Pace Law Review

Volume 9
Issue 3 *Summer 1989*

Article 2

June 1989

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Recommended Citation
Gary A. Munneke and Theresa E. Loscalzo, *The Lawyer's Duty to Keep Clients Informed: Establishing a Standard of Care in Professional Liability Actions*, 9 Pace L. Rev. 391 (1989)
DOI: https://doi.org/10.58948/2331-3528.1491
Available at: https://digitalcommons.pace.edu/plr/vol9/iss3/2

Articles

The Lawyer's Duty to Keep Clients Informed: Establishing a Standard of Care in Professional Liability Actions

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I. Introduction

Attorneys are in the business of providing information to their clients. Whether they act as advocates for a client's cause, advisors concerning a client's problem, or agents representing a client's interest, lawyers cannot escape the pivotal role that communication plays in the attorney-client relationship. When the client needs such information to make informed decisions concerning the representation, the quality of the representation is inevitably diminished if the attorney provides inaccurate or insufficient information, or no information at all.

In recent years, questions have been raised concerning the scope of lawyers' responsibilities to provide information to clients.[1] If there is a duty to inform the client in certain situations, then the failure to do so may subject the lawyer to criticism, discipline, or malpractice liability.[2]

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1. *See generally* Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Peck, *A New Tort Liability for Lack of Informed Consent in Legal Matters*, 44 LA. L. REV. 1289 (1984); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

2. *See* R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 1.8 (3d ed. 1989) [hereinafter MALLEN]; W. KEETON, PROSSER AND KEETON ON TORTS § 32, 185-92 (5th ed. 1984).

In the field of medical malpractice, a cause of action based upon a breach of the doctor's duty to disclose the risks of treatment has evolved. The failure of the doctor to obtain a patient's informed consent to medical procedures, as well as an actual error in judgment, can result in liability.[3]

There are parallels between informed consent in medical malpractice cases in which an informed consent action is allowed, and legal cases where it is not. A number of commentators have suggested that an informed consent action should be recognized in legal malpractice. Because of historical differences in the development of medical and legal malpractice, courts have not recognized the right of a lawyer's client to sue for failure to provide adequate information upon which to base decisions regarding the case. Commentators have proposed creation of a cause of action grounded upon the lawyer's duty to inform and the client's right to make fundamental decisions about the representation.[4] These writers have viewed informed consent as a basic tenet of a broader client-centered approach to the attorney-client relationship.[5]

Client-centered lawyering is by no means universally accepted by practicing lawyers, who tend to view their right to make decisions about the case much more broadly than theoreticians would permit.[6] This presents a dilemma for the writers

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3. *See infra* note 34 and accompanying text. Ironically, lawyers have not only avoided liability based on a failure to provide informed consent, but also have successfully argued that good faith errors in judgment are not actionable either.

4. Peck, *supra* note 1, at 1297-1307.

5. The term "client-centered approach" appears in virtually all the literature and course material on the subject of client interviewing and counseling. *See, e.g.*, D. BINDER AND S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 147-48 (1977) [hereinafter BINDER]. *See also* A. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS (1976). The basic idea is that the case belongs to the client, not to the lawyer. The client has a right to make fundamental decisions about the representation. This participatory model shifts the balance of power in the attorney-client relationship away from the lawyer toward the client. *See* D. ROSENTHAL, ATTORNEY AND CLIENT: WHO'S IN CHARGE? (1977). The duty to inform flows naturally from the client's right to control decision-making because the client must have sufficient information in order to make rational decisions. If the lawyer does not give the client information, the client cannot make decisions. *See* Martyn, *supra* note 1, at 312-16.

6. The traditional view suggests that because the lawyer has superior knowledge and experience, he should make most of the decisions concerning the representation or at least lead the client to the "correct" decision (according to the lawyer). This paternalistic view is widely held by practicing attorneys who consider it a professional responsibility

who have proposed a broad-based cause of action that has not been embraced by the courts.[7] It is unlikely that courts will recognize an actionable duty to inform based upon a client's right to control the representation if a substantial segment of the practicing bar neither subscribes nor adheres to the client-centered lawyering theory.[8] It is, therefore, necessary to look beyond common practice in order to find a defensible rationale for informed consent that will give rise to liability.

This Article will explore the problem of the attorney's duty to provide clients with adequate information to make informed decisions. It will discuss situations in which such a duty is appropriate, and suggest that a cause of action for informed consent must be limited to those fact patterns where courts have established the right of the client to make the decision. The analysis rejects establishment of a broad right of the client to control all aspects of the representation.

The Article will first review the history of the development of professional liability law with particular emphasis on the medical profession, including an analysis of why informed consent has evolved as a cause of action. Second, the Article will review the development of the legal malpractice field giving particular attention to the failure of the courts to adopt a parallel informed consent doctrine for lawyers. Third, the Article will look at the evolution of ethical standards relating to the duty to keep clients informed, and it will address the problem of whether such a duty can or should be adopted as a standard of care in a legal malpractice action. Fourth, the Article will propose a limited cause of action grounded in tort, based upon the attorney's duty to keep the client reasonably informed in situations specifically identified in the ABA Model Rules of Profes-

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to take charge of the case in order to attain their clients' objectives. Although commentators have questioned whether a lawyer can know better than the client what the client wants, the view persists. *See* WATSON, *supra* note 5, at 142.

7. *See* Peck, *supra* note 1.

8. The professional standard of care rests upon the premise that the professional will exercise the skill and knowledge customary in the profession. *See* KEETON, *supra* note 2, § 32, at 185-86. In order to establish the standard in a legal malpractice case, it is necessary to look to the practice of other lawyers. Thus, if the custom of the profession follows the traditional as opposed to the client-centered approach to decision-making, it may be difficult for a plaintiff to show that the professional standard was violated. *See generally* BINDER, *supra* note 5, at 147-55.

sional Conduct.[9]

II. Background

A. *Professional Liability*

This is the era of the professional. Everyone, it seems, claims special knowledge, training, or expertise in everything from medicine to plumbing.[10] In a complex industrialized society, service differentiation, market segmentation, and specialization are increasingly necessary to solve even the most basic problems.[11] For example, people do not go to a lawyer any more, or even a real estate lawyer; they seek a condo conversion specialist. When people go to professionals who claim to possess special knowledge, they expect to (and usually do) pay a premium for that expertise.[12] They also expect a higher level of service for their money.[13]

The fundamental rationale for all professional liability cases is that individuals who hold themselves out to others as possessing greater skill, knowledge, or ability than the average person can be held to a higher standard of care than an average person

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9. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES]. *See infra* notes 259-334 and accompanying text.

10. *See generally* KEETON, *supra* note 2, § 32, at 185-92.

11. Specialization in various professions has resulted in professional standard of care actions in such fields as dentistry, veterinary medicine, pharmaceuticals, accounting, plumbing, and architecture. *Id.*

12. Specialization in legal practice has not evolved as it has in medicine. In that profession, doctors receive formal specialized training and practice in limited areas. Lawyers, on the other hand, are presumed to be competent in all areas of the law. *See* MODEL RULES, *supra* note 9, Rule 1.1 and comment. The comment to Rule 1.1 states:

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar . . . . A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Id.

In reality, de facto specialization within the legal profession is not new. *See* O. MARU, RESEARCH ON THE LEGAL PROFESSION: A REVIEW OF WORK DONE 18 (1972). Today, many states provide for some form of certification of specialists. Whether it is out of fear of malpractice or a desire to make more money, lawyers increasingly are limiting their practices to areas of special expertise.

13. *See generally* Comment, *Legal Specialization and Certification*, 61 VA. L. REV. 434 (1975).

in the exercise of such skill, knowledge, or ability.[14] If the average person can be held to a standard of ordinary care, the professional may be held to a professional standard of care.[15] Normally, this is expressed as a duty of the professional to exercise the ordinary skill of a reasonably prudent professional similarly situated.[16] A breach of this professional standard of care can result in liability if the breach causes injury to the client or patient.[17] It is frequently necessary to produce expert testimony concerning the normal practice of members of the profession in order to establish the standard of care and breach thereof.

Most malpractice cases sound in tort. The plaintiff must prove the fundamental elements of a tort claim: (1) the existence of a duty to perform services with ordinary and reasonable professional care; (2) a breach of such duty by the professional; (3) causation of injury to the plaintiff; and (4) actual damages.[18] In such cases, the courts apply tort rules regarding damages, statutes of limitations, and form.[19]

Some cases, however, follow a contractual theory. The professional relationship is usually based upon an agreement between the parties wherein the professional promises to perform certain services in consideration of a fee. Thus, contract theory can provide a basis for recovery as well.[20] In some contract cases, the action may be based upon express promises about the services to be performed.[21] In others, courts may find implied promises in the agreement deriving from the professional relationship itself.[22] In both situations, however, liability in a contract action is based upon a breach of promise by the professional.

The distinction between a contract and a tort claim is criti-

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14. KEETON, *supra* note 2, § 32, at 185-92.

15. *Id.* at 185. *See also* MALLEN, *supra* note 2.

16. KEETON, *supra* note 2, § 32, at 187.

17. MALLEN, *supra* note 2, § 8.3.

18. KEETON, *supra* note 2, § 32, at 164-65.

19. Schnabel, Beck & Keitel, *Some Aspects and Issues of Legal Malpractice*, in DEFENDING THE PROFESSIONAL 313, 364-69 (1982).

20. KEETON, *supra* note 2, § 32, at 186.

21. *Id.*

22. George v. Caton, 93 N.M. 370, 600 P.2d 822 (1979) (attorney may be found liable for malpractice for failure to file proper motion papers on behalf of his client, even though no formal fee contract was ever drawn).

cal because the two causes of action are dissimilar as to theory, proof, and damages recoverable. In tort, the plaintiff can recover for pain and suffering which is proximately caused by the professional's wrongful act.[23] Moreover, it is possible for such a plaintiff to recover punitive damages.[24] On the other hand, contract law attempts only to restore the status quo. Damages are generally restricted to actual payments and to the expenditures that actually flowed from the breach of contract.[25] Additionally, different statutes of limitations may apply to contract and tort actions, and the time of accrual of the cause of action may be different according to the applicable statute.[26]

These differences arise because a tort action is based on obligations imposed by law to avoid injury to others.[27] Tort law specifically identifies a standard of conduct that must be met in exercising that duty.[28] Contract law, on the other hand, is premised on specific promises made by the parties to each other based on the parties' manifested intent.[29] Thus, contract law asserts only that one of the parties failed to live up to his part of the bargain. The result is that, under a tort theory, the plaintiff has a greater burden of proof at trial than under a contract theory.

Some cases impose professional liability for misrepresentations or omissions.[30] In efforts to compartmentalize legal actions,

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23. *See, e.g.*, Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

24. For example, punitive damages are often awarded in a medical malpractice action for malfeasance and nonfeasance. *See* J. DOOLEY, 2 MODERN TORT LAW § 34.109 (Supp. 1988). *See also* DEPT. OF HEALTH, ED. AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE, 29 n.8 (1973).

25. *See, e.g.*, Hadley v. Baxendale, 156 Eng. Rep. 145 (1854).

26. Statutes of limitations and accrual rules are governed by state law. A comprehensive review by jurisdiction is beyond the scope of this Article. For an in-depth discussion of statutes of limitations and the related issue of accrual in medical malpractice actions, see D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE, §§ 13.01-13.66 (Supps. 1987 & 1989) [hereinafter LOUISELL].

27. KEETON, *supra* note 2, § 92, at 655. *See also id.* § 4, at 20-23. Historically, a tort action was based on the concept of fault. *Id.*

28. *Id.* § 92, at 656.

29. *Id.* at 655-56.

30. *See, e.g.*, Spector v. Mermelstein, 361 F. Supp. 30 (S.D.N.Y. 1972), *aff'd in part and remanded*, 485 F.2d 474 (2d Cir. 1973) (defendant attorney breached his fiduciary duties to plaintiff client by failing to inform client fully of facts known to attorney which raised serious questions regarding the advisability of client's loaning money to a corporation which owned a Nevada gambling casino).

commentators often overlook these misrepresentation cases in discussions of malpractice.[31] The essence of misrepresentation, however, is miscommunication.[32]

A misrepresentation case involves a false statement of fact upon which the plaintiff relies; an informed consent case, on the other hand, implicates the quality of the information necessary for the client to make rational decisions. The information does not have to be untrue, but rather, inadequate.[33]

One particular issue that pervades contract, tort, and misrepresentation law is the fiduciary nature of the professional relationship. Because the professional claims or possesses special knowledge, courts often find a fiduciary relationship which places a heavier burden on the professional to act in the best interests of the client or patient.[34] While the roots of fiduciary duty are grounded in contract, the concept has been adopted in

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31. *See generally* Martyn, *supra* note 1, at 307-08; Peck, *supra* note 1, at 1290.

32. KEETON, *supra* note 2, § 106, at 736-37.

33. An exploration of the relationship between informed consent and misrepresentation is beyond the scope of this Article. Misrepresentation, however, involves the plaintiff acting to his detriment because he relied upon the false statement of the defendant. Traditionally, the misrepresentation had to be intentional. More recently, courts have permitted recovery in negligent misrepresentation cases where the defendant, in a position of trust or power, reasonably should have known that the plaintiff would act in reliance on the defendant's statement. *See, e.g.* Menzel v. Morse, 362 N.W.2d 465 (Iowa 1985); International Products Co. v. Erie R.R., 244 N.Y. 331, 155 N.E. 662, *cert. denied*, 275 U.S. 527 (1927). The fact that the defendant did not intend to deceive is not relevant because a duty to ascertain the true facts is imposed on the defendant. If a lawyer misstates a material fact, there may be grounds for a misrepresentation action. If the lawyer simply fails to give the client enough information, recovery on a misrepresentation theory is unlikely. The anomalous result would be that a lawyer who said nothing could escape liability while the lawyer who said the wrong thing could not.

34. *See* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972). The issue of whether a risk should have been disclosed to the patient was to be determined by the standard of the reasonable, prudent person in a position similar to that of the patient. Additionally, a physician bears the duty of disclosing alternative procedures and the risks that they encompass. *Id.* The Supreme Court of Louisiana held that attorneys are obligated to scrutinize any contract which they advise their clients to execute, and are required to disclose the full import of the instrument and the possible consequences that may arise upon execution. Ramp v. St. Paul Fire and Marine Ins. Co., 263 La. 774, 269 So. 2d 239 (1972). The Michigan Court of Appeals held that the attorney breached the applicable standard of care when he failed to inform the client of offers by the plaintiff to settle prior to trial. Joos v. Auto-Owners Ins. Co., 94 Mich. App. 419, 288 N.W.2d 443 (1979), *affd. sub. nom* Joos v. Drillock, 127 Mich. App 98, 338 N.W.2d 736 (1983).

various situations in both tort and misrepresentation cases.[35] As will be demonstrated, fiduciary principles underlie the ABA Model Rules of Professional Conduct, specifically regarding the lawyer's duty to inform clients and to obtain informed consent.[36] These rules can provide a basis for subjecting the lawyer to civil liability for breach of this duty to inform.

