protective functions. . . . On the other hand, if the initial demand is too high, it may (i) be dismissed and have no effect on opposing counsel's decisions; (ii) cause opposing counsel to believe that threats or other cost-imposing tactics are necessary; (iii) produce an expectation of deadlock (opposing counsel might then begin preparing for trial, incurring costs which would later have to be recovered).

G. BELLOW & B. MOULTON, *supra* note 196, at 100.

199. *See* cases cited *infra* note 32.

200. This article has focused on the right of the client to recover in a malpractice action against an attorney for the failure to involve the client in decisionmaking in a civil trial, but the right to make choices concerning negotiation in a criminal trial is also very important. The criminal defendant's right to be informed of a plea bargain offer is clearly established. The criminal defendant should also have the right to decide whether to initiate plea bargaining. *See* United States ex rel Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982); Harris v. State, 437 N.E.2d 44 (Ind. 1982).

B. *The Client's Right to Pursue Alternative Methods of Dispute Resolution*

In recent years, there has been a substantial growth in interest in alternative means of dispute resolution.[201] The major alternatives to litigation and negotiation are mediation and arbitration.[202] In mediation, the parties meet with a neutral third party, generally chosen by the parties, who attempts to facilitate the parties' negotiation of a settlement.[203] The mediator helps to facilitate negotiation by helping to define the problem and suggesting options for its resolution.[204] Mediation is like negotiation, in that the parties must reach agreement for there to be a resolution of the dispute. In many cases, agreements worked out by the parties through mediation are subject to the review of counsel before final approval by the parties.

In arbitration, an arbitrator, generally chosen by the parties, conducts a hearing and resolves the dispute.[205] The parties generally are represented by counsel. Arbitration is like litigation in that a third party, the arbitrator, decides how to resolve the dispute. The ground rules of the arbitration generally are created by the agreement of the parties. They determine how many arbitrators there will be, how the arbitrators will be chosen, what rules of evidence will apply, and whether or not the decision may be appealed. Courts have generally upheld agreements to binding arbitration.[206]

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201. *See, e.g.*, J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984); S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION (1985) [hereinafter S. GOLDBERG]; J. MURRAY, A. RAU & E. SHERMAN, PROCESSES OF DISPUTE RESOLUTION 247 (1989) [hereinafter J. MURRAY]; L. RISKIN & J. WESTBROOK, *supra* note 6; Edwards, *supra* note 19; Fiss, *supra* note 19; Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985); Lavorato, *Alternative Dispute Resolution: One Judge's Experience*, ARB. J. 64 (1987); Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29 (1985); McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); Nelson, *The Immediate Future of Alternative Dispute Resolution*, 14 PEPPERDINE L. REV. 777 (1987); Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420 (1982); Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982); Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1 (1985).

202. Other forms of alternative dispute resolution include the mini-trial (lawyers present their cases to the principals of institutional clients, who then, with the help of an advisor, seek to reach agreement) and mediation/arbitration (begins as mediation, proceeds to arbitration if the parties do not agree). L. RISKIN & J. WESTBROOK, *supra* note 6, at 173-88. Each of these has proven to be helpful in resolving some disputes, but they have not yet become so common or so widely known that the failure of an attorney to alert clients to their use should subject the attorney to liability for malpractice.

203. *See* J. MURRAY, supra note 201, at 247; L. RISKIN & J. WESTBROOK, *supra* note 6, at 83-90. A mediator facilitates a settlement by controlling the communication and information exchange between the parties, establishing a positive emotional climate and developing procedures to generate options.

204. *See* J. MURRAY, *supra* 201, at 248. Normally mediators attempt to be only facilitators, and do not interject their views or values, but in recent years some mediators have become more activist and even promote particular solutions. *See id.* at 248-50.

205. *See* L. RISKIN & J. WESTBROOK, *supra* note 6, at 3-4.

206. *See* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974); Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960); Bailey v. Bicknell Minerals, Inc., 819 F.2d 690 (7th

There are risks and potential benefits to both mediation and arbitration. An attorney should inform the client of these risks and potential benefits and allow the client to choose whether to pursue these means of dispute resolution.[207]

1. The Potential Benefits and Risks to the Client of Mediation and Arbitration

Mediation and arbitration may differ from litigation in time required before resolution of the dispute, cost, effect on the future relationship of the parties, likely result, and procedural protections.

a. Time and Attorneys' Fees

Mediation and arbitration may save the client both time and money.[208] They can save the client time in two respects. First, the parties generally can arrange to have the dispute mediated or arbitrated at a much earlier date than they could have a trial. In litigation, the delay between the filing of a complaint and the trial of a case can be substantial. For example, in 1985, in Los Angeles County Superior Court it took an average of thirty-six months for civil cases to get to trial.[209] Parties can begin to mediate or arbitrate a dispute as soon as they agree on a mediator or arbitrator and arrange for a meeting.[210]

Mediation and arbitration can save the client time in a second respect. Once one of these methods of dispute resolution begins, it may require a shorter amount of attorney and client time than litigation or attorney

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Cir. 1987); O'Malley v. Wilshire Oil Co., 59 Cal.2d 482, 381 P.2d 188, 30 Cal. Rptr. 452 (1963); Retail Clerks Union, Local 770, AFL-CIO v. Thriftimart, Inc., 59 Cal.2d 421, 380 P.2d 652, 30 Cal. Rptr. 12 (1963); Posner v. Grunwald-Marx, Inc., 56 Cal.2d 169, 363 P.2d 313, 14 Cal. Rptr. 297 (1961).

207. Implicit in the suggested duty of the attorney to involve the client in decisionmaking concerning alternatives to litigation is the assumption that attorneys will know about alternatives. An attorney should know about mediation and arbitration. These methods of dispute resolution have been widely discussed in bar association journals, as well as in scholarly publications. *See* articles cited *supra* note 201.

208. Pearson, *supra* note 201, at 435.

209. 1986 JUDICIAL COUNCIL OF CALIFORNIA ANNOTATED REPORT, pt. II, table T-17, at 144, *cited in* Petillion, *Recent Developments in Alternative Dispute Resolution*, 14 PEPPERDINE L. REV. 929, 931 (1987).

210. Though the parties can arrange for mediation at an early date, if the parties fail to resolve a dispute through mediation, and then have to get a trial date, the mediation may delay the resolution of the dispute. The parties can avoid this problem if they set a trial date and mediate the dispute pending the trial.

Parties can be certain that a dispute will be resolved at an early date if a case is arbitrated. *See* L. RISKIN & J. WESTBROOK, *supra* note 6, at 146-47. As with mediation, the parties can arrange to have a case arbitrated within a short period of time and, unlike mediation, the parties can be sure that arbitration will result in a resolution of the dispute. The client will not have the right to reject the decision of the arbitrator, but the client can be confident that the arbitrator will reach a decision.

negotiation. In some cases, mediation will resolve a dispute faster than attorney negotiation, in some cases it will not. Some characteristics of mediation may expedite resolution of a dispute. When the parties meet directly with each other during mediation, they can answer each other's questions and make offers and counter-offers without delay. On the other hand, during mediation, the parties may spend time dealing with underlying emotional conflicts that are not related to the specific problem in dispute.

Arbitration generally will require a shorter amount of time than litigation. The arbitrator is typically an expert in the subject matter of the dispute, and may understand the facts of the case more quickly than a judge or jury.[211] Arbitration results also may not be subject to appeal, and thus arbitration may prevent the long delay that can accompany appellate review.

In addition to the potential time savings, the parties may save attorneys' fees through mediation or arbitration. In mediation, generally, the parties meet with the mediator, without their attorneys. Negotiations between the parties during mediation will require less expense than negotiation for a similar amount of time by attorneys. Mediation requires only one professional fee, the fee of the mediator, during the time of the mediation. However, this savings may be offset, to some extent, by the expense of having an attorney review the agreement. If the mediation is successful, the parties will probably save money. If the mediation is unsuccessful, however, the parties will pay the mediator's fees, as well as their future attorneys' fees.

Mediation creates the largest savings of time and money in cases in which the parties reach agreement and attorney negotiation would not have been successful. Of course, it is difficult to tell whether or not any one case that has been settled through mediation would have been settled through attorney negotiation, but it appears that mediation is somewhat more successful at resolving disputes than attorney negotiation.[212] Therefore, if the parties mediate, the client is likely to save time and money if the mediation is successful. When the client knows the other party, the client may be best able to determine whether mediation is likely to lead to an agreement.

The attorneys' fees in arbitration are likely to be somewhat less than the attorneys' fees in litigation. In arbitration, attorneys represent the parties in hearings that are like trials in many respects. The arbitrator is typically an expert in the subject matter of the dispute, and so the hearing may be shorter, requiring less attorneys' fees than a trial.[213] However, the parties will generally have to pay the expense of the arbitrator, and this may reduce

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211. *See* Lieberman & Henry, *supra* note 164, at 431.

212. *See, e.g.*, Pearson & Thoennes, *Divorce Mediation: Strengths and Weaknesses Over Time*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 57-58 (H. Davidson, L. Ray, & R. Horowitz eds. 1982).

213. *See* Lieberman & Henry, *supra* note 164, at 431.

the savings of attorneys' fees created by the shorter hearing. The parties are likely to have a big savings in time and attorneys' fees if they agree that the decision of the arbitrator will be final and thereby avoid the expense of an appeal.[214]

b. The Future Relationship Between the Parties

Litigation discourages communication and trust between the parties.[215] They are adversaries: one party wins, the other party loses, and victory is reduced to a money judgment.[216] Litigation is likely to increase friction and animosity between the parties. The friction that litigation creates can be especially troublesome in commercial cases in which the parties want to maintain a future business relationship,[217] and in child custody cases in which the parties must maintain a future family relationship.[218]

Possibly the greatest value of mediation is that the parties are likely to have a better future relationship after mediation than after litigation.[219] Whereas litigation and attorney negotiation are likely to inhibit communication between the parties, one of the central goals of mediation is to create trust and communication between the parties.[220] Maintaining a good relationship with the other party may be important to the client.

c. Results

The likely result if a case is mediated or arbitrated may be better or worse for the client than the likely result if the case is litigated. Whether, for an individual client, mediation is likely to lead to a more favorable resolution than litigation or attorney negotiation will depend on the client, the other party, the case, and the mediator. Clients with good negotiation skills, *i.e.*, clients that are intelligent, articulate, forceful, and meticulous,

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214. S. GOLDBERG, *supra* note 201, at 189-90.