Although legal and medical malpractice cases comprise the bulk of professional liability actions, members of many other professional fields are subject to suit by their clients or patients.[37] As other groups push to attain professional status, they discover that one of the risks is increased exposure to malpractice liability.[38] Today, virtually all professions, including both traditional professions and newly recognized ones, are subject to malpractice actions. Furthermore, malpractice theory has been applied in cases involving individuals claiming special skill or knowledge, even where the field itself does not represent an area recognized as a profession.[39]

In recent years, an increase in malpractice cases has contributed substantially to what has been called a rising tide of litigation. Since 1984, insurance companies have promoted the idea that the civil justice system is in the throes of a tort crisis.[40] Just as avidly, American trial lawyers have argued that this crisis was manufactured along with the accompanying calls for tort

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35. *See supra* note 34.

36. *See* MODEL RULES, *supra* note 9, Rules 1.2, 1.4, 1.8.

37. *See, e.g.*, Everett v. Bucky Warren, Inc., 376 Mass. 280, 380 N.E.2d 653 (1978) (professional liability action including breach of duty of a hockey coach); Tom Beuchler Constr., Inc. v. City of Williston, 392 N.W.2d 403 (N.D. 1986) (action for breach of duty of a building inspector); Jewell v. Beckstine, 255 Pa. Super. 238, 386 A.2d 597 (1978) (professional liability action for breach of dairy farmer's duty).

38. *See* Note, *Failure to Maintain Independence: A Proposed Cause of Action Against Accountants*, 62 TEX. L. REV. 923 (1984).

39. *See* KEETON, *supra* note 2, § 32, at 185-86. Persons employed as milk haulers, expert skiers, and abstractors of titles are just a few examples of those persons who have been held responsible to answer to a professional standard of care. *Id.*

40. Statistics from the Insurance Services Office, a New York based advisory, rate making, statistical, and research service organization for property and casualty insurance companies, show that paid losses for commercial liability insurance grew 179% from 1979 to 1985 and that general and medical professional liability paid losses were up 234% for the same period. Szabo, *No Relief from the Liability Crisis*, NATION'S BUS. 70 (Oct. 1986). For more information concerning trends in the insurance industry, see Freedman, *General Liability and Medical Malpractice Insurance Marketing - 1985*, BEST'S REV. 32 (Oct. 1986).

reform.[41]

Although the battle of tort reform seems to be waning, the debates have highlighted a number of considerations concerning malpractice law. First, the number of malpractice cases has increased dramatically, not only in traditional areas but in new fields as well.[42] Second, damage awards have increased significantly over the past decade.[43] Third, insurance premiums have escalated[44] in response to what carriers viewed as a threat to their financial stability.[45] One theory suggests that as society becomes more informed through widespread availability of information, individuals are becoming more aware of their rights and are willing to assert them through legal action.[46] In a society where the rule of law becomes more accepted, the tendency of people to utilize the courts will increase, while the tendency to resolve problems through self-help will decrease. It may be that the prospect of large damage awards provides an incentive for people to sue. If people view legal action as an opportunity to make a profit from their misfortunes, rather than merely to compensate them for their losses, they are likely to enter the litigation sweepstakes.

One factor that cannot be ignored is that the number of lawyers has mushroomed. In 1960, there were approximately 286,000 lawyers.[47] In 1980, the number had increased to 542,000.[48] By the year 2000, there will be over 1,000,000 lawyers

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41. *See* McKay, *Litigation Explosion?: ABA House to Review Tort Report*, Nat'l L.J., Feb. 16, 1987, at 17, col. 1. The buzz words "litigation explosion," "malpractice crisis," "tort reform," and others that have been tossed about during this debate, often obscure the fundamental facts that individual lawsuits are brought by people who believe they have been injured; courts have means of dealing with frivolous and unmeritorious claims; and damage awards demonstrate that the plaintiff has proved his case in court. Id.

42. Such diverse professionals as pharmacists, veterinarians, and abstractors of title have found themselves victims of this wave of litigation. KEETON, *supra* note 2, § 32, at 185-86.

43. *See* Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 21 (1986).

44. Szabo, *supra* note 40.

45. *See generally* Galanter, *supra* note 43.

46. People are more aware of their duties as well, but, ironically, crime has increased. *See generally* BUREAU OF JUSTICE STATISTICS NAT'L CRIME SURVEY, NAT'L CRIME SURVEY (1989).

47. G. GREENWOOD, THE 1961 LAWYER'S STATISTICAL REPORT (1961).

48. B. CURRAN, THE LAWYERS STATISTICAL REPORT: A STATISTICAL PROFILE OF THE

in the United States.[49] This increase in number has produced a much wider availability of legal services.

When the number of lawyers was smaller, there were simply fewer attorneys to represent injured individuals. The increased accessibility of potential clients to legal services has been further expedited by the erosion of rules against lawyer advertising.[50] In a series of cases, the U.S. Supreme Court has made it clear that attorneys are free to advertise their services as long as their ads are not false, deceptive, or misleading.[51] State regulation of such activities must be narrowly drawn if it is permitted at all.[52] One result of the open environment created by the law on advertising has been the development of marketing mania.[53] Almost overnight, law firms that considered "advertising" tawdry and unprofessional embraced the concept of "marketing" with open arms.[54] Today, firms of all sizes regularly address the problems of marketing their services to prospective clients.[55] The overall effect of the marketing revolution has been that lawyers are not only promoting their services more actively, but also more efficiently.[56] The relationship between marketing and the rise in malpractice litigation remains unclear, but the facts suggest a positive correlation.[57]

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49. *Id.* The projections go only to 1995 when it is predicted that the lawyer population will reach 930,000. The projections show a growth in the profession of more than 125,000 for each five year period from 1980 forward, suggesting that the one millionth lawyer will be admitted some time around 1997 or 1998.

50. *See generally* L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 77-78 (1980); H. HAYNSWORTH, EXPANDING YOUR PRACTICE: THE ETHICAL RISKS (1984).

51. Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985); *In re* R.M.J., 455 U.S. 191 (1982); Bates & O'Steen v. State Bar of Arizona, 433 U.S. 350 (1977).

52. *In re* R.M.J., 455 U.S. at 203.

53. Marketing and advertising are not the same. Advertising represents a permissible way to market legal services. In-person solicitation represents an impermissible way. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 466 (1978). Popular literature is replete with articles advising law firms how to market their services. *See, e.g.*, McCrensky, *Cohesiveness Necessary for Successful Marketing*, Nat'l L.J., Mar. 13, 1989, at 20, col. 1. There is even a national organization of law firm marketing administrators. Whatever onus the term "advertising" may have carried, marketing has attained no such infamy.

54. *See generally* R. DENNEY, HOW TO MARKET LEGAL SERVICES (1984).

55. *See generally* A. ANDERSON, MARKETING YOUR PRACTICE (1987).

56. *Id.*

57. Marketing legal services may have implications for professional liability actions.

Informed consent is related conceptually to two other rights: the right of autonomy and the right to information. Both of these rights are founded on the notion that the individual should control his or her own destiny, and that it is necessary to recognize a body of rights in order to assure that control. While legislative and judicial recognition of these rights has helped to establish them, the impetus for their creation came largely from a grassroots movement.[58]

The concept of autonomy suggests that individuals should have control over the basic personal elements of their existence. Constitutionally, autonomy has been recognized within the penumbra of certain fundamental rights.[59] In the medical malpractice area, autonomy has been articulated as the basis for the right to control one's body which is integral to the concept of medical informed consent.[60] It is the unfettered right of the individual to control his or her own body that gives rise to the doctor's duty to disclose the risks involved in a proposed medical procedure. At least one commentator has proposed that autonomy can provide the basis for legal informed consent as well.[61] While this Article rejects the notion that the lawyer's client has a right to control all aspects of the case, the authors recognize

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If advertising raises the expectations of clients, it follows that they would be more likely to sue if their expectations are not met than they would be if their expectations were lower. Generally, when a lawyer holds herself out as possessing certain expertise, she may be held to that standard. In one sense, marketing involves the lawyer convincing potential clients that she is competent to handle their legal problems. If she fails to perform, a malpractice action is a predictable result.

58. Roe v. Wade, 410 U.S. 113 (1973). In *Roe*, the plaintiff sought to overturn a state abortion law. Thus, in one sense, the case represents an individual effort to assert greater control over the fundamental right of self-determination.

59. *See, e.g., id.* The Court has held that "a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard." Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966). The Court has stated that "we are one people, with one common country . . . and as members of the same community must have the right to pass and repass through every part of it without interruption . . . ." Crandall v. Nevada, 73 U.S. 35, 48-49 (1867) (citation omitted). Furthermore, the Court has held that an Arizona statute requiring one year residency in the state as a prerequisite to receive non-emergency medical care at state expense unconstitutional. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974).

60. *See* McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959).

61. *See* Martyn, *supra* note 1, at 319.

that autonomy is a factor in the client's decision to control some elements of the representation.

The right to information is conceptually similar to autonomy in that it is based upon the existential notion that individuals have the right to determine their own destiny. However, autonomy and fundamental rights go to the individual's physical security, while the right to information addresses an intellectual state involving access to information. Since one cannot exercise rational choices or self-determination without adequate information, to give someone the freedom of choice while withholding important information is a hollow gift indeed.

Various states have enacted laws guaranteeing citizens the right to information, including acts providing access to government documents and personal files, credit reporting acts, open meeting acts, and sunshine acts.[62] No two states have approached the problem identically; the net result has been a patchwork of laws that say generally that people have a right to obtain information they need to make rational choices about their lives. The same idea runs through the Federal Freedom of Information Act.[63]

The notion that citizens in a democracy have a right to information is not a new concept. It may be found in the constitutional guarantee of freedom of the press.[64] Even earlier, it can be seen in the law of libel which recognizes a number of privileges: an absolute privilege in judicial proceedings,[65] a qualified privilege to report on official and government meetings,[66] and a qualified privilege to report fairly on events of public interest.[67] What has come to be known as the public's right to know is basically a right to information necessary to make informed decisions.

It is important to understand that information rights are not recent legislative innovations. The action has both constitutional and common-law roots of long-standing duration. Modern

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62. *See, e.g.*, ARK. STAT. ANN. §§ 11-10-314, 25-19-105 (Supp. 1987); DEL. CODE ANN. tit. 29, § 100.02 (Supp. 1987); VA. CODE ANN. § 2.1-344 (Supp. 1989); WYO. STAT. § 16-4-202 (1982).

63. 5 U.S.C.A. § 552 (1977 & Supp. 1989).

64. U.S. CONST. amend. I.

65. KEETON, *supra* note 2, § 114, at 816-19.

66. *Id.* § 115, at 836-38.

67. *Id.* § 115, at 830-35.

statutory enactments[68] have broadened these rights considerably, but the underlying principle is not new.

The advent of electronic media and mass communication have revolutionized the relationship between people and information.[69] As information has become more readily available, individuals have inherited a greater potential to exercise power concerning events in their lives. To the extent that people are aware of their rights, they are less willing to delegate decisions about those rights to others. They are also more willing to utilize the judicial system to protect or vindicate their rights. Although there may be other reasons, this phenomenon has been a factor in fueling the litigation explosion of recent years.

There is clearly a tension between the individual's right to information and the power of the government, employers, or professionals to control access to information. It is not surprising that this allocation of power should be fought out in the courts.

Professionals hold themselves out as possessing special knowledge and information, which they exercise for the benefit of their clients and patients. Traditionally, the professional used his superior information paternalistically, withholding from the client-patient information that was too difficult to understand or appreciate. It followed that the professional made most of the decisions about the representation. As more information became available to clients and patients, they sought greater authority to make decisions, and they became more willing to second-guess decisions made for them. This second-guessing arises specifically when the professional is sued for malpractice.

The "malpractice crisis" of the 1980's in one sense is a manifestation of this conflict over control of access to information and decision-making power.[70] The increase in professional liability suits is one product of this tug-of-war.[71] Attorneys must now consider the quality of information they provide clients. The

68. *Id.*

69. *See generally* M. MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964); A. TOFFLER, FUTURE SHOCK 136-61 (1970). A number of authors have pointed out that people are awash in a sea of information to a degree that it cannot all be processed. Yet, citizens have instant access to so much information that it has transformed the way they relate to government and each other.

70. *See generally* MALLEN, *supra* note 2, §§ 11.2, 12.13, 13.27.

71. *Id.* § 11.2.

practical effects of this development are predictable. Attorneys are more likely to reduce representation and fee agreements to writing.[72] They are less willing to put legal advice into writing[73] or give off-the-cuff advice.[74] They are more likely to eschew cases they believe to be outside their fields of expertise.[75]

Given the likelihood of adverse liability judgments resulting in increased malpractice insurance premiums or financial ruin, many lawyers have taken the conservative road in their dealings with clients. Defensive practices also lead attorneys to file every conceivable motion, make every plausible argument, and pursue every possible theory in a case.[76] In order to protect themselves from malpractice suits, attorneys may even adopt strategies suggested by clients that they would not otherwise have considered.[77]

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72. *Id.* § 2.9, at 78. In fact, they are so required in some cases. *See* MODEL RULES, *supra* note 9, at 1.5(b), (c), (e)(1). In Pennsylvania, all fee agreements must be in writing when the lawyer has not regularly represented the client in the past. Penn. Rules of Professional Conduct, Rule 1.5(b)(1988).

73. MALLEN, *supra* note 2, § 2.9. Ironically, the trend seems to be to increase formal communications that protect the lawyer's interests (for example, fee agreements), and reduce formal communications that expose the lawyer to a greater risk of liability (for example, opinion letters). It is not uncommon for a lawyer to reduce to writing conversations with clients in which the client gives instructions or makes demands. The writing may take the form of a confirmation or memo to file.

74. *Id.* § 2.30.

75. *Id.*

76. *See generally* Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292 (1963).

77. It is not necessarily bad that attorneys are more thorough as a result of increased exposure to the risk of malpractice. On the other hand, if the lawyer's tactics are based on self-protection rather than the client's interests, the added benefit to the client may be negligible. In fact, if such practices result in increased costs of litigation, delayed resolution of disputes, or increased acrimony among litigants, defensive practices by the attorney may even be deleterious to the client's best interests. In order to reduce unnecessary, frivolous and harassing litigation tactics, the Federal Rules of Civil Procedure now state:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FED. R. CIV. P. 11.

Courts today increasingly impose sanctions against attorneys for a variety of con-

A new balance of power has evolved. Lawyers today must provide enough information to allow clients to make rational choices about their cases. If clients assume greater responsibility for their representation, they must also assume greater responsibility for the consequences of their decisions.[78] The era of paternalistic attorney-client relationships is slowly giving way to a participatory model.[79]

In terms of the litigation explosion, clients who want a greater degree of participation in decisions may be more willing to sue their lawyers when they feel that they have been denied such participation and have been injured thereby. Although most legal malpractice litigation has focused on negligent practice, there is growing sentiment to hold lawyers to a reasonable standard of care with respect to the information they provide and the decisions they take upon themselves to make.[80]

These developments in the field of legal malpractice parallel changes in medical malpractice law.[81] In fact, doctors faced the problems associated with rising expectations of patients to participate in their treatment long before lawyers.