215. *See* Lieberman & Henry, *supra* note 164, at 427.

216. *See* L. RISKIN & J. WESTBROOK, *supra* note 6, at 24.

217. Arbitration has flourished in situations in which the parties wish to continue to deal regularly with each other. J. MURRAY, *supra* note 201, at 248.

218. *See* Lavorato, *supra* note 201 (Iowa Supreme Court Justice Louis A. Lavorato discusses damaging nature of litigation in family disputes).

Divorce mediation, in addition to enabling the parties to maintain a relationship, may be therapeutic. Psychologist Joan Kelly has noted that the mediation process often leads to an observable reduction in the anxiety, depression and anger that can be generated in divorce. Kelly, *Mediation and Psychotherapy: Distinguishing the Differences*, 1 MEDIATION Q. 33, 36 (Sept. 1983).

On the other hand, there is a danger that if one party has dominated the other party during the marriage, the pattern of domination will continue during mediation. *See infra* notes 226-27 and accompanying text.

219. A study comparing separated parents who reached child custody agreements through mediation with other separated parents found that a substantially higher number of those that had mediated agreements were in compliance with their visitation and child support responsibilities. *See* Pearson & Thoennes, *supra* note 212, at 59.

220. *See* Lieberman & Henry, *supra* note 164, at 427.

are likely to do well in mediation. Clients that have poor negotiation skills are likely to do poorly. If the parties have had a relationship in which one party has dominated the other party, often the case in a domestic dispute, the dominant party may have a great advantage. Additionally, the party with the greater knowledge of the subject of the litigation is likely to do better in mediation.[221] Some mediators will attempt to equalize the bargaining strengths of the parties, others will not.[222]

In some cases, the results of mediation are likely to be better for both parties than would a result reached through litigation or attorney negotiation. The parties may develop a creative compromise through mediation that differs from any remedy a court has power to provide.[223] Attorneys, of course, may reach a creative compromise through negotiation,[224] but the parties will often be more familiar than their attorneys with the subject matter of the dispute and may be more likely to develop a creative compromise. For example, assume that there is a contract dispute between two commercial parties. A court may have only the option of determining which party breached and awarding damages to the innocent party. Attorneys may be concerned primarily with the dispute at issue and may attempt to compromise and settle for an amount somewhere between the likely result if plaintiff had won and the likely result if the plaintiff had lost. However, in mediation, the parties may be able to structure a new agreement in a way that will be beneficial to both parties.[225]

Studies comparing the attitudes of parties toward litigation and mediation show that the parties are more satisfied with the results that they achieve in mediation.[226] They are more likely to comply with and less likely to litigate over agreements that they have reached through mediation.[227]

An advantage of arbitration is that an arbitrator may be more likely to give a correct decision than a judge or jury. The parties can choose the arbitrator based on experience, expertise in the subject of the dispute, and reputation for good judgment. The arbitrator's expertise may be especially beneficial if the resolution of the dispute depends on trade custom and usage.[228] In a dispute concerning a complex area of business, it may be in

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221. *See* J. MURRAY, *supra* note 201, at 292.

222. This advantage may be diminished if the mediator seeks to equalize the power between the parties, but there is disagreement among mediators over whether this is a proper role for the mediator. *See* J. FOLBERG & A. TAYLOR, *supra* note 201, at 185; Lieberman & Henry, *supra* note 164, at 431.

223. Lieberman & Henry, *supra* note 164, at 429.

224. *See supra* text accompanying notes 164-65.

225. As discussed *supra* at text accompanying notes 156-61, lawyers may have interests that conflict with the interest of the client in the negotiation process. It may be in the lawyer's interest to either negotiate a quick settlement or to delay resolution of the dispute. In mediation, the client is directly involved in the negotiation process and can minimize the effect that the lawyer's self-interest might have on the results. Lieberman & Henry, *supra* note 164, at 430.

226. *See* J. MURRAY, *supra* note 201, at 248.

227. *Id.*

228. *See id.* at 391.

the interest of a client who wants a correct decision to have an arbitrator with a background in the subject area resolve it.[229]

d. Privacy

A final advantage to the parties of alternative methods of dispute resolution is privacy. Mediation sessions and arbitration hearings of private disputes are not open to the public. The information that the parties convey in the meetings will not be a matter of public record unless the result later becomes the subject of a court proceeding.[230] Privacy can be especially important to parties in a domestic dispute, who consider the matters discussed to be personal, or to parties in a business dispute, who want to avoid releasing information that might place them at a competitive disadvantage.[231]

2. Mediation, Arbitration, and the Lawyer's Conflict of Interest

The decision whether to adopt mediation or arbitration as a means of dispute resolution should be made by clients, rather than by attorneys, not only because of the risks and potential benefits to the client of each of these methods, but because lawyers are likely to have a conflict of interest over whether to pursue alternative methods of dispute resolution.