B. *The Law of Medical Malpractice*

1. *Historical Development and Overview*

At common law, a physician's liability[82] was premised on the notion that the medical profession was a "public" or "com-

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duct that may be predicated upon the lawyer's desire to cover every base. Rule 11 balances the interests of zealous advocacy against the need to prevent frivolous actions.

78. Mitchum v. Hudgens, 533 So. 2d 194 (Ala. 1988). An attorney hired by an insurance company to defend an insured doctor in a medical malpractice case is not liable to the doctor for settling the case without his permission. The Alabama Supreme Court recently held that the doctor had signed a policy with the insurance company which expressly granted the attorney the right to accept a settlement offer without consulting the doctor. *Id.* at 196-97.

79. *See* D. ROSENTHAL, *supra* note 5; BINDER, *supra* note 5, at 150.

80. *See generally* Peck, *supra* note 1.

81. *See, e.g.*, Sapp, *Medical Malpractice Crisis: Rethinking Issues and Alternatives*, 55 DEF. COUNS. J. 373 (1988); Pavalon, *Another "Reform" — The Assault Continues* 24 TRIAL 5 (Apr. 1988).

82. Unlike professional liability generally, medical malpractice liability assumes a physician-patient relationship. *See* Easter v. Lexington Memorial Hosp., 303 N.C. 303, 278 S.E.2d 253 (1981). At least one court has held that the husband of a pregnant patient is the direct beneficiary of the duty imposed by the physician-patient relationship. *See* Goldberg v. Ruskin, 128 Ill. App. 3d 1029, 471 N.E.2d 530 (1984), *aff'd*, 113 Ill. 2d

mon" calling, similar to that of a common carrier or innkeeper.[83] But as the body of American jurisprudence developed, American courts increasingly began to analyze the physician's liability in terms of breach of contract.[84]

Contract is still available as the underlying basis of liability where there is an implied or express agreement between the physician and the patient.[85] Various courts have recognized express contracts between patients and physicians when the physician has promised to achieve a specific or definite result for the patient.[86] In addition, a contract may be implied by law between a physician and a patient where no special agreement exists between the parties.[87] Today, however, medical malpractice actions are generally based on tort concepts.[88]

Specifically, medical malpractice is viewed as a breach of a physician's duty to exercise reasonable skill and care in the treatment of a patient.[89] This skill and knowledge represents the criteria that constitute "that special form of competence which is not part of the ordinary equipment of the reasonable man, but which is the result of acquired learning, and aptitude developed by special training and expertise."[90]

Physicians must act with a level of skill and learning com-

482, 499 N.E.2d 406 (1986). Other courts recognize a duty to the patient's unborn fetus. Schroeder v. Perkel, 87 N.J. 53, 64-65, 432 A.2d 834, 839 (1981). *See infra*, note 144.

83. *See* KEETON, *supra* note 2, § 28, at 161.

84. KEETON, *supra* note 2, § 28, at 161.

85. *See infra* notes 120-24 and accompanying text.

86. KEETON, *supra* note 2, § 32, at 186. Often cases involving procreation issues, such as tubal ligations and vasectomies, fall into this category. *See, e.g.*, Mason v. Western Penn. Hosp., 286 Pa. Super. 354, 428 A.2d 1366 (1981) (pregnancy followed tubal ligation); Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496 (1979) (unsuccessful vasectomy), *aff'd in part and rev'd in part*, 497 Pa. 77, 439 A.2d 110 (1981).

87. Fala, *The Law of Medical Malpractice in Pennsylvania*, 36 U. PITT. L. REV. 203, 205-08 (1974). Whether or not there is an implied contract is a factual question that must be determined by the trier of fact. *See* Beadling v. Sirotta, 71 N.J. Super. 182, 176 A.2d 546 (1961), *vacated on other grounds*, 39 N.J. 34, 186 A.2d 680 (1962) (to be determined by judge); Pfeiffer v. Kraske, 139 Pa. Super. 92, 11 A.2d 555 (1940) (to be determined by the jury).

88. KEETON, *supra* note 2, § 28, at 160.

89. LOUISELL, *supra* note 26, §§ 8.04-05. This standard applies generally to all professionals. *See, e.g.*, Gammel v. Ernst & Ernst, 245 Minn. 249, 255, 72 N.W.2d 364, 368 (1955) (accountants); Bell, *Professional Negligence of Architects and Engineers*, 12 VAND. L. REV. 711, 716 (1959) (architects and engineers).

90. RESTATEMENT (SECOND) OF TORTS § 299A comment a (1965).

monly possessed by members of the profession in good standing. But it is not malpractice where competent professionals differ on the proper course of action and the physician merely chooses one of two acceptable alternatives.[91] Thus, where there are conflicting schools of medical thought on a given issue, the doctor's level of skill and competence must be judged by reference to the beliefs of the school that he follows.[92] And where a physician holds himself out as a specialist he will be held to the minimum standard of care of that specialty.[93]

A physician's professional negligence must be shown through expert testimony.[94] This, of course, is an extremely difficult burden for the plaintiff to carry due to what has been called the "conspiracy of silence" among physicians.[95]

Until recently, doctors were generally bound only to the professional standard of care prevailing in the community in which they practiced.[96] Many jurisdictions have expanded this rule to a standard based on the skill and competence of physicians practicing in similar communities.[97] This rule is eroding

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91. KEETON, *supra* note 2, § 32, at 186-87.

92. *Id.* § 32, at 187. But note that a doctor cannot establish his own "school of thought." "A 'school' must be a recognized one within definite principles, and it must be the line of thought of a respectable minority of the profession." *Id.*

93. The standard of care of a specialist has been articulated as that of a "reasonable specialist practicing medicine in the light of present day scientific knowledge." Swanek v. Hutzel Hosp., 115 Mich. App. 254, 320 N.W.2d 234, 236 (1982)(citation omitted).

94. There are noted exceptions, however, to the expert testimony requirement. For instance, one exception is where the negligence is obvious to the layman; *i.e.*, if the defendant's negligence is so blatant that the court determines as a matter of law that a layman could identify it as such. *See* Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944).

95. "[A]s a practical matter, we must consider the plaintiff's difficulty in finding a physician who would breach the 'community of silence' by testifying against the interest of one of his professional colleagues." Cooper v. Roberts, 220 Pa. Super. 260, 267, 286 A.2d 647, 650 (1971). For an extensive discussion of the conspiracy of silence see generally Kelner, *The Silent Doctors — The Conspiracy of Silence*, 5 U. RICH. L. REV. 119 (1970); Markus, *Conspiracy of Silence*, 14 CLEV.-MAR. L. REV. 520 (1965).

96. *See* Robak v. United States, 658 F.2d 471 (7th Cir. 1981). *See generally* McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 569-75 (1959). This was known as the "strict locality" rule.

97. "Plaintiff has the burden to prove what a *reasonable medical practitioner of the same school and same or similar community, under the same or similar circumstances, would have disclosed to his patient.*" Kaplan v. Haines, 96 N.J. Super. 242, 257, 232 A.2d 840, 848 (App. Div. 1967) (emphasis added), *aff'd*, 51 N.J. 404, 241 A.2d 235 (1968). *See* Priest v. Lindig, 583 P.2d 173 (Alaska 1978); Bartimus v. Paxton Community Hosp., 120 Ill. App. 3d 1060, 458 N.E.2d 1072 (1983); LeBlanc v. Lentini, 82 Mich. App. 5, 266

quickly, however, and many jurisdictions now hold the defendant to the standard of care recognized nationally in the profession.[98] Regardless of whether a local or national standard is applied, the traditional medical malpractice case focuses on the quality of the professional service.

2. *Development of the Informed Consent Theory*

Informed consent is a "distinct specie of liability" separate and apart from the traditional medical malpractice action.[99] Traditional malpractice actions could not, and did not adequately address the plight of the patient who suffered injury resulting from the doctor's failure to disclose the risks involved in a proposed course of treatment. If the patient had in fact consented to the procedure, his consent was regarded as a bar to recovery if he had no clear understanding of the implications of the information he was given. Consent under these circumstances was the antithesis of the recognized concept of autonomy and individual rights.[100]

Over a period of time, the doctrine of informed consent emerged requiring the physician to give the patient information concerning: (1) the diagnosis; (2) the general nature of the contemplated procedure; (3) the risks involved; (4) the prospects of success; (5) the prognosis if the procedure was not performed; and (6) any alternatives available.[101] Informed consent recognizes and maximizes the role of the patient in the decision-mak-

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N.W.2d 643 (1978); Swan v. Lamb, 584 P.2d 814 (Utah 1978).

98. *See, e.g.*, Lane v. Otts, 412 So. 2d 254 (Ala. 1982); Logan v. Greenwich Hosp. Ass'n, 191 Conn. 282, 465 A.2d 294 (1983); Morrison v. MacNamera, 407 A.2d 555 (D.C. 1979); Hall v. Hilbun, 466 So. 2d 856, 872 (Miss. 1985).

99. LOUISELL, *supra* note 26, § 22.01 (Supp. 1987).

100. LIDZ, MEISEL, ZERVLANCK, CARTER, SESTAK & ROTH, INFORMED CONSENT: THE LEGAL DOCTRINE (1984).

> Informed consent is an ethical as well as a legal imperative. It had deep strong roots in the individualistic tradition of the English common law tradition reflected in and reinvigorated by the American constitution. Informed consent is a legal mandate . . . . *Informed consent reflects one of our highest social values, individual autonomy. It reflects a strong emotional need for a sense of control over our own lives and an admission of our dependence upon others, and it deals with a subject of fundamental importance, our health.*

Id at 10.

101. LOUISELL, *supra* note 26, § 22.01 (citing Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972)).

ing process.

Historically, the doctrine of informed consent was grounded in concepts of assault and battery.[102] But the thrust of the informed consent action gradually evolved to focus on the quality of the consent, rather than the nature of the unauthorized touching. Thus, an informed consent action today sounds in negligence rather than in battery.[103] Because it is the singular mechanism by which a patient grants the physician the power to act,[104] consent is the crux of the issue. And informed consent focuses on the quality of that consent.[105]

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102. *See* Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905); Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914). In *Schloendorff* the court stated: "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." *Id.* at 93 (citations omitted). A patient's cause of action against his physician will still sound in battery where there is no consent at all. *See generally* Kohoutek v. Hafner, 383 N.W.2d 295 (Minn. 1986) (discussing battery cause of action); Scott v. Bradford, 606 P.2d 554, (Okla. 1979) (completely unauthorized treatment is battery).

103. At least one court has recognized a cause of action against a physician sounding in negligent misrepresentation. *See* Bloskas v. Murray, 646 P.2d 907, 914 (Colo. 1982). In *Bloskas,* the court held that Section 311 of the Second Restatement of Torts, "Negligent Misrepresentation Involving Risk of Physical Harm," was applicable to the physician-patient relationship where the physician asserted that he had prior experience performing ankle replacement surgery when, in fact, he had none and the patient reasonably relied on the physician's representations in deciding to undergo surgery which ultimately resulted in leg amputation. *Id.* Actions for fraud and deceit may also be viable claims when the physician intentionally misrepresents facts to the patient. *See* Hedin v. Minneapolis Medical & Surgical Inst., 62 Minn. 146, 64 N.W. 158 (1895). *See also* Katz, *Informed Consent - A Fairy Tale? Law's Vision,* 39 U. PITT. L. REV. 137, 147-48 (1977).

104. Pratt v. Davis, 118 Ill. App. 161, 166 (1905), *aff'd,* 224 Ill. 300, 79 N.E. 562 (1906).

> [T]he free citizen's first and greatest right, which underlies all others - the right to the inviolability of his person, in other words, his right to himself - is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skillful or eminent, who has been asked to examine, diagnose, advise and prescribe (which are at least necessary first steps in treatment and care), to violate without permission the bodily integrity of his patient . . . without his consent or knowledge.

Id.

105. Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972). "True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each." *Id.*

3. *Elements*

As in any other tort involving negligence, the patient must prove all four elements of negligence to recover under an informed consent theory: (1) duty — the plaintiff must establish that the doctor owed him a specific duty of care to disclose specific information; (2) breach of duty — the plaintiff must show that the physician breached that duty of care by failing to make an adequate disclosure; (3) proximate cause — the plaintiff must establish a causal connection between the act of the physician and the injury sustained; and (4) damage — the plaintiff must establish that he has suffered actual loss or damage.[106]

a. *Duty and Breach*

Under the informed consent theory, there are two separate duty elements: (1) the duty of the physician to *obtain the patient's consent* to the treatment proposed; and (2) the duty of the physician to *inform the patient* of all material factors concerning the treatment.[107] This duty of reasonable disclosure is an inherent part of the physician's overall responsibility to the patient.[108]

Because a key to valid consent is the requirement that the patient be adequately informed, the emergence of the informed consent doctrine required the courts to devise guidelines to determine the specific information that physicians had to disclose

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106. *See* KEETON, *supra* note 2, § 30, at 164-65.

107. What is "material" is not always clear, and is often judged by different standards. In the landmark case of Canterbury v. Spence, the court addressed materiality: "[T]he test for determining whether a particular peril must be divulged is its materiality to the patient's decision: all peril potentially affecting the decision must be unmasked." *Canterbury*, 464 F.2d at 786-87. But whether this is judged from an objective or subjective standard varies by jurisdiction. *See infra* notes 116, 319-24 and accompanying text. *See also* Natanson v. Kline, 186 Kan. 393, 410-11, 350 P.2d 1093, 1106-07 (1960).

> In considering *the obligation of a physician to disclose and explain to the patient in language as simple as necessary the nature of the ailment, the nature of the proposed treatment, the probability of success or of alternatives, and perhaps the risks of unfortunate results and unforeseen conditions within the body*, we do not think the administration of such an obligation, by imposing liability for malpractice if the treatment were administered without such explanation where explanation could reasonably be made, presents any insurmountable obstacles.

Id. (emphasis added).

108. Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (the relationship between a physician and his patient is of a fiduciary nature).

to their patients. The criteria for disclosure differ from state to state due to both legislation and case law.[109] Basically, there are two standards of disclosure: (1) the professional standard, which is traditionally applied in medical malpractice actions;[110] and (2) the reasonable patient standard.[111]

(i) *The Professional Standard*

Initially, the professional standard was applied in informed consent cases.[112] Under this standard, the physician's duty of disclosure is defined only by the standards of his colleagues.[113] What the reasonable patient might deem important is of no relevance. Therefore, a patient attempting to prove that the physician violated this duty is required to produce expert testimony that establishes the standard medical procedure in such a case, and then offer proof that the physician deviated from such practice.[114]

Under the professional standard, disclosure should be based

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109. Various jurisdictions have enacted informed consent statutes delineating the standards of disclosure and causation. For a comprehensive survey of informed consent statutes, see LOUISELL, *supra* note 26, ¶¶ 22.17-22.68 (Supp. 1987).

110. *See supra* notes 89-93 and accompanying text; *see infra* notes 112-15 and accompanying text.

111. *See infra* notes 116-21 and accompanying text.