As to the decision whether to pursue mediation, an attorney's conflict of interest is likely to be great. Mediation generally is conducted by the parties, without the presence of their attorneys. The attorneys lose work because mediation generally does not require as much attorney time as negotiation or litigation.[232] Attorneys will also have a conflict of interest as

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229. A disadvantage of arbitration may be that it deprives the parties of some of the procedural and constitutional protections of litigation. *See* Pearson, *supra* note 201, at 440. Generally the parties agree that the arbitrator is not bound by the rules of evidence and that the decision of the arbitrator is not appealable. An appellate court will not vacate an arbitration award if the arbitrator is mistaken in interpretation of the law, unless the arbitrator shows a manifest disregard of the law. *See* L. RISKIN & J. WESTBROOK, *supra* note 6, at 143. The Eighth Circuit Court of Appeals has stated:

> The present day penchant for arbitration may obscure for many parties who do not have the benefit of hindsight that the arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law. . . .No one ever deemed arbitration successful in labor conflicts because of its superior brand of justice.

Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir. 1986).

230. *See* J. MURRAY, *supra* note 201, at 391.

231. *See* L. RISKIN & J. WESTBROOK, *supra* note 6, at 148.

232. Leonard Riskin has said:

> Legal fees are generally based upon a portion of the amount recovered or on an hourly rate. Mediation threatens to reduce the amount recovered, because in settling their dispute, the parties may wish to include nonmaterial considerations: for instance, to trade money for respect or recognition. The lawyer who is paid by the hour—to the extent he is motivated by fees—also may view mediation dimly. Whether the mediation is performed by the lawyer himself or another mediator, it

to whether to pursue mediation or arbitration if they are not familiar with these processes.[233] If a client wishes to pursue mediation or arbitration and the lawyer is not experienced with these methods of dispute resolution, the lawyer may have to refer the case to another attorney. In light of this risk, lawyers that are not familiar with alternative means of dispute resolution will be tempted to avoid presenting clients with these options.

3. Policy Considerations

Courts may be inclined to recognize a cause of action for the failure to allow the client to choose mediation or arbitration, not only because this is an important decision for the client, but also because such a cause of action will encourage mediation and arbitration of disputes. Courts may want to encourage mediation and arbitration because these methods of dispute resolution may help to relieve overloaded courts and encourage reconciliation. On the other hand, alternative means of dispute resolution may limit the quality of justice. This section discusses each of these arguments.

a. Overloaded Courts

As noted in a prior section, the delay before a case can be tried may be substantial.[234] This delay occurs, in part, because of the great increase that has occurred in the number of cases that are filed. For example, between 1960 and 1980, the number of cases filed per capita in the Federal District Courts nearly doubled.[235] This creates problems, not only for individual litigants, but also for the legal system. Numerous commentators and judges have advocated alternative dispute resolution as a means of relieving the backlog of cases in the court system.[236]

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is likely to save some of the lawyer's time. Thus, the lawyer who brings mediation into a case that he could handle in an adversary manner will often earn less than he otherwise would have on that case.

Riskin, *supra* note 201, at 49.

If attorneys handle arbitration cases, the temptation to avoid arbitration will not be as great because the parties are generally represented by their attorneys during arbitration.

233. *See id.* at 49-51.

234. *See infra* text accompanying note 209.

235. Galanter, *Reading the Landscape of Disputes: What We Know And Don't Know (And Think We Know) About Our Allegedly Contentious And Litigious Society*, 31 UCLA L. REV. 4, 37 (1983).

236. *See*, Lavorato, *supra* note 201; McThenia & Shaffer, *supra* note 201.

Former Chief Justice Warren E. Burger, speaking to the American Bar Association, said that reliance on the adversarial process as the principal means of resolving disputes is:

> a mistake that must be corrected. . . . For some disputes, trials will be the only means, but for many claims, trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.

Address by Former United States Supreme Court Chief Justice Warren Burger at the American Bar Association Mid-Winter Meeting 1984, *quoted in* Nelson, *supra* note 201, at 777.

An example of the effectiveness of mediation at resolving cases quickly and promptly is the New York "Neighborhood Justice Center" program,[237] in which volunteers from the community mediate interpersonal, neighborhood, domestic, consumer, landlord-tenant, and minor criminal disputes.[238] The neighborhood justice centers have been able to resolve a substantial number of disputes quickly, at a very small cost to the state.[239] It may be that many of the disputes that such programs resolve would otherwise have been litigated.