112. The earliest case recognizing the duty of informed consent was Salgo v. Leland Stanford Junior Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957). In *Salgo*, the court held that a physician had a duty to disclose "any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment." *Id.* at 578, 317 P.2d at 181. The *Salgo* court premised the duty of disclosure on the traditional malpractice professional standard of care. The physician had only the duty to inform a patient in compliance with whatever the prevailing medical practice was in the community.

113. As noted previously, jurisdictions differ on what geographic scope should be considered in determining the "standards of his colleagues." *See supra* notes 96-98 and accompanying text.

114. Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960), was the first major case in which this practice was applied to assess the adequacy of the information disclosed prior to consent. In *Natanson*, the physician failed to disclose the hazards inherent in cobalt radiation treatment, which at the time was both new and untried. *Id* at 397, 350 P.2d at 1096-97. The patient suffered serious side effects and sued alleging that her consent was invalidated by her lack of knowledge of the dangers. *Id* at 400, 350 P.2d at 1100. The cause of action was framed as a claim of assault and battery, but the court addressed it as an issue of professional negligence. The burden of establishing the recognized professional standard of care (through expert testimony) was placed on the patient. *Id* at 410, 350 P.2d at 1106.

on medical judgment. Its proponents argue, first, that it is not feasible for a physician to determine what a reasonable person would want to know, and second, that the disclosure of information necessary for a valid consent should be cast in light of what the health care professional deems important to the patient and to the patient's well-being. Although the professional standard is the traditional and so-called majority rule, it is being rejected rapidly in favor of the patient need standard.[115]

(ii) *The "Patient Need" or Reasonable Patient Standard*

The reasonable patient standard focuses on the informational needs of the average reasonable patient rather than on professionally established standards of disclosure. This standard requires that the physician disclose all material information.[116]

Canterbury v. Spence[117] refuted the propriety of the professional standard of care rule.[118] In addressing the issue of the physician's standard of disclosure, the court states:

> There are, in our view, formidable obstacles to acceptance of the notion that the physician's obligation to disclose is either germinated or limited by medical practice. To begin with, the reality of any discernible custom reflecting a professional consensus on communication of option and risk information to patients is open to serious doubt. We sense the danger that what in fact is no custom at all may be taken as an affirmative custom to maintain silence, and that physician-witnesses to the so-called custom may state merely their personal opinions as to what they or others would do under given conditions. . . . Nor can we ignore the fact that to bind the disclosure obligation to medical usage is to arro-

115. *See* Wheeldon v. Madison, 374 N.W.2d 367 (S.D. 1985). *See also* ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE 41-42 (1984).

116. As previously noted, "material" information is a rather esoteric concept that is defined somewhat differently under different views of causation. *See supra* note 107 and accompanying text. Under the patient need/objective view, disclosure is required of all information that a reasonable person (in the position which the physician knew or should have known to be that of the patient) would deem significant in making a decision. *See, e.g.*, Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972). The patient need/subjective standard requires disclosure of all information which the patient himself would deem significant in making a decision. *See e.g.*, Scott v. Bradford, 606 P.2d 554 (Okla. 1979).

117. 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

118. *Id.* at 786-87. *See supra* notes 112-15 and accompanying text.

> gate the decision on revelation to the physician alone. Respect for the patient's right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves.[119]

A significant aspect of the *Canterbury* decision is that the standard articulated relieves the patient of the burden of introducing expert testimony concerning the professional standard in the community.[120] Many jurisdictions now apply this standard.[121]

b. *Causation*

No matter which disclosure standard is employed, there must be some causal connection between the physician's failure to disclose and the injury suffered. Although almost all jurisdictions now recognize the concept of informed consent, there is a lack of consistency in both the standard to be applied in determining proper disclosure of information, and in the application of standards determining causality.

Essentially, there are two standards of causality: subjective and objective. Many jurisdictions adhere to the objective standard.[122] The objective theory inquires what a reasonable person in the plaintiff's position would have done if information about

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119. *Canterbury*, 464 F.2d at 783-84 (footnotes omitted). In *Canterbury*, the minor plaintiff consulted a neurosurgeon, Spence, for severe upper back pain. Diagnosis indicated a spinal defect and the defendant physician told the patient that surgery was necessary to correct the problem. The patient neither objected to nor questioned the recommended procedure. *Id.* at 777 The surgeon obtained consent from the patient's mother after she asked about the possible dangers and was told that the proposed surgery was no more dangerous than any other operation. While recovering from surgery, Canterbury fell and became paralyzed from the waist down. Canterbury then sued Spence on a theory of informed consent. The appellate court held that the failure to disclose a specific risk of paralysis raised a triable issue of fact as to the validity of the consent. *Id.* at 794.

120. "Experts are unnecessary to a showing of the materiality of a risk to a patient's decision on treatment, or to the reasonably expectable effect of risk disclosure on the decision." *Canterbury*, 464 F.2d at 792; *see also* Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676, 688 (1972) (variability of physician-patient relationship eliminates need of showing what other doctors would have done with other patients).

121. *Cf.* Wheeldon v. Madison, 374 N.W.2d 367 (S.D. 1985) (noting trend rejecting professional standard, the court adopts patient need standard, but requires expert testimony to establish some elements of cause of action).

122. *See generally* Meisel, *The Expansion of Liability for Medical Accidents: From Negligence to Strict Liability by Way of Informed Consent*, 56 NEB. L. REV. 51, 109-11 (1977).

the risk had been disclosed.[123] If it can be demonstrated that a reasonable person would have consented to the treatment, the plaintiff cannot prevail.

The subjective theory is based on what the patient himself would have done if adequate information had been disclosed.[124] Under this theory, if an injured plaintiff assured the physician that he wanted the treatment regardless of the risk involved, or if the plaintiff himself chose not to receive the information, the plaintiff would have no cause of action due to a lack of causation.

c. *Injury*

The final element of an informed consent action requires proof that the plaintiff suffered an injury represented by actual damages. Even if the plaintiff can establish a duty to disclose, demonstrate that the doctor breached the duty, and show that the procedure employed actually caused an unwanted result, there can be no recovery without a showing of a loss subject to a monetary compensation. "The risk [of harm] must actually materialize and plaintiff must have been injured as a result of submitting to the treatment."[125] Therefore, despite the occurrence of an unwanted result, if there are no damages, the failure of the physician to disclose the risk is not actionable.[126] What this means is that when informed consent evolved as a negligence action, the elements of negligence (including the requirement of actual damages) applied. If the gravamen of the action were battery, then damages could be awarded for the nonconsensual touching, even if those damages were nominal.

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123. *See supra* note 116. *See, e.g.*, Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir.), *cert. denied*, 464 U.S. 983 (1983); *Canterbury*, 464 F.2d at 787; Nickell v. Gonzalez, 17 Ohio St. 3d 136, 477 N.E.2d 1145 (1985). Some jurisdictions have statutorily imposed standards. *See* Fain v. Smith, 479 So. 2d 1150 (Ala. 1985). The court in *Fain* interpreted the statute to "mean reasonable person with all the characteristics of the plaintiff, including his idiosyncracies and religious beliefs. . . ." *Id.* at 1155.

124. *See supra* note 116. *See, e.g.*, Smith v. Reisig, 686 P.2d 285 (Okla. 1984); Scott v. Bradford, 606 P.2d 554 (Okla. 1979).

125. *Scott*, 606 P.2d at 559.

126. *Id.*

4. *Exceptions to the Informed Consent Requirement*

Four major exceptions relieve the physician of the duty to obtain informed consent.[127] These exceptions are recognized as affirmative defenses to an informed consent action, and the physician bears the burden of proof.[128] In many jurisdictions the exceptions are statutorily prescribed.[129]

One of the clearly recognized exceptions is the emergency doctrine. A physician has implied consent to act where: (1) the patient is unconscious or otherwise without capacity to make a decision; *and* (2) no one legally authorized to act for the patient is available; *and* (3) delay in treatment would seriously jeopardize the patient; *and* (4) a reasonable person would consent under the circumstances.[130] A second recognized exception is the therapeutic privilege. Where the disclosure itself would be harmful to the best interests of the patient, a physician may withhold disclosure.[131] This privilege confers significant discretion on the physician in making a determination whether disclosure would be harmful. Third, a defense is recognized where the risk is known or reasonably should have been known by the patient.[132] Similarly, where the risk is common to all operations and is a risk of which average persons would already be aware, the exception applies.[133]

It is possible also for a patient to waive the right to give an informed consent. A patient can waive that right prior to treatment by affirmatively indicating that he does not want to be informed. He can waive that right subsequently by indicating that

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127. For an extensive discussion of these exceptions, see Meisel, *The Exceptions to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking*, 1979 WIS. L. REV. 413.

128. *See Scott*, 606 P.2d at 558.

129. *See* T. LEBLANG, INFORMED CONSENT A SEPARATE CAUSE OF ACTION 14-20 (1983). (comprehensive list of statutorily enacted defenses by jurisdiction).

130. *See* Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914); *see also* Keogan v. Holy Family Hosp., 95 Wash. 2d 306, 622 P.2d 1246 (1980); *see generally* KEETON, *supra* note 2, § 18, at 117.

131. *See* Patrick v. Sedwick, 391 P.2d 453 (Ala. 1964); Di Filippo v. Preston, 53 Del. 539, 173 A.2d 333 (1961); *See generally* Smith, *Therapeutic Privilege to Withhold Specific Diagnosis from Patient Sick with Serious or Fatal Illness*, 19 TENN. L. REV. 349 (1946).

132. *See, e.g., Scott*, 606 P.2d at 558.

133. Canterbury v. Spence, 464 F.2d 772, 788 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

he would have undergone the treatment regardless of the risk involved.[134]

C. *Legal Malpractice*

1. *Background*

Historically, the development of legal malpractice traced a different path than did the development of other types of professional liability.[135] Unlike physicians and other professionals who were held to the standard of care required of those engaged in a "public" or "common" calling, lawyers historically insulated themselves from liability: "Perhaps the most influential factor in shaping the development of legal malpractice case law is that it has always been, and will continue to be, written by lawyers."[136]

This insularity was accomplished by various means — from calling legal fees "honorariums" or "gratuities" so that clients could claim no "contract" upon which to sue,[137] to imposition of liability only upon a finding of gross negligence[138] or breach of fiduciary duty.[139] Moreover, this self-imposed protectionism generated general distrust toward the profession as a whole.[140]

Even today, the legislatures and the courts, dominated by the legal profession, continue to shield lawyers from liability by failing to recognize fundamental litigation concepts in legal malpractice actions. For example, only lawyers have had the temerity to develop an extensive code of professional conduct that clearly defines and delineates prohibited and unethical conduct, and then preface that code with the caveat that: "violation of a

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134. *See* Putensen v. Clay Adams, Inc., 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319 (1970).

135. *See supra* notes 82-98 and accompanying text.

136. MALLEN, *supra* note 2, § 1.2.

137. *See generally id.* § 3, at 11; Weiland, *Another Early Chapter: Attorney Malpractice and the Trial Within a Trial: Time for a Change*, 19 J. MARSHALL L. REV. 275, 276 n.2 (1986) [hereinafter Weiland].

138. MALLEN, *supra* note 2, § 1.5, at 16.

139. *Id.*

140. *Id.* § 1.2.

> If a dishonest attorney should think fit to betray his clients, sell them to their adversaries, do anything in their cause that is contrary to their interest, pray what remedy have they? Why, to employ another attorney to call them to account who will do the very same, ad infinitum.

Id. (citation omitted).

Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached . . . . [The Rules] are not designed to be a basis for legal liability."[141] This position infers an attempt not only to prohibit conduct that the profession views as improper, but also to prevent outsiders from using lawyers' own standards against them to create civil liability. If the legal profession prohibits specific conduct because it is unethical, and lawyers are required to adhere to such standards, clients victimized by the violation of such regulations should have a right to compensation. When an attorney violates a rule of conduct, it is small solace to the client who has suffered a real loss to know that the attorney will have his wrist slapped. Internal regulations are effective to the degree that they discipline the lawyer who has acted wrongfully, but disciplining the lawyer does not compensate the injured client. Thus, it is up to the judiciary or legislature, with or without the profession's support, to permit the use of the profession's own standards to determine the duty the lawyer owes to a client.

Lawyers are expected to account for their conduct in a manner like all other professionals.[142] Although legal malpractice is often thought of as attorney negligence, in reality, it is not limited to liability for negligent conduct. Rather, attorneys can be held professionally liable for breach of contract[143] and breach of fiduciary obligations as well.[144] Legal malpractice actions[145] are

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141. *See* MODEL RULES, *supra* note 9, Scope. A similar provision appears in the Code of Professional Responsibility. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1981) [hereinafter MODEL CODE]. The Model Code is also referred to as the 1969 Code based on its initial date of adoption by the ABA House of Delegates. *See, e.g.*, Zanders v. Jones, 680 F. Supp. 1236 (N.D. Ill. 1988); Brown v. Larkin & Shea, P.A., 522 So. 2d 500 (Fla. Dist. Ct. App. 1988).

142. *See supra* notes 10-11 and accompanying text. There is general agreement that attorneys should be held to the same standards of care as other professionals. KEETON, *supra* note 2, § 32, at 185-86; MALLEN, *supra* note 2, § 1.1, at 4.

143. Breach of contract can be implied or express. An express contract is created when the attorney promises to achieve specific results or perform a specific service. *See, e.g.*, Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 181, 491 P.2d 421, 423, 98 Cal. Rptr. 837, 839 (1971). More frequently, there is an implied contract. In every lawyer-client relationship, the lawyer impliedly contracts to use the degree of ordinary skill and knowledge of a professional. Breach of this duty gives rise to liability. *Id.*

144. Just as a physician has a fiduciary obligation to his patients, an attorney has a fiduciary duty to his clients. When he reveals client confidences or represents conflicting interests, liability for breach of fiduciary duty may be incurred. Breach of a fiduciary obligation is often considered legal malpractice since it encompasses a breach of the law-

most frequently based on negligence,[146] breach of contract[147] or fraud.[148] But where the essential tort is negligence, the plaintiff must prove duty, breach, proximate cause, and injury.[149]

2. *Elements of Legal Malpractice*

An attorney must act with the level of skill and competence commonly possessed by members of his profession in good standing.[150] Thus, an attorney can be held liable for failure to use that degree of ordinary skill and knowledge expected of any professional,[151] provided, of course, that the plaintiff can establish that the attorney's breach caused his loss.[152] This is far more difficult than it appears at first glance, particularly in the litigation context. To establish proximate cause in a legal malpractice action, the plaintiff must, in effect, prove *two* meritorious claims. This is generally known as the "trial within a trial" requirement.[153] Not only must the plaintiff prove that the attorney had a duty, that the attorney breached that duty, and that the plain-

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yer's duty to the client. *See* MALLEN, *supra* note 2, § 11.1. This is the one area of legal malpractice where courts have required something analogous to an "informed consent." *See infra* notes 161-68 and accompanying text.

145. Although traditional privity requirements no longer always have to be satisfied to impose liability for professional malpractice, the very nature of the informed consent theory limits its application to those to whom the professional has a direct, specific, defined duty of care. *See, e.g.*, Vereins Und Westbank, AG v. Carter, 691 F. Supp. 704, 710-13 (S.D.N.Y. 1988). Thus, this Article is limited in scope to a discussion of the applicability of the informed consent theory in the context of the attorney-client relationship.

146. Behnke v. Rodtke, 65 Wis. 2d 403, 222 N.W.2d 686, 689 (1974) (attorney's negligence "caused" damage to his client).

147. Carroll v. Rountree, 34 N.C. App. 167, 237 S.E.2d 566, 570 (1977), *cert. denied*, 295 N.C. 549, 248 S.E.2d 725 (1978) (attorney was subject to contract liability for settling a domestic relations matter without client's authority after the attorney had expressly promised not to do so without first obtaining his client's consent).

148. MALLEN, *supra* note 2, § 8.1.

149. *See* KEETON, *supra* note 2, § 30, at 164-65.

150. *See supra* note 8 and accompanying text.

151. *See* KEETON, *supra* note 2, § 30, at 164-65. *See also* RESTATEMENT (SECOND) OF TORTS § 299A (1984); Curran, *Professional Negligence — Some General Comments*, 12 VAND. L. REV. 535, 545 (1959). There is, however, some debate as to whether a lawyer's conduct should be judged by the standard prevailing in his community, a similar community or nationally. This issue has not received as much attention in legal malpractice cases as it has in the medical malpractice area. But the trend is to judge lawyers according to a national standard. *Id.* at 536.

152. *See supra* notes 18, 106 and accompanying text.

153. *See* Weiland, *supra* note 137, at 278.

tiff suffered a loss, but he also must establish proximate cause. The plaintiff must show that "but for" the attorney's breach, he would have been successful in the underlying case on the merits. This is a difficult burden to say the least.

One commentator suggests that the " 'trial within a trial' requirement is a prime example of the failure of [the legal] profession to police itself."[154] More precisely, it appears to be an example of the legal profession setting standards to "police" itself, standards that are so incredibly difficult to attain that it in effect insulates itself from liability.[155]

As in any other tort-based action, attorneys sued for legal malpractice may interpose a number of defenses,[156] including statutes of limitations,[157] contributory negligence,[158] assumption

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154. *Id.*

155. For an excellent discussion of the "trial within a trial" requirement and proposed solutions to the double burden it imposes on plaintiffs, see generally *id.* But the "trial within a trial" requirement may not be applicable in an informed consent action. *See infra* notes 318 and accompanying text.

156. *See generally* MALLEN, *supra* note 2, §§ 17.1-17.18.

157. An extensive discussion of the various statutes of limitations applied in legal malpractice actions is beyond the scope of this Article. States have various statutes that might apply to a legal malpractice action depending on the theory of the case, for example, fraud, misrepresentation, contract, personal injury, property damage, implied contract or malpractice. Moreover, the commencement and accrual rules vary by jurisdiction. Some jurisdictions apply the Occurrence Rule, where the statute commences to run upon the occurrence of the critical facts constituting the cause of action. Under this rule, it is irrelevant when or if the client discovers the critical facts. *See* MALLEN, *supra* note 2, § 18.10. Other jurisdictions apply the Damage Rule. Under this approach, the statute is tolled until the client sustains actual injury. *Id.* § 18.11. Still other jurisdictions apply the Continuous Representation Rule. Under this Rule, the cause of action does not accrue until the attorney's representation for the matter at issue has terminated. *Id.* § 18.12. In addition, nearly all jurisdictions apply some form of the Concealment Rule, which tolls the statute until the client discovers or should have discovered concealed facts. But differences exist between jurisdictions on what constitutes concealment. *Id.* § 18.13. Lastly, some jurisdictions have begun applying the Discovery Rule, that is, the statute of limitations does not begin to run until the client knows or should have known the critical facts constituting the cause of action. *Id.* § 18.14. For a more extensive discussion of the applicable statutes of limitations and related issues, see generally *id.* §§ 18.1-18.21.

158. *See generally id.* § 17.2. Contributory negligence in traditional legal malpractice actions falls within five general categories: (1) where the client fails to supervise, review or inquire about the issue which is the subject of the representation; (2) where the client fails to follow the attorney's instructions or advice; (3) where the client actively interferes with the lawyer's representation or where the client fails to complete specific responsibilities concerning the claim; (4) *where the client fails to provide essential information to the lawyer*; and (5) where the client fails to mitigate the effects of the

of risk,[159] and waiver, abandonment, and ratification.[160] These defenses frequently create a legal minefield for the unwary plaintiff and shield the lawyer from liability. As in the medical area, the difficulties of proof and availability of these defenses have not prevented a dramatic increase in malpractice suits.

3. *Informed Consent*

Generally, the doctrine of informed consent has not been carried over from medical to legal malpractice. Since lawyers themselves are primarily responsible for the development of the law of legal malpractice, it is not surprising that liability concepts in this area have developed agonizingly slowly, have imposed almost insurmountable burdens on plaintiffs,[161] and have lagged far behind developing liability concepts in other areas of professional malpractice.[162]

Indeed, it is clear that the development of legal malpractice concepts has lagged far behind those of medical malpractice.[163] Although both consent[164] and disclosure[165] are important issues in attorney-client relationships, there are few instances where

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attorney's negligence. *Id.* A question arises as to whether the lawyer can defend because the client failed to provide specific information about a claim or because the client failed to review or inquire about certain issues. What about the reverse: should the client be able to sue when the lawyer neglects to provide that very same information?

159. *See generally* MALLEN, *supra* note 2, § 17.11. This defense is particularly appropriate in informed consent actions. *See infra* note 319 and accompanying text.

160. *See generally* MALLEN, *supra* note 2, § 17.11. This defense is also particularly applicable to informed consent actions. *See supra* note 134 and *infra* notes 320-23 and accompanying text.

161. *See, e.g., supra* notes 99-105.

162. *See* KEETON, *supra* note 2, § 32.

163. The doctrine of informed consent has been recognized in the context of medical malpractice for more than 30 years. *See* Salgo v. Leland Stanford Junior Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957) (case recognizing duty of informed consent).

164. For example, an attorney must have consent: to settle a case, *e.g.*, Jones v. Schreiber, 70 A.D.2d 791, 415 N.Y.S.2d 916 (1979); to waive a jury trial, *e.g.*, Blanton v. Womancare Clinic, 38 Cal. 3d 396, 696 P.2d 645, 212 Cal. Rptr. 151 (1985); to decide what plea to enter, *e.g.*, McAleney v. United States, 539 F.2d 282 (1st Cir. 1976).

165. Disclosure is required, for example, where there are conflicting interests, *e.g.*, Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (1984), or where a settlement offer is made, *e.g.*, Joos v. Auto-Owners Ins. Co., 94 Mich. App. 419, 288 N.W.2d 443 (1979), *aff'd sub. nom.* Joos v. Drillock, 127 Mich. App. 98, 338 N.W.2d 736 (1983).

the courts have read those two requirements in conjunction with each other and imposed liability on a theory of informed consent.[166] One exception to the non-application of informed consent is in the area of fiduciary obligations. Courts have consistently required that where a conflict of interest exists, the attorney must fully inform the client and obtain from the client an intelligent consent.[167] One court has applied a true "informed consent" rule in the context of disciplinary proceedings regarding fiduciary responsibilities.[168] Generally, however, courts narrowly construe the client's right to make an informed choice. But lawyers' own professional standards of the legal profession are more than sufficient to support such a right.

D. *Professional Obligations*

Under a tort theory, the plaintiff can establish a duty on the part of the defendant by showing the violation of a statute by the defendant. Since the legislature is presumed to promulgate laws which are known and obeyed by reasonable men and women, the violation of a statute which establishes a standard of conduct can provide a basis for civil liability.[169] This negligence per se approach may permit recovery in cases where breach of a common law duty may be otherwise hard to prove.[170] Different jurisdictions have developed varying interpretations of the weight to be given to statutory violations as well as the types of statutes that can be used.[171]

Considerable controversy has surrounded the question of whether and when the violation of an ethical rule by an attorney can provide a basis for liability in a legal malpractice action. Un-

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166. *See generally* MALLEN, *supra* note 2, § 11.17, at 677.

167. *Id.*

168. *See* Figueroa-Olmo v. Westinghouse Elec. Corp., 616 F. Supp. 1445, 1451 (D.P.R. 1985).

169. *See* RESTATEMENT (SECOND) OF TORTS § 874A (1984). *See also* KEETON, *supra* note 2, § 36, at 220. In such a case, the defendant may become liable on the mere basis of his violation of the statute. No excuse is recognized and neither reasonable ignorance nor all proper care will avoid liability. Such a statute falls properly under the heading of strict liability, rather than any basis of negligence.

170. *See* Keeton, *supra* note 2, § 36, at 229.

171. Bauer v. H.H. Hall Constr. Co., 140 Ill. App. 3d 1025, 489 N.E.2d 31 (1986); Zimmer v. Chemung Co. of Performing Arts, 65 N.Y.2d 513, 482 N.E.2d 898, 493 N.Y.S.2d 102 (1985); Bauman v. Crawford, 104 Wash. 2d 241, 704 P.2d 1181, (1985).

til recently, most jurisdictions held that an ethical violation was insufficient to establish negligence per se, or even raise a presumption of negligence.[172] At best, the plaintiff could use proof of a violation to show evidence of negligence.[173]

Whether a violation of the disciplinary code is treated as evidence or as a presumption of negligence in malpractice actions against lawyers,[174] it is clear that it can be introduced for the purpose of establishing a standard of care.[175] Since the state's rules for professional conduct have been promulgated by legal authority, and represent an attempt to affix a standard of conduct for lawyers,[176] it follows that a lawyer who violates the code thereby causing injury to a client may be sued by the client on the basis of that violation.[177] Traditionally, courts have acknowledged that the violation of a custom or common practice in a trade or industry gives rise to a presumption of negligence. In the context of legal informed consent, the rules dealing with the attorney's duty to provide information to clients and the client's rights to make informed choices establish a standard of

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172. ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 301:128 (1984) [hereinafter LAWYER'S MANUAL]. The ABA's Model Code of Professional Responsibility specifically disclaims any intention to establish a duty of care owed to clients and others who may rely on an attorney's professional services. "The disciplinary rules governing the bar are intended for the protection of the bench and other attorneys, as well as the public. A breach of a disciplinary rule or other rule of court that is not directly intended for the benefit of the public doesn't necessarily amount to breach of a duty owed to a client." *Id.*

173. Lipton v. Boesky, 110 Mich. App. 589, 313 N.W.2d 163 (1981). The court held that violation of the Code of Professional Responsibility, "as with statutes, . . . is rebuttable evidence of malpractice." *Id.* at 598, 313 N.W.2d at 167.

174. KEETON, *supra* note 2, § 36, at 227-31.

175. *Id.*

176. *Id.*

177. LAWYER'S MANUAL, *supra* note 172, § 301:128. The authors are reluctant to suggest that courts employ a negligence per se approach in legal informed consent cases since the disciplinary code may be considered a court rule rather than a statute. In most states the code is promulgated by the court of highest authority in the jurisdiction. Arguably, court rules should have the force of statutes, although strictly speaking they are not statutes. The custom of an industry may also give rise to a presumption of negligence. So to the extent that lawyer's conduct involving communications with clients is customary, it may create a presumption of negligence. Even if courts are unwilling to go so far as to recognize a presumption in these cases, violation of a disciplinary rule should at least be admissible as evidence of negligence. *See* Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980).

practice upon which to base an informed consent action.[178] The question of allocation of authority between attorney and client has been addressed under various formulations of the ethical rules. The 1908 Canons of Professional Ethics did not spell out a clear rule for dividing authority between lawyer and client, but several canons allude to the issue.[179] The 1969 Model Code also addressed this problem,[180] ostensibly solving it with a means-objectives test that stated that the lawyer controlled the means and the client controlled the objectives in the representation.[181] In practice, however, the rule created a false dichotomy, giving little guidance to either the practitioner or client. What is an objective of the litigation? A means? At what point does a means become an objective? Who should decide? Are some mat-

178. *In re* Masters, 91 Ill. 2d 413, 438 N.E.2d 187 (1982).

179. ABA CANONS OF PROFESSIONAL ETHICS (1908).

180. MODEL CODE, *supra* note 141, DR 7-101.

181. *Id.* EC 7-7, 7-8.

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

Id. EC 7.7

> A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possiblility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

Id. E.C. 7.8.

ters means in some circumstances and objectives in others?[182]

Even more troubling was the question of how much information lawyers must provide their clients in order for the clients to make decisions concerning the representation. Assuming that the client has the right to make at least some of the decisions about his case, how much information is required to make the decision an informed one? The Canons and the Code did not address this problem directly.[183] Since there were no clear standards for lawyers to follow, the failure to inform provided no basis for an actionable duty.[184]

The new Model Rules[185] deal directly with the questions of client decisionmaking and information about the representation.[186] The Rules were adopted by the American Bar Association in 1983 after three years of study by a select commission and another three years of spirited debate.[187] Since then the Rules have been adopted with modifications in thirty jurisdictions, and are being actively considered in nine others.[188] Much

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182. *See* Spiegel, *supra* note 1, at 65-67.

183. *Id.* at 49.

184. *See* MALLEN, *supra* note 2, § 1.5. The absence of clear standards undoubtedly had a substantial impact on the attorney-client relationship despite the fact that many complaints against lawyers were related to inadequate communications, disciplinary boards were often powerless to impose sanction against lawyers based on a failure to communicate. In such an environment lawyers have no incentive to improve the quality of communications with their clients.

185. MODEL RULES, *supra* note 9. The Model Rules were developed in part because of concerns that the Model Code failed to provide answers to tough ethical issues faced by lawyers. The client control issue is a good example of such a failure, but it is not the only one.

186. *See, e.g.*, MODEL RULES, *supra* note 9, Rules 1.2, 11.6.

187. *See, e.g.*, ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES (1987) [hereinafter LEGISLATIVE HISTORY].

188. LAWYER'S MANUAL, *supra* note 172, § 1:3.

DATES OF ADOPTION OF MODEL RULES
(as amended)
(Alphabetical)

Arizona	2-01-85
Arkansas	1-01-86
Connecticut	10-01-86
Delaware	10-01-85
Florida	1-01-87
Idaho	11-01-86
Indiana	1-01-87

of the controversy surrounding the Rules deals with issues of confidentiality,[189] pro bono responsibility of lawyers,[190] and advertising.[191] But, the most far-reaching change in the way future lawyers practice may be related to those provisions of the Rules defining the attorney-client relationship and establishing the duty to provide information.[192]

Model Rule 1.2 provides that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."[193] The Rule specifically requires the lawyer to accept the client's decision to settle a case, and in a criminal case to enter a plea, testify, or waive a jury trial.[194] With respect to the representation of an accused criminal, the lawyer must

Kansas	3-01-88
Louisiana	1-01-87
Maryland	1-01-87
Michigan	10-01-88
Minnesota	9-01-85
Mississippi	7-01-87
Missouri	1-01-86
Montana	7-01-85
Nevada	3-28-86
New Hampshire	2-01-86
New Jersey	9-10-84
New Mexico	1-01-87
North Carolina	10-07-85
North Dakota	1-01-88
Oklahoma	7-01-88
Pennsylvania	4-01-88
South Dakota	7-01-88
Utah	1-01-88
Washington	9-01-85
West Virginia	1-01-89
Wisconsin	1-01-88
Wyoming	1-12-87

189. *See* Spiegel, *supra* note 1.