This article advocates the extension of malpractice liability to attorneys who fail to allow clients the choice of whether to pursue mediation or arbitration. Adoption of this proposal may initially create some new attorney malpractice suits. Eventually, however, the number of suits that are avoided because clients choose to pursue alternative means of dispute resolution are likely to greatly outnumber the attorney malpractice causes of action that the cause of action would initially generate. Once courts clearly establish the right of the client to choose alternative means of dispute resolution, the number of situations in which attorneys fail to present these options to the client should greatly diminish.

b. The Value to Society of Reconciliation

The ultimate goal of many advocates of alternative methods of dispute resolution is not merely dispute resolution, but reconciliation of the parties.[240] This can benefit, not only the individuals involved,[241] but society as a whole. Reconciliation of the parties can reduce the likelihood of future disputes and prevent conflict from escalating into serious, violent, criminal confrontation. As noted previously, the New York neighborhood justice mediation program resolved many disputes that might have otherwise been litigated. It also may be that without mediation, some of the disputes would have led to violence.[242]

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237. Sander, *supra* note 201, at 6.

238. *See* L. RISKIN & J. WESTBROOK, *supra* note 6, at 84.

239. For the fiscal year ending March 31, 1986, New York's 48 centers handled 18,541 disputes among 60,703 persons. 1985-1986 N.Y., THE COMMUNITY DISPUTE RESOLUTION CENTER PROGRAM ANN. REP., *cited in* Petillon, *supra* note 209, at 934. There was successful resolution of 88% of the cases going to mediation. *Id.* On the average, the Centers disposed of cases in 14 days from filing to disposition, and the average time required to resolve a dispute was 84 minutes. *Id.* The average cost to the state was $88.87 per settled case. *Id.*

240. *See* McThenia & Shaffer, *supra* note 201.

241. *See infra* text accompanying notes 215-20.

242. The report of the New York Neighborhood Justice System, discussed *supra* at note 239, states:

> The dispute resolution process can reduce crime and prevent situations from escalating into serious often violent criminal matters. It can teach people to manage conflict constructively in a peaceful, effective manner. If each community has access to a dispute resolution center, individuals and groups can have a forum for dialogue and mutual understanding and satisfactory agreements.

Petillon, *supra* note 209, at 935.

c. Will Informal Justice Inhibit the Development of Justice?

There is a concern among some legal scholars that alternative means of dispute resolution will dispense inferior justice[243] in three respects. First, it is argued that alternative methods of dispute resolution create a risk of injustice in individual cases; the more powerful party might take advantage of the less powerful party.[244] Since mediation often does not rely on substantive or procedural rules of law or procedure or on other protections of the adversarial process, less powerful individuals and groups may be treated unfairly. They may be forced into an inferior settlement because they need funds immediately or because they cannot afford the expense of litigation.[245] In litigation, however, judges lessen the impact of inequalities, for example, by asking questions at trial or inviting *amici* to participate.[246]

Second, beyond the risk that alternative means of dispute resolution will yield unjust results in individual cases, is the risk that removing cases from the judicial system will reduce the ability of the system to develop just rules of law. Courts will not be confronted with the opportunity to develop precedents that benefit the disadvantaged. This is an especially great risk if alternative means of dispute resolution become the primary methods of dispute resolution that are available to the poor. As to many issues, there is a genuine social need for an authoritative interpretation of law.[247] If the problems of the poor are increasingly handled through alternative means of dispute resolution, the judicial development of legal rights for the poor may diminish.[248]

A third argument against alternative methods of dispute resolution is that through their use, those not responsible to the public may resolve issues of great significance to the public. One of the values of adjudication is that it vests the power of the state in highly visible officials who act as trustees for the public, and are therefore answerable for their actions.[249] Owen Fiss argues on behalf of litigation that the job of the courts "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in" the law.[250] Federal Circuit Court Judge Harry T. Edwards is troubled, for example, by settlement of environmental disputes through negotiation and mediation. Negotiation over environmental protection standards that Congress or a governmental agency

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243. L. RISKIN & J. WESTBROOK, *supra* note 6, at 115. McThenia and Shaffer have suggested that this argument is based on the assumption that it is the state that dispenses justice. They argue that justice is not something that people generally get from the state, but that it is something that people get from each other. *See* McThenia & Shaffer, *supra* note 201, at 1664-65.

244. *See* Fiss, *supra* note 19, at 1076-78.

245. *See id.* at 1076.

246. *See id.* at 1077.

247. *Id.* at 1073.

248. *See* Edwards, *supra* note 19, at 679.

249. *Id.*

250. *See* Fiss, *supra* note 19, at 1085.

has enacted may yield results that are inconsistent with the rule of law.[251] There is a danger that private groups will set environmental standards, without the democratic checks of governmental institutions.[252]

Based on these problems with alternative means of dispute resolution, some have argued that we should not adopt rules that push parties toward alternative dispute resolution.[253] The proposals advanced herein would not impose on anyone the duty to engage in alternative methods of dispute resolution, but it would probably lead to greater use of alternative methods of dispute resolution and may therefore take some disputes out of the judicial system.

Nevertheless, clients should have the right to choose how their cases are handled. If a client wants a case to be handled in a way that will establish a rule that will be beneficial to society, that should be the client's choice. But, if a client wants to pursue a method of dispute resolution that may require less expense, less time, and less conflict, the client should be able to do so.[254] It may be helpful to consider a medical analogy. In some medical cases, it might be better for society if a patient underwent a new, experimental treatment, but, based on the principle of autonomy, we allow medical patients to control their destiny. The client should control the way that a case is handled, just as the patient controls the choice of medical treatment.