190. *See generally* ABA COMMITTEE ON PUBLIC INTEREST PRACTICE: IMPLEMENTING THE LAWYER'S PUBLIC INTEREST PRACTICE OBLIGATIONS (1977); Christensen, *The Lawyer's Pro Bono Public Responsibility*, AM. B. FOUND. RES. J. 1 (1981).

191. *See* Elliot, *Trolling for Clients Under the First Amendment: It's Hard to Keep a Good Solicitor Down*, 60 CONN. B.J. 214 (1986); Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speed and Anti-trust Doctrine*, 13 HASTINGS CONST. L.Q. 487 (1986).

192. *See* MODEL RULES, *supra* note 9, Rules 1.2, 1.4.

193. *Id.* Rule 1.2.

194. *Id.* Rule 1.2(a).

consult with the client concerning those matters about which the client has the right to decide.[195] Additionally, the lawyer may limit the objectives of the representation (if the client consents after consultation).[196] The Rule also forbids the lawyer from counseling a client or assisting in criminal or fraudulent conduct, and adds that when the lawyer knows that the client expects such assistance "the lawyer shall consult with the client concerning the relevant limitations on the lawyer's conduct."[197]

Model Rule 1.4 reinforces the requirement to provide information articulated in Rule 1.2. Rule 1.4 mandates that the lawyer must do three things: "keep a client reasonably informed about the status of a matter,"[198] "promptly comply with reasonable requests for information,"[199] and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions . . . ."[200] Since Rule 1.4 has no direct counterpart in the Code,[201] there is little historical guidance to help interpret the Rule. The Comments to Rule 1.4 make clear that it pertains to the matters covered in Rule 1.2(a),[202] and the two

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195. *Id.*

196. *Id.* at Rule 1.2(c).

197. *Id.* at Rules 1.2(d), (e).

198. *Id.* at Rule 1.4(a).

199. *Id.*

200. *Id.* at Rule 1.4(b).

201. *See* MODEL CODE, *supra* note 141, EC 7-8, EC 9-2.

202. *See, e.g.*, MODEL RULES, *supra* note 9, Rule 1.4.

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

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

COMMENT:

[1] The client should have sufficient information to particiate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Id. at rule 1.4.

Rules together establish an unequivocal duty to inform the client about fundamental aspects of the representation.

The term "consult" which appears so prominently in Rule 1.2 is similar to the informational provisions of Rule 1.4.[203] Consult is defined in the Preamble of the Model Rules as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." The framers of the Model Rules chose the word "consult" over "disclose" which is used throughout the Model Code. The definition of consultation incorporates the concepts of participatory communication and comprehension, while disclose suggests a more one-directional statement of information that does not connote understanding.[204] The choice of the term consultation seems to place a greater burden on the lawyer to provide adequate information for the client to make informed decisions.[205]

In addition to the provisions of Rule 1.2, the Rules require informed consent in a number of situations. The client must consent after consultation before the lawyer may reveal information relating to the representation.[206] A lawyer may not represent a client if the client's interests are materially adverse to those of the lawyer,[207] or if the representation may be materially limited by other interests.[208] Nor may the lawyer enter into a business transaction with a client,[209] or use information about

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203. While Rule 1.4 talks about providing information to the client in situations where the client has the power to make or participate in decisions, the Preamble definition of "consult" seems to refer to two-way communication and is linked in the Rules to client consent to specific actions taken by the attorney. *See* MODEL RULES, *supra* note 9, *Terminology*.

204. Disclose is defined as: "1. to uncover; to lay open to view. 2. to reveal, to make known . . ." while consult is defined as "1. to seek the opinion or advice of another; to confer or converse *in order to plan or decide something*." and "2. to ask advice of; to seek the opinion of as a guide to one's own judgment . . ." Clearly these words are not synonyms. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED (1983) [emphasis added].

205. While the Rules consistently substitute consult for disclose, Model Rule 1.6 suggests that the change was not an accident. In fact, the earliest version of the proposed Model Rules used the term disclose. *See* LEGISLATIVE HISTORY, *supra* note 187, at 48-55.

206. MODEL RULES, *supra* note 9, Rule 1.6(a).

207. *Id.* at Rule 1.7(a).

208. *Id.* at Rule 1.7(b). Here, the rule specifies that in situations involving the representation of multiple clients "the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." *Id.*

209. *Id.* at Rule 1.8(a).

the representation to the disadvantage of the client.[210] The client must consent to the lawyer's acceptance of compensation for the representation from a third party.[211] The clients in a multiple representation must consent to an aggregate settlement of claims.[212] A lawyer may not (1) represent a client in a case in which the lawyer is related to the opposing attorney without the client's consent,[213] (2) represent someone against a former client in a substantially related matter,[214] (3) represent a private client against a government agency if the lawyer was formerly involved personally and substantially with the agency,[215] or (4) represent anyone in a matter in which the lawyer was involved in the case as a judge, law clerk, or arbitrator.[216] It is equally impermissible for a lawyer to act as an intermediary among clients without their consent.[217] A common thread in these situations is that they involve conflicts between the clients' interests and what the lawyer wants to do. When the lawyer wants to pursue a course of action that contravenes a client's interests, the Rules specify that the client controls the right to make an informed decision. In other situations, this is not the case.[218]

The notion of client consent is not new to the Rules. Most of the situations described above also required consent under the Code,[219] but since the Code used the expression "after full disclosure" rather than "after consultation," the requirement for informed consent as articulated in the Code is highly ambiguous.[220] The Rules adopt a client-centered approach to the lawyer-client relationship that gives the client greater power than

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210. *Id.* at Rule 1.8(b).

211. *Id.* at Rule 1.8(f).

212. *Id.* at Rule 1.8(g).

213. *Id.* at Rule 1.8(i).

214. *Id.* at Rule 1.9(a).

215. *Id.* at Rule 1.11(a).

216. *Id.* at Rule 1.12(a).

217. *Id.* at Rule 2.2(a). Rule 2.2(b) adds that "[w]hile acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client *can make adequately informed decisions*" *Id.* (emphasis added). Thus, in this instance at least, the Rules link the consultation language to the concept of informed consent.

218. *See, e.g., id.* at Rule 1.5(e)(2), which provides that "the client is advised of and does not object to . . ." a division of fees among lawyers.

219. *See, e.g.*, MODEL CODE, *supra* note 141, DR 4-101 (client confidences).

220. *Id.* DR 4-101(B)(3), (C)(1).

suggested by the Code.[221] Part of the change may be related to the drafting. The Rules are drafted with greater specificity and employ mandatory language to spell out the various communication requirements.[222] Thus, the increased clarity of the Rules makes it easier to establish a duty based upon the new informed consent language.

Whether disciplinary standards may be used to provide a basis for establishing attorney negligence is another matter. Traditionally, courts were reluctant to impose a duty upon lawyers that could provide a basis for civil liability on the theory that the disciplinary process was the best vehicle to deal with attorney misconduct.[223] This view, spelled out in the Preamble to the Rules,[224] has been subject to both criticism[225] and erosion.[226] However, if it is ambiguous or unclear whether the ethical rule delineates a standard of conduct, courts may be unwilling to adopt it as a standard.[227]

III. Informed Consent and Legal Malpractice

A. *Legal Background*

An informed consent cause of action in legal malpractice has been suggested by some commentators, but courts have been slow to respond to these calls to action.[228] Part of the reason is undoubtedly the inertia of precedent; since courts have not extended the cause of action based on failure to obtain informed consent available in medical malpractice to lawyers in the past,

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221. MODEL RULES, *supra* note 9, Rule 1.2(a). The client is to be considered the master of the objectives of representation.

222. *Id.* Rule 1.4 states: "(a) A lawyer *shall* keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer *shall* explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* (emphasis added).

223. *See supra* notes 172-78 and accompanying text.

224. MODEL RULES, *supra* note 9, *Scope*, §§ 5, 6.

225. MALLEN, *supra* note 2, § 1.9, at 31-33.

226. M. DAVIS & F. ELLISTON, ETHICS AND THE LEGAL PROFESSION 14 (1986).

227. *See, e.g.*, Tyree v. Hendrix, 480 So. 2d 1176 (Ala. 1985). In a legal malpractice action the court held that failure to inform defendant of enhancement statute which could double sentence imposed upon him could not support legal malpractice claim. *Id.* at 1177.

228. *See generally supra* note 1 and accompanying text.

they are unwilling to do so today.[229] Because medical informed consent has its roots in battery, the argument that legal informed consent cannot rely on that theory has superficial force. However, as informed consent has evolved in the medical area, reliance on battery theory has evaporated.[230] Presently, the action is based upon the patient's right to make decisions about his or her body and the doctor's duty to provide enough information to allow an informed choice.[231] The doctor's duty flows directly from the patient's right.

There is no concomitant right of lawyers' clients to control the flow of information that corresponds to patients' rights to control their bodies.[232] Creation of a broad-based right to sue based on an ill-defined right to autonomy is neither desirable nor practical in the legal setting. Taken to its logical limit, the client retains the right to make all decisions about the representation. In such an environment, whenever a client disagreed with the lawyer, the client could claim that consent to the lawyer's conduct was missing or invalid because of inadequate information. Such an environment would foster an adversarial atmosphere and impede open communication instead of improving attorney-client relationships.

Ultimately, the question is not whether client control of the representation is "good," but whether it is proper. The client controls certain decisions; the lawyer controls others; some require joint decisionmaking. The Model Rules attempt to delineate specific circumstances where the power to make decisions is

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229. *See* Martyn, *supra* note 1, at 321-40.

230. KEETON, *supra* note 2, § 32. *See also* Trogrun v. Fruchtman, 58 Wis. 2d 569, 207 N.W.2d 297 (1973). If treatment is completely unauthorized and performed without any consent at all, there has been a battery. However, if a physician obtains a patient's consent but has breached his duty to inform, the patient has a cause of action sounding in negligence.

231. *See, e.g.*, Nickell v. Gonzalez, 17 Ohio St. 3d 136, 477 N.E.2d 1145 (1985) (physician required to disclose whatever information a reasonably prudent patient would deem material in deciding whether to undergo a medical procedure).

232. On one level, there is probably a different emotional response to losing the use of one's arm than losing one's house. Medical procedures produce irreversible results which impact fundamentally upon an individual's opportunities. Losses occasioned by a lawyer's advice may be just as disastrous, but the societal value placed upon such a loss is different. Just as deadly force may be used in self-defense, where it is not permitted in defense of property, legal injuries may not require the same degree of protection as physical injuries.

granted to attorney, client, or both.[233]

The drafters of the Model Rules attempted to promulgate rules that would be internally consistent and supported by external legal doctrine enunciated in the case law and general agency principles. [234] While there is considerable case law establishing that agency principles govern the attorney's exercise of authority on behalf of the client,[235] the Model Code did not recognize any nexus between its provisions and those of agency law. By recognizing the applicability of an underlying body of legal doctrine, the Rules extend the duties of lawyer and client beyond the disciplinary process.

Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[236] An agency relationship does not require a contract, only an agreement.[237] When an individual agrees to be represented by the lawyer, an agency arises. The client is the principal, the person who has authorized the lawyer to act on his behalf and under his control. The lawyer is the agent, who is authorized to act on behalf of the client.[238] The agent's authority may be implied or inferred from the principal's statements and conduct, as well as from the facts of the situation itself.[239] "If [the agent] is a professional, he represents that he has the knowledge which is standard for the profession in

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233. *See infra* notes 248-53 and accompanying text.

234. G. HAZARD, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 10 (1985); Spiegel, *supra* note 1; Peck, *supra* note 1.

235. Brinkley v. Farmers Elevator Mut. Ins. Co., 485 F.2d 1283, 1286 (10th Cir. 1973).

236. RESTATEMENT (SECOND) OF AGENCY § 1(1)(1958).

237. *Id.*

238. *Id.* at § 385(1). This section states in part that "an agent is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform." *Id.*

239. *Id.* at § 385(1) comment a. This comment states in part:

> [A] contract of agency is interpreted as including a promise by the agent to act with reference to the subject matter of the agency in accordance with the reasonable directions of the principal. . . . [I]n the absence of a special agreement . . . an attorney is in complete charge of the minutiae of court proceedings and can properly withdraw from the case, subject to control by the court, if he is not permitted to act as he thinks best.

Id.

which he is employed . . . ."[240] The agent is a fiduciary, "having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking."[241] The principal, on the other hand, "has the right to control the conduct of the agent with respect to matters entrusted to him."[242] All these rules define the attorney-client relationship and support the allocation of power established in Rule 1.2.

Rule 1.4 is consistent with the agent's duty to provide information:

> "Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have communicated without violating a superior duty to a third person."[243]

"The duty is inferred, just as an authority may be inferred. The extent of the duty depends on the kind of work entrusted to him, his previous relations with the principal, and all the facts of the situation."[244]

Since the Model Rules are supported by principles of general law, the lawyer's duty to inform should not be different in the disciplinary setting than in the professional liability setting. Not only can the body of disciplinary cases and ethics opinions provide insights as to the proper interpretation of the rule, but the presence of the rule in code form, promulgated by the highest court in the jurisdiction, permits the trial court in a civil case to look to the disciplinary standard in establishing the professional standard in a professional liability case.[245]

If agency principles are recognized as applicable to professional liability situations generally, some of the distinctions between medical informed consent and the legal counterpart evaporate. If the mutual responsibilities in the professional

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240. *Id.* at § 10 comment c.

241. *Id.* at § 13 comment a.

242. *Id.* at § 14.

243. *Id.* at § 381. The comment indicates that the duty to inform may exist even if the principal has not specifically instructed the agent to do so, "if he has notice of facts which, in view of his relations with the principal, he should know may affect the desires of the principal as to his own conduct. . . ." *Id.* at § 381 comment a.

244. *Id.*

245. *In re* Masters, 91 Ill. 2d 413, 438 N.E.2d. 187 (1982).

relationship are defined in agency terms, it may be easier to achieve a unified theory of professional liability.[246]

Instead of focusing on historical anomalies such as the fact that medical informed consent grew out of battery, it is easier and more logical to recognize that both the doctor and the lawyer have a common law duty to provide information and to obtain informed consent in the exercise of their responsibilities as agents for their clients or patients.[247]

Viewed in agency terms, the lawyer's duty to inform the client is inherent in the lawyer-client relationship. The client, as principal in the relationship, may direct the lawyer's actions with respect to those matters for which the client asked the lawyer to act on his or her behalf. However, if such a right is to have meaning, the lawyer also must have a duty to provide adequate information to allow the client to make informed decisions. On the other hand, the client/principal does not have unlimited control of the situation. The underlying basis for agency law is the precept that the agent is entrusted or given power to act on behalf of and to bind the principal. By creating the agency, the client cedes certain power to the agent to act on his or her behalf.

The Model Rules of Professional Conduct attempt to spell out the delineation of power in this agency relationship in considerable detail.[248] It is clear that the drafters of the Rules did not choose to break from established agency principles and give the client control over all aspects of the representation. They established specific situations in which the client controls the attorney's conduct, and reserved for the attorney the power to exercise professional judgment in carrying out the responsibilities

246. Although this is not the topic of this Article, such an approach would seem to make more sense than treating doctors, lawyers, accountants, brokers and other professionals differently in similar circumstances. While differences in the types of services performed, the nature of the professional relationship itself, and the applicable codes of conduct may produce different results, there may be situations where common rules are appropriate. One of these seems to be the duty to inform; the agent must provide enough information to permit the principal to make decisions about matters over which the principal has control.

247. The other side of the coin is that the doctor-patient relationship is an agency, also.

248. *See generally* MODEL RULES, *supra* note 9, Rules 1.2, 1.4, 1.6, 1.8.

entrusted to him.[249]

The Rules correctly recognize that both attorney and client have a role in decisionmaking, and that sometimes these roles overlap. Sometimes decisions must be joint ones; sometimes there is conflict as to who should decide. The nexus between attorney and client in these situations is information; hence, the attorney's duty to provide information is crucial to this dynamic process.

It is not the purpose of this Article to suggest ultimate answers to these questions. Rather, the authors suggest that the Model Rules provide a flexible formula for allocating the decisionmaking power. They establish the basic concept of client control of the objectives of the representation. They specify certain situations where decisionmaking is reserved for the client.[250] They provide that the attorney has the right to exercise independent professional judgment about the means by which clients' objectives should be pursued.[251] They require at every stage of the representation that the lawyer keep the client informed about the case.[252] They presume that when the lines of communication are open, lawyers and clients will be able to resolve issues involving the allocation of power, and through interpretation of the Rules over time, aspects of this allocation will be clarified and evolve.[253]

If the Rules were drafted so as to establish standards of conduct, why did the drafters include in the preamble the statement that they should not be used to establish civil liability? The most obvious answer is that lawyers were interested in protecting themselves, and, recognizing the potential for application of the Rules in civil suits, attempted to insulate themselves from liability. Earlier drafts of the Rules provided that violation of the Rules "should not necessarily result in civil liability,"[254] rec-

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249. *See infra* notes 263-303 and accompanying text.

250. *See, e.g.*, MODEL RULES, *supra* note 9. Rule 1.2 requires a lawyer to "abide by a client's decision concerning the objectives of representation . . . ." *Id.* at Rule 1.2.

251. ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 25 (1984).

252. MODEL RULES, *supra* note 9, Rule 1.4. *See also* MALLEN, *Recognizing and Defining Legal Malpractice*, 30 S.C.L. REV. 203, 209 (1979).

253. *See generally* Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, AM. B. FOUND. RES. J. 1003 (1980).

254. *See* MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft)(1980).

ognizing implicitly that in some cases violation of the Rules may do just that. Under both the Code and the Rules, cases increasingly recognize that where the ethical rules establish a standard of conduct, violation of the rules may point in the direction of negligence.[255] Courts are not likely to be persuaded to abandon such codes despite the self-serving protestations of the lawyers themselves.[256]

A more charitable interpretation of the Preamble language would suggest that the drafters were attempting to avoid letting the Rules become mere weapons in the courtroom battle.[257] In any event, whether the Model Rules represent a self-serving attempt to insulate lawyers from malpractice liability, or constitute a public spirited gesture, a unilateral pronouncement in the Preamble of the document is not likely to deter either plaintiffs or the courts from adopting an otherwise appropriate standard.[258]

If courts are willing to utilize the Model Rules to establish an informed consent standard in legal malpractice cases, the Rules themselves define the limits of the lawyer's duty.[259] Looking at specific Rules, there are three broad areas where the duty to inform comes into play: in litigation,[260] in situations where the lawyer is not acting as an advocate,[261] and in cases involving client objectives.[262]

Under the Rules, a lawyer acting as an advocate must provide information to his client in situations where the right to make decisions is reserved to the client.[263] Although it could be argued that the lawyer should keep the client informed about all matters relating to the representation, it does not follow that a lawyer who does not do so should be subject to civil liability in all situations. By limiting application of the duty to inform to those matters articulated in the Rules, the limits of a new theory

255. *See supra* notes 172-77 and accompanying text.
256. *Id.*
257. MODEL RULES, *supra* note 9, *Preamble.*
258. *Id.*
259. *See generally* Peck, *supra* note 1, at 1290-93; Spiegel, *supra* note 1, 71-72.
260. *See, e.g.*, MODEL RULES, *supra* note 9, at Rules 1.2, 1.7.
261. *See, e.g., id.* at Rules 1.8, 2.2, 2.3.
262. *See, e.g., id.* at Rule 1.2 (including comments).
263. *Id.*

of recovery in legal malpractice can be allowed to evolve. In addition, attorneys subject to the Rules are on notice as to their provisions, and cannot claim that they were unaware of a duty to inform where that duty is spelled out. In the absence of clear language, it is difficult to envision the duty giving rise to civil liability.

In the litigation setting, the Rules addressing civil and criminal responsibilities should be discussed separately. However, in each case, if the client has the right to make a particular decision, the lawyer has a concomitant duty to provide adequate information to permit the decision to be an informed one.

In civil litigation, the client has the right to decide whether to accept a settlement offer.[264] If the lawyer accepts an offer without authorization, or fails to communicate an offer to the client, the lawyer may be subject to liability.[265] In settlement situations, the client must demonstrate that the attorney acted unreasonably.[266] The right of the client to approve a settlement and to sue the lawyer for unauthorized settlement is already well established.[267] Such a right is consistent with a broader action based upon a theory of informed consent.[268] Stated simply, an informed consent action covers unauthorized settlement as well as other analogous situations in which the Rules require the lawyer to obtain the client's informed consent. Thus, recognition of an informed consent action is a logical step for courts that accept an action based on unauthorized settlement.

The other area in civil litigation where the client is given the right to decide under both the law and the Rules involves

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264. *Id.* at Rule 1.2. *See, e.g., in re* Montrey, 511 S.W.2d 805 (Mo. 1974) (attorney settled case for an amount in excess of authority).

265. *See* MODEL RULES, *supra* note 9, Rule 1.2. *See also In re* Stern, 81 N.J. 297, 406 A.2d 970 (1979) (attorney subject to disbarment for misrepresenting to client that suit was filed when it was not and for secretly accepting a settlement offer despite client's refusal). Silver v. State Bar, 13 Cal. 3d 134, 528 P.2d 1157, 117 Cal. Rptr. 821 (1974) (attorney dismissed client's appeal without his client's consent).

266. *See supra* note 194 and accompanying text.

267. MODEL RULES, *supra* note 9, Rule 1.2 (a). An attorney has a duty to disclose to the client all good faith settlement offers. *See, e.g., In re* Ratzel, 108 Wis. 2d 447, 449, 321 N.W.2d 543, 544 (1982); Joos v. Auto-Owners Ins. Co., 94 Mich. App. 419, 424, 288 N.W.2d 443, 445 (1979), *aff'd*, Joos v. Drillock, 127 Mich. App. 99, 338 N.W.2d 736 (1983).

268. *Joos*, 94 Mich. App. at 424, 288 N.W.2d at 445.

conflicts of interest.[269] The Rules identify several circumstances where the client must consent to the conflict or the attorney must withdraw from the representation.[270] As Part II of this Article demonstrates, the informational component of the term "consultation" is identical to that of Rule 1.4.[271] Thus, the lawyer has a duty to provide adequate information to the client in order to assure an informed consent to a potential conflict.

In the criminal area, the Rules[272] are quite specific: the client must decide what plea to enter,[273] whether to testify in his own defense,[274] and whether to waive a jury trial.[275] These rights enunciated in the Model Rules derive from the constitutional rights protecting individuals accused of crimes.[276] In these cases the lawyer must consult with the defendant concerning the implications of decisions involving these rights.[277] While the failure of the attorney to provide this information may give rise to a collateral attack on a subsequent conviction based on a theory of ineffective assistance of counsel,[278] a duty to obtain the client's informed consent would also permit a direct action against the attorney.[279] Although an overturned conviction might negate the civil suit by eliminating the damages in some cases,[280] in others there may be special damages resulting from the failure to in-

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269. *See, e.g.*, MODEL RULES, *supra* note 9, Rules 1.7, 1.8, 1.9, 1.10, 1.11.

270. *See, e.g., id.* at Rule 1.7(b) which states that a lawyer may not represent two clients with conflicting interests unless (1) the lawyer reasonably believes the representation of that client will not adversely affect the relationship with the other client; and (2) each client consents after consultation. *Id.*

271. *See supra* notes 204-05 and accompanying text.

272. MODEL RULES, *supra* note 9, Rule 1.2(a) states in part "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." *Id.*

273. *See, e.g.*, McAleney v. United States, 539 F.2d 282 (1st Cir. 1976) (court held that attorneys have a duty during plea bargaining to ensure that any information conveyed to clients is accurate and complete).

274. Wisconsin v. Albright, 96 Wis. 2d 122, 133, 291 N.W.2d 487, 492 (1980), *cert. denied*, 449 U.S. 957 (1980).

275. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275-76 (1942).

276. ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 24-25 (1984).

277. MODEL RULES, *supra* note 9, Rule 1.2(a).

278. *See, e.g.*, Faretta v. California, 422 U.S. 806, 812-36 (1975) (decision to waive counsel); *Adams*, 317 U.S. at 274-75 (decision to demand jury trial).

279. *See supra* notes 161-68 and accompanying text.

280. *See, e.g.*, State v. Ermert, 94 Wash. 2d 839, 621 P.2d 121 (1980).

form.[281] Thus, in a criminal case there may be a distinction between a failure to provide advice and actually offering bad advice.

Another set of circumstances where the Rules have established the right of the client to consent to representation arises in a non-advocate setting.[282] The Rules, unlike the Code, recognize that lawyers perform a number of different functions besides representing clients as advocates.[283] The lawyer's responsibility, however, does not evaporate if the representation does not involve the adversary process.

The most notable non-advocate role for the lawyer is that of mediator. Rule 2.2 states that "[a] lawyer may act as an intermediary between clients if: (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privilege, and obtains each client's consent to the common representation . . . ."[284] This provision recognizes the inherent problems involved in common representation,[285] and makes clear that the lawyer cannot assume such an intermediary role without the client's informed consent. The Rule goes on to provide that the lawyer must independently consider the client's need for information. The representation is only permissible if "the lawyer reasonably believes . . . that each client will be able to make adequately informed decisions . . . ."[286]

This Rule establishes an objective standard for determining whether the lawyer's judgment is appropriate, and a protection against those situations where the clients may not appreciate the dangers or may not be in a position to make a reasonably informed choice.[287] A lawyer who acts as an intermediary must continue to communicate with her clients while she performs that role; she must "consult with each client concerning the de-

281. *See* Olfe v. Gordon, 93 Wis. 2d 173, 182-85, 286 N.W.2d 573, 577-78 (1980).

282. *See, e.g.*, MODEL RULES, *supra* note 9, Rules 1.8, 2.2.

283. *See* LAWYER'S MANUAL, *supra* note 172, § 51:103.

284. MODEL RULES, *supra* note 9, Rule 2.2(a)(1).

285. There is a difference between a lawyer who acts as a mediator (Rule 2.2) and a lawyer who serves as an advocate for multiple parties (Rules 1.7, 1.8(g)), although both situations require client consent after consultation.

286. MODEL RULES, *supra* note 9, Rule 2.2(a)(2).

287. *Id.* at Rule 2.2.

cisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions."[288] Thus, the lawyer must do more than secure informed consent to the arrangement; she must continue to inform the clients about all matters involving the representation.

The comments to Rule 2.2 specify that "[p]aragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is an intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented."[289] When the lawyer represents the client as an advocate, the lawyer acts exclusively for the client. When a lawyer represents a single client, that client may cede greater decisionmaking power to the lawyer than when the lawyer represents more than one client in the same matter or when he acts as an intermediary. Since the client does not rely on the non-advocate lawyer as a personal representative, the client alone must make the decisions. In order for the client to do so in a meaningful way, the lawyer must provide adequate information. If the lawyer breaches this duty, the client may sue under a failure to inform theory.

Rule 2.3 discusses the lawyer's evaluation of a matter involving a client that will be used by a third party.[290] In this situation, also, the client must consent to the arrangement after consultation.[291] The duty does not extend as far in the evaluator situation as it does in the mediator one. In the latter circumstance, the duty goes only to the consent to the arrangement, largely because ongoing communication with the client is not as critical to the evaluation as the accurate assessment for the benefit of the third party.[292] Clearly, however, the attorney cannot undertake such an evaluation absent the informed consent of the client without risking liability.[293]

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288. *Id.* at Rule 2.2(b).

289. *Id.* at Rule 2.2, comment 9.

290. *See also* LAWYER'S MANUAL, *supra* note 172, § 71:701.

291. MODEL RULES, *supra* note 9, Rule 2.3.

292. *See, e.g.*, Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1080 (2d Cir. 1977), *cert. denied*, SEC v. Frank, 388 F.2d 486, 489 (2d Cir. 1968), 434 U.S. 1035 (1978); Gleason v. Title Guarantee Co., 300 F.2d 813, 814 (5th Cir. 1962).

293. In one sense, this duty is the same as the duty enunciated in Rule 1.6 stating that "[a] lawyer shall not reveal *information relating to the representation* of a client unless the client consents after consultation, except for disclosures that are impliedly

The last set of situations where the Model Rules establish a duty to inform falls under the rubric of client control over the objectives of the representation.[294] Any situation in the representation which constitutes an objective is subject to the client's decision, and implicates the duty to inform prescribed in Rule 1.4.[295] The problem with this statement of the Rule lies in the difficulty of distinguishing between objectives controlled by the client, and means, sometimes referred to as strategy and tactics, reserved to the lawyer. It is not the position of this Article that anything in the representation becomes an objective because the client says so, or that the means-objective dichotomy should be abandoned in favor of complete client control of decisions. Such a stance is supported by neither the case law[296] nor the Rules.[297] It is clear, however, that the present language provides little guidance in determining who should decide particular questions.

One solution to this dilemma is to create a materiality standard: a matter is an objective if a reasonable person of ordinary prudence would attach such weight to it that he would want to reserve the decision to himself.[298] A subjective standard would focus on the actual client's opinion as to whether or not a matter constitutes an "objective." Such a standard fails to protect the lawyer from the tyranny of clients who would cry foul under an informed consent theory whenever they disagreed with the lawyer's course of conduct.[299]

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authorized in order to carry out the representation." MODEL RULES, supra note 9, Rule 1.6 (emphasis added). The duty of the lawyer regarding information about the representation is the same in the advocate and evaluator situation. The scope of confidentiality is much broader under the Rules than under the Code, where DR 4-101(A) prohibits disclosure of confidences ("information protected by the attorney-client privilege") and secrets ("information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client"). MODEL CODE, *supra* note 140. Under the broader language of the Rules, it is conceivable that a client could sue the lawyer for disclosing any "information relating to the representation," despite consent, if the consent was not an informed one. MODEL RULES, *supra* note 9, Rule 1.6.