C. The Cause-in-fact Issue: What Loss, if Any, Has the Lawyer's Failure to Allow the Client to Control Negotiation and to Pursue Alternatives to Litigation Caused?

In an attorney malpractice case, the plaintiff must show, not only that the attorney acted negligently, but that the attorney's negligence was a cause-in-fact of the client's loss. Even if a client can establish that an attorney violated a duty to allow the client to control negotiation and choose other alternatives to litigation, it may be difficult for the client to establish that the loss of that right has caused a substantial loss.

Even if a lawyer fails to allow the client to control a decision concerning negotiation, mediation, or arbitration, the client would not have benefited from the right of control if any of the following would have occurred: 1) the client would have made the same choice that the attorney made; 2) the opposing party would not have agreed to the client's proposal to settle, mediate or arbitrate; or 3) the proposal of the client, if accepted, would not have produced a better result for the client than the attorney achieved. Therefore, to recover in a client control cause of action, clients will probably

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251. Edwards, *supra* note 19, at 677.

252. *Id.*

253. *See, e.g.*, Fiss, *supra* note 19.

254. Owen Fiss has stated that he would "not urge that parties be 'forced' to litigate, since that would interfere with their autonomy." *See id.* at 1085. This article argues that to fail to give clients the option to pursue alternatives to litigation interferes with their autonomy.

have to show that, given the opportunity, they would have made a different choice than the one made by the attorney, that the other side would have agreed to the client's proposal, and that the dispute would have been resolved under terms that would have been more beneficial to the client than the result that the attorney achieved. Clients will also have to show the extent to which they would have benefited had the attorney pursued the client's choice. This section will consider these requirements.

1. Showing Cause-in-Fact in the Client Choice Cases—Part One: Would This Client (or Would a Reasonable Client) Have Made a Different Choice?

Even if clients can show that the attorney should have allowed them to control negotiation or choose an alternative to litigation, an attorney's failure to do so has not caused a client any loss if the client would have made the same choice as the attorney. However, it may be difficult to reconstruct the decision that the client would have made had the attorney given the client the opportunity. Courts are faced with similar causation problems in cases in which an attorney has failed to present a settlement offer to the client and in medical malpractice informed consent cases.[255]

In the settlement offer cases, courts apply a subjective causation test and require clients only to show that had the lawyer presented them with the offer, they would have accepted it.[256] This type of subjective causation test carries great risks for lawyers. At the trial of the action against the attorney, the client is asked a hypothetical question, "If your attorney had presented you with this settlement offer, would you have accepted it?" It is unlikely that even honest clients, answering such a question, would be able to divorce themselves from the fact that the trial of the case was unsuccessful and the fact that they will lose the possibility of recovery from the attorney if they testify that they would have rejected the settlement offer.

The medical informed consent cases present courts with a similar causation issue. The majority of jurisdictions have found that a subjective test, requiring the patient merely to show that he or she would have made a different choice than the doctor, would unfairly place doctors at the mercy of the patient's biased speculation.[257] These courts apply an objective

255. The medical informed consent cause-in-fact problem is discussed in Waltz & Scheuneman, *Informed Consent Therapy*, 64 NW. U.L. REV. 628, 649 (1970).

256. *See, e.g.*, McDonald v. Hutto, 414 F. Supp. 532 (E.D. Ark. 1976); People v. Mason, 29 Ill. App. 3d 121, 329 N.E.2d 794 (1975); Rubenstein & Rubenstein v. Papadakos, 31 A.D. 2d 615, 295 N.Y.S. 2d 876 (1968) (client denied recovery where she admitted that she would not have accepted settlement).

A minority of medical informed consent cases apply a similar rule and require that patients merely show that they would not have had surgery had the doctor told them of its risks or alternatives. *See, e.g.*, Scott v. Bradford, 606 P.2d 554 (Okla. 1979).

257. *See, e.g.*, Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir. 1983); Canterbury v. Spence, 464 F.2d 772, 792 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 23 Cal. App. 3d 313, 100 Cal. Rptr. 98, (1972); Wooley v. Henderson, 418 A.2d 1123 (Me. 1980); Macy v. James, 139 Vt. 270, 427 A.2d 803 (1981).

causation test in the informed consent cases. They require that patients show, not only that they would have made a different choice, but that a reasonable patient, knowing of the risk of or the alternatives to the proposed treatment, would not have had the treatment that caused the harm.[258]

Courts could, of course, apply a similar objective standard in the client control cases. They could require that the client show that a reasonable client would have made the same choice that the client claims that he or she would have made. However, such a requirement would substantially limit the right of clients to make their own choices.[259] If a court recognized a right of client choice and then adopted such a causation rule, it would be taking back with the hand of causation what it purported to give with the hand of duty. Such a court might as well say that lawyers may choose for the client as long as they make the choice that the reasonable client would make. The client would lose the right of autonomy.