294. MODEL RULES, *supra* note 9, Rule 1.2.

295. *Id.*

296. *See, e.g.*, Gallegos v. Turner, 256 F. Supp. 670, 677-79 (D. Utah 1966), *aff'd*, 386 F.2d 440 (10th Cir. 1967).

297. *See generally* MODEL RULES, *supra* note 9, Rules 1.2, 2.2.

298. LAWYER'S MANUAL, *supra* note 172, §§ 31:301-10.

299. Frank v. Bloom, 634 F.2d 1245 (10th Cir. 1980).

> The fact . . . that the attorney in the heat of the trial disregards the direction

In his handbook on the Model Rules of Professional Conduct, Professor Hazard points out that:

> adequate communication is in fact one of the essential building blocks of the client-lawyer relationship. The relationship is at bottom a matter of simple agency: a client engages a lawyer to do a job. Of necessity, therefore, a lawyer must get his instructions from the client, report back on his progress, and seek guidance as new options become available.[300]

The fact that the client directs the fundamental agency does not mean that the lawyer does not have certain inherent and implied authority.[301] If the client has communicated to third parties the apparent authority of the attorney, the attorney can bind the client.[302] Further, matters falling within the scope of the lawyer's professional expertise should not be left to the client.[303] In matters of material importance to the client, however, the lawyer must provide adequate information to allow the client to make an informed decision.

In all the instances enumerated in this section, the Model Rules establish an explicit duty on the part of the lawyer to provide information sufficient to permit the client's informed consent. The fact that self-regulating lawyers disclaim any civil liability for breach of this duty[304] should not bar courts from adopting the Rules as a standard of conduct if the language of the Rules actually articulates such a standard, which it does. By limiting the applicability of the duty to inform to situations specifically designated in the Rules, the cause of action is both manageable and predictable. Finally, by recognizing a duty to inform, courts can bring the law of legal malpractice into harmony with professional liability law in other professions, such as medicine.

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of the client as to trial strategy or activity does not give the client a right of action against the attorney. . . . If the client had the last word on this, the client could be his or her own lawyer.

Id. at 1256-57.

300. G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK OF THE MODEL RULES OF PROFESSIONAL CONDUCT, 62 (1985).

301. LAWYER'S MANUAL, *supra* note 172, § 31:304.

302. Jones v. Nunley, 274 Or. 591, 595, 547 P.2d 616, 618 (1976).

303. LAWYER'S MANUAL, *supra* note 172, § 31:310.

304. *See supra* note 177 and accompanying text.

In an action based upon a lawyer's failure to provide information, the plaintiff must prove breach of the duty. If the duty itself is defined in terms of the lawyer's obligation to provide adequate information to allow the client to make an informed decision about the case, breach should be defined as a failure to disclose the facts necessary to make such a decision in such a way that the client understands the risks and advantages of the options available to him. The plaintiff may show that the attorney failed to disclose that which he should have disclosed, or that the disclosure was insufficient to allow the client to make a reasoned choice. Thus, the attorney may neglect to describe a relevant course of action, withhold information about courses not favored by the attorney, misrepresent the situation to the client, or communicate so imprecisely that the client fails to comprehend the substance of the communication.[305] In addition, the lawyer may fail to provide the disclosure in a manner timely enough to permit the client to act.[306] The key to understanding the requirements for breach of the duty may be found in the language of Rule 1.4 and the definition of consultation in the Model Rules.[307] The clear import of these provisions is that the specific requirements of disclosure may vary from case to case depending on the circumstances, but in every case the client must understand enough to make a reasonably informed decision.[308]

The other problem in proving breach is one that has plagued the medical cases involving informed consent: what standard of disclosure should be applied? While the subjective standard permits recovery in a greater number of cases and is arguably more consistent with the underlying theory of informed consent, many courts have applied an objective standard of disclosure. Such a standard asks what disclosures the reasonable patient similarly situated would need in order to make an informed decision.[309] It strikes a balance between the interests of

305. *See* MODEL RULES, *supra* note 9, Rule 1.4(b).

306. *Id.* at Rule 1.3.

307. *Id.* at *Terminology* [2] states: " 'Consult' or 'Consultation' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Id.*

308. *Id.* at Rule 1.4 comment 1.

309. Nickell v. Gonzalez, 17 Ohio St. 3d 136, 138, 477 N.E.2d 1145, 1148 (1985).

doctor and patient, and, for this reason, has gained increasing acceptance.[310]

In legal informed consent cases as well, an objective standard seems more practical, manageable, and consistent with the trend in the medical malpractice area.[311] The lawyer's client would have to show that the lawyer breached his duty by failing to provide that information which a reasonable client of ordinary prudence would require.

Causation has proved to be problematic in the medical informed consent cases also.[312] The issue is whether to apply an objective or subjective standard. The same question would arise in a legal informed consent case. In order for causation to exist, the doctor's failure to provide information must be a substantial factor in bringing about the patient's injury. A subjective standard would look to the patient's personal belief that the doctor failed to provide sufficient information. An objective standard would ask whether a reasonable patient of ordinary prudence would have consented to the doctor's conduct had the doctor disclosed the risk. In a medical case, the patient may be dissatisfied with the results of a surgical procedure.[313] Under a subjective standard, the patient's belief that the doctor failed to provide sufficient information as to the risks involved would be sufficient to support causation if the risk in question materialized. Under an objective standard, causation would be determined by a reasonable patient standard.

In legal informed consent the same issue exists: is an objective or subjective standard more appropriate? What happens if the client claims that his lawyer failed to inform him of the risk of losing at trial if a settlement offer is refused, and the case is in fact lost? Using a subjective standard for causation, the attorney is at the mercy of the client who claims that he did not understand the risk. Such a standard would give the losing client two bites at the apple: the original case, and the malpractice suit

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310. KEETON, *supra* note 2, § 32.

311. *Id.*

312. *See, e.g.*, East v. United States, 629 F. Supp. 682, 686 (E.D. Mo. 1986). Nothing in the record reflected that the plaintiff would have forgone his surgical implantation of a penile prosthesis had he been informed by the physician that circumcision was necessary. *Id.*

313. *Id.* at 685.

against the lawyer. An objective standard would consider whether the information received about the risk of loss at trial was sufficient to permit a reasonable client to make an informed decision to settle. This standard is the better rule because it balances the interests of lawyers and clients. Whether an objective or subjective standard is applied, there must be a causal nexus between the lawyer's breach of duty and the client's loss.[314]

Specifically, the lawyer should disclose the alternative and recommended courses of action, legal and non-legal risks of the alternative choices, the likelihood of success of each option, and the general value of the case.[315] The lawyer must present to the client an understandable description of the alternatives and the consequences of each choice.[316] While there can be no bright-line test of sufficiency for the information provided, the lawyer should always attempt to provide enough information to permit informed consent by a reasonable client.

The client must of course suffer some injury in order to recover. However, it has long been recognized that a choice of action is a property right and such a right has value.[317] Thus, the loss of a cause of action through the attorney's failure to obtain an informed consent before dismissing, settling, compromising, or terminating an action is a legally cognizable injury.

An informed consent action may also eliminate the burdensome "trial within a trial" requirement. What the client needs to show in an informed consent action is not that the underlying action would have been meritorious, but rather, that a particular undisclosed risk was present; that the client, or a reasonable person in the client's position, would have chosen a different course of action if he knew of the risk; and that the risk materialized, causing him injury.[318]

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314 . SCHNABEL, BECK & KEITEL, SOME ASPECTS AND ISSUES OF LEGAL MALPRACTICE, DEFENDING THE PROFESSIONAL 329-31 (1982).

315. *See* BINDER, *supra* note 5, at 135-53, 157-86. *See also* MODEL RULES, *supra* note 9, Rule 2.1.

316. *See* BINDER, *supra* note 5, at 135-53, 157-86. *See also* MODEL RULES, *supra* note 9, Rule 2.1.

317. MALLEN, *supra* note 2, § 16.1.

318. An example would be if an attorney knew or should have known that the highest appellate court was currently reconsidering a liability issue present in the client's case, but the attorney counseled the client not to settle the case without disclosing the high court's reconsideration of the issue. The high court then reverses, and the client's

Moreover, several defenses or exceptions are particularly adaptable to an informed consent action: assumption of risk, release, waiver, abandonment, and ratification. "The keystone of the [assumption of risk] defense is both a comprehension and willful assumption of the risk. . . . The defense may lie where the attorney adequately and competently explains to the client the risks of various strategic alternatives . . . then, the risk becomes the client's . . . ."[319] Thus, if an attorney has a duty of informed consent, and does not breach that duty, an attorney can defend a legal malpractice action by showing that the client was made aware of the risks and made an informed choice to proceed in a particular manner.

Further, a client could ratify[320] a decision made by the attorney in the absence of the client's informed consent if the lawyer made a belated full disclosure of the risks, advantages, and disadvantages of his decision, and the client ratified the attorney's actions.[321]

The authors also suggest that a client should be able to expressly waive the right to make an informed choice. If a client does not wish to be advised, consulted, and informed, but rather, affirmatively and intelligently chooses to permit his attorney to

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case is dismissed on summary judgment. Here, the client need only prove that a reasonable person in his position would have accepted the settlement offer if he had known of the risk.

319. MALLEN, *supra* note 2, § 17.3.

320. *See generally* MALLEN, *supra* note 2, § 17.11. Ratification must be based on full disclosure and knowledge of the consequences. *Id.*

> Then, again, it has been said, that the plaintiff afterwards ratified all the proceedings of the defendant, and expressed his satisfaction in the most unequivocal manner. If this were with a full knowledge of all the transactions, the ratification would have a most important bearing. But a ratification, made in ignorance of material facts, cannot give validity to the acts of an attorney in the conduct of a suit, or repel the imputation of fraud. To give any effect, therefore, to any expressions of this nature, the previous foundation must be laid, that there has been a full disclosure of facts on the part of the attorney, and that the ratification is the result of a judgment acting upon knowledge, and not upon a blind personal confidence in the general integrity of the agent.

Id. at n.4, quoting Williams v. Reed, 29 F. Cas. 1386, 1391 (C.C.D. Me. 1824) (No. 17733).

321. For example, if the lawyer filed a complaint in one of several possible forums without discussing the choice of forum with the client, but prior to the time the statute of limitations ran, or issue preclusion applied, the lawyer consulted with the client and the client knowingly approved the lawyer's choice, the client would be deemed to have ratified the lawyer's act, despite the lack of informed consent.

make decisions on his behalf, the client should be permitted to make that choice. Although prospective releases from malpractice liability are expressly prohibited by the Model Code and the Model Rules,[322] as a matter of fairness the lawyer should be permitted to include release language for issues concerning the duty to inform in an informed consent waiver agreement.[323] A client cannot be permitted to waive his right to informed consent and then sue a lawyer for depriving him of that right.

Lastly, the authors suggest that the duty to inform might be mitigated in certain circumstances, such as where time is of the essence and the attorney must make some decision immediately to protect the client.[324] Of course, the attorney would still be obligated to fully inform the client of his decision and of the risks, advantages, and disadvantages of that decision, as soon thereafter as possible. Although an emergency might justify an attorney acting without client consultation and consent, it can never justify an attorney's failure to subsequently advise the client of all the facts and circumstances and take whatever corrective measures are possible if the client does not ratify the attorney's decision.

B. *Policy Issues*

A recognition of an informed consent action in legal malpractice undoubtedly will engender substantial criticism from segments of the lawyer population satisfied with the status quo. As mentioned earlier in this Article, lawyers have resisted professional liability standards that are applied to other professions.[325] Despite erosion of some barriers, malpractice remains difficult to prove and fraught with pitfalls for the unwitting

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322. *See* MODEL CODE, *supra* note 141, DR 6-102(A); MODEL RULES, *supra* note 9, Rule 1.8(h).

323. The authors expressly distinguish here between a waiver and release which relieves the attorney of the *duty* to inform, and a prospective release of liability for failure to inform in the absence of a waiver, which should never be permitted in any case.

324. *See* Sockolof v. Eden Point N. Condominium Ass'n, Inc., 421 So. 2d 716, 728 (Fla. Dist. Ct. App. 1982) (lawyer was justified in settling client's case where client told lawyer "[d]o the best you can under the circumstances" and impending trial portended an extremely disadvantageous result that could only be avoided by an immediate settlement).

325. *See supra* notes 172-79 and accompanying text.

plaintiff.[326] Any effort to expand the limits of liability will face the same opposition that has managed to narrow the liability of attorneys over the years. In light of this new approach to informed consent outlined herein, however, these criticisms will not be upheld.

The first anticipated criticism against an expansion of informed consent is that recognition of the action will produce a floodgate of litigation. Aside from the fact that this red herring is thrown up at virtually every innovation in the law,[327] informed consent is unlikely to result in substantially more legal malpractice actions. Under the formulations of earlier commentators, giving the client control of all decisions in the representation,[328] such concerns may be more valid. If the client can sue over every difference of opinion with the attorney or over any item of information he failed to receive, there is at least a potential for abuse. Whether such abuse would be significant enough to be characterized as a flood, or whether other means could be developed to control the abuse, are questions that do not need to be answered under the informed consent theory. Since informed consent is already recognized in a number of areas,[329] extension of the action to other limited situations hardly constitutes open season on attorneys.

A related issue involves insurance rates and legal fees. The argument is that increasing the exposure of attorneys to new and expanded liability will lead inevitably to higher malpractice insurance rates. These increases may force some lawyers out of private practice and lead some lawyers to drop professional liability coverage in favor of self-insurance or refuse to handle cases they otherwise would handle. In many cases, increased insurance premiums would be passed along to clients in the form of higher fees, further limiting the availability of legal services to clients with substantial means. The response to this argument is that insurance premiums reflect the risks associated with the practice of law. Lawyers have a duty to protect their clients in

326. KEETON, *supra* note 2, § 32.

327. *See, e.g.*, Heaven v. Pender, 11 Q.B.D. 503, 509 (1883); Weitl v. Moes, 311 N.W.2d 259, 266 (Iowa 1981) (recognizing child's right to maintain wrongful death action for loss of parental companionship).

328. *See generally supra* note 2 and accompanying text.

329. *See supra* notes 161-68 and accompanying text.

case such a risk causes injury. Whether such costs should or would be passed along to clients really begs the question. If a professional has a duty to act in a particular way, then one of the costs of doing business is insurance against the breach of that duty. The incidence of informed consent actions is not likely to increase insurance premiums significantly any more than it will create a floodgate of litigation.

A final criticism of informed consent is that recognition of this cause of action will erode the fundamental attorney-client relationship. Opponents to informed consent may contend that by creating an action based upon inadequate communication, the duty to inform will impede open and candid dialogue between attorneys and clients. Attorneys will always be on their guard, unwilling to freely say anything that might some day return to haunt them, and they will resort to giving civil "Miranda warnings" for all their advice. Such a scenario is basically unrealistic, and similar arguments preceded passage