On this issue of causation, it does not appear that there is an alternative to either putting the lawyer at the mercy of the client's less than objective hindsight under the subjective standard, or significantly undercutting the right of client choice under the objective standard. As between the two, the subjective standard is preferable for several reasons. First, for all of the reasons suggested elsewhere in this article, the client's right to choose is of sufficient importance that it should not be undercut. Second, lawyers can protect themselves from the risk that they will be subject to the client's hindsight by allowing the client to control choices concerning negotiation and alternatives to litigation. Third, as with some other difficult tort causation questions, as between an innocent plaintiff and a negligent defendant, the law should err on the side of the innocent plaintiff.[260] Finally, even under the subjective standard the lawyer is not entirely at the mercy of the client.[261] The trier-of-fact must believe that the client would have made a different choice if the lawyer had given the client the opportunity, and it is unlikely that the trier-of-fact will believe that the client would have made an extremely unreasonable choice.[262]

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258. *See, e.g.*, Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir. 1983); Canterbury v. Spence, 464 F.2d 772, 792 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 23 Cal. App. 3d 313, 100 Cal. Rptr. 98, (1972); Wooley v. Henderson, 418 A.2d 1123 (Me. 1980); Macy v. James, 139 Vt. 270, 427 A.2d 803 (1981).

259. *See, e.g.*, Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir. 1983); Canterbury v. Spence, 464 F.2d 772, 792 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 23 Cal. App. 3d 313, 100 Cal. Rptr. 98, (1972); Wooley v. Henderson, 418 A.2d 1123 (Me. 1980); Macy v. James, 139 Vt. 270, 427 A.2d 803 (1981).

260. *See, e.g.*, Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Sindel v. Abbot Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (shifting burden to negligent defendants to show that they did not cause plaintiff's loss), *cert. denied*, 449 U.S. 912.

261. *See* Spiegel, *supra* note 11, at 133-36.

262. Doctors have a similar risk under a subjective standard in the medical informed consent cases. *See Canterbury*, 464 F.2d at 790; Sard v. Hardy, 281 Md. 432, 444, 379 A.2d 1014, 1025 (1977).

2. Showing Cause-in-Fact in the Client Control Cases—Part Two: Would the Client's Choice Have Yielded a Different Result, and, if so, What Result?

To show that the lawyer's failure to allow them to control negotiation and choose alternatives to litigation caused them damages, clients must not only prove that they would have made a different choice than the attorney made, but also that the opposing side would have agreed to the client's proposal, and that the ultimate result would have been more favorable to the client. The proof required of the client will be somewhat different in the negotiation and mediation cases than in the arbitration cases.

a. The Negotiation and Mediation Cases: Would the Client and the Opponent Have Made an Agreement, and, if so, What Agreement?

When clients allege that the lawyer should have allowed them to make decisions concerning negotiation or allowed them to pursue mediation, they must show that the opposing party would have agreed to negotiate or mediate, and that the parties would have reached an agreement that would have been more favorable to the client than the result the attorney achieved.

Courts confront a similar difficult causation issue when clients allege that attorneys acted incompetently in litigation.[263] In those cases, the trier-of-fact must determine what result the parties would have achieved had there been a trial. In the litigation malpractice cases, the courts conduct a trial-within-a-trial. They retry the issues of the original case, complete with the evidence that the parties would have presented in the original trial, and allow the new trier-of-fact to determine how the case would have been resolved had the attorney handled it properly.[264]

In the client control cases, courts could also allow the plaintiff to try and reconstruct before the trier-of-fact the result that would have been achieved had the attorney allowed the client to control the negotiation or mediation decisions. The client could reconstruct the negotiation or mediation through the testimony of the parties to the initial action. The client and the opposing party could testify to the offers, counter-offers and agreement that they would have been willing to make.[265] This was the method that the Pennsylvania Supreme Court permitted in the *Rizzo* case, discussed earlier.[266] The court allowed into evidence the settlement authority

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263. Some courts in the attorney malpractice cases have placed the burden on the attorneys to show that their negligence did not cause a loss to the plaintiff. *See* Moormen v. Wood, 117 Ind. 144, 147, 19 N.E. 739, 741 (1889).

264. *See* C. WOLFRAM, *supra* note 23, at 218.

265. There is, of course, a risk that the opportunity to win in the action against the attorney will affect the client's testimony on this issue.

266. Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (1989). *See supra* text accompanying notes 167-82.

of the opposing party and allowed the client to testify that he would have agreed to settle for that figure.[267]

Though courts should allow clients to reconstruct negotiations or mediation if they can, often it will be difficult for them to do so for several reasons. First, in some cases, unlike *Rizzo*, the opposing party may not have given his or her attorney any settlement authority, and the opposing party may find it difficult to reconstruct how he or she would have responded to various offers. Second, it may be difficult to get the opposing party to accurately reconstruct the settlement negotiations that would have occurred. The opposing party may have ill feelings toward the client or the client's attorney and may be inclined to damage the case of one or the other. The opposing party may not want to waste further time on the case. In addition, the opposing party, the opposing attorney, or the liability insurance company that defended the opposing party in the initial action may want to preserve the confidentiality of their negotiation practices. Knowledge of these practices might be a great help to attorneys who oppose them in future negotiations. Third, after the initial case has been litigated, it will be difficult to reconstruct the effect that the threat of litigation would have had on the parties during negotiation or mediation. In both negotiation and mediation, the threat of impending litigation helps to spur the parties to settle. Finally, mediators do things with the parties, such as allowing them to vent emotions, that are designed to prepare the parties emotionally for reconciliation. It may be impossible to reconstruct the effect of these methods on the parties after the dispute has been litigated.

Rather than require the client to reconstruct the negotiations or mediation, a court could allow an expert to testify to the result that the parties would have likely reached had they negotiated or mediated the case. Experts could base such an opinion on their experience in negotiation or mediation,[268] on statistics that show the likely results of negotiation and mediation, and on the factors that are likely to lead to a successful or unsuccessful result. In malpractice cases in which plaintiffs allege that the attorney erred at trial, courts generally have not allowed experts to testify to the result that likely would have occurred had the attorney acted competently,[269] but the difficulties of reconstructing the negotiation or mediation in court may justify allowing expert testimony as to the likely outcome had the client controlled negotiation or had the parties mediated.

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267. *Rizzo*, 520 Pa. at 484, 555 A.2d at 58.

268. Rosenthal, in his study of the effect of client involvement on results in automobile personal injury cases, used a panel of experts including plaintiffs' attorneys, insurance companies' attorneys, and an insurance company adjuster to determine the reasonable value of cases. D. ROSENTHAL, *supra* note 11, at 37. For a more thorough discussion of the Rosenthal study, see *supra* note 57. The parties could use similar experts for the cause of action proposed in this article. *Cf.* C. MCCORMICK, HANDBOOK ON LAW OF DAMAGES 31 (1935) (before verdict, value of lawsuit is estimate of value if won times the probability of winning).

269. *See* C. WOLFRAM, *supra* note 23, at 218.

b. The Arbitration Cases: Would the Opponent Have Agreed to Arbitration and Would Arbitration's Result Have Differed From Litigation's Result?

When clients allege that the lawyer should have allowed them to pursue arbitration, they must show that the opposing side would have agreed to arbitration and that the arbitrator would have made a more favorable decision than the decision that the court reached in the litigation. It may be that an arbitrator would have reached a different result than that obtained through litigation. As argued earlier in this article, parties to an arbitration are likely to choose an arbitrator that is familiar with their business, and such an arbitrator may render a better decision than a judge or jury that is less familiar with it.[270]

However, it is highly unlikely that, following a trial, a court would hold that an arbitrator would have reached a different decision than reached by the trial court. To do so, the court would either have to conclude that the trial court had resolved the case incorrectly and that an arbitrator would have resolved it correctly, or that the court had resolved the issue correctly and an arbitrator would have resolved it incorrectly. A court would be unlikely to hold that the original court erred due to its lack of expertise and that an arbitrator would have decided the case correctly. A court might decide that the original case was lost based on the failure of the lawyer to properly handle the case, but if that is the client's argument, he or she is likely to bring a malpractice action based on the attorney's lack of competence at trial rather than the attorney's failure to allow client control. A court is also unlikely to allow the client to recover based on the theory that the original court decided the case correctly and that an arbitrator would have decided it incorrectly. The court would be unlikely to assume that an arbitrator would have decided the case incorrectly and, even if it did, it would be unlikely to hold that clients should get the recovery they would have gotten from an errant arbitrator.

Though clients are unlikely to recover the difference between what they would have recovered in arbitration and what they recovered in litigation, it may be that courts will allow them to recover other losses suffered due to the failure of the lawyer to allow them to pursue arbitration. A big advantage to the parties in arbitration is that an arbitrator can resolve a dispute quickly and the parties can avoid the risk of an appeal.[271] It may be that a client, deprived of the right to pursue arbitration, could recover damages suffered as a result of a delayed trial decision or an appeal from a trial decision.

VI. Conclusion

The right of the client to control the important decisions during legal representation should be a part of the client's right to autonomy. Client

270. *See supra* text accompanying notes 228-29.

271. *See supra* notes 206, 211 and 214 and accompanying text.

control will generally yield better results for the client, will limit the effect of conflicts of interest that accompany the attorney/client relationship, and will build on the precedent of medical informed consent. Courts should extend the right of client control, both by giving the client the right to control those decisions which a reasonable client, in what the lawyer knows or should know to be the position of the client, would want to control, and by continuing to identify specific choices that, as a matter of law, are for the client.

Whether or not courts adopt a general standard of client control, they should identify the significant choices in negotiation, and the choice whether to pursue mediation or arbitration, as decisions that are for the client. These choices are of great significance to clients and are within the competence of clients. Client control over the decision to use alternative dispute resolution is likely to lead to greater use of mediation and arbitration, a reduction in the load on courts, and more reconciliation among litigants. If clients can show that the failure of the attorney to allow them to control negotiation decisions and to choose mediation or arbitration caused them to suffer loss, courts should allow them a malpractice recovery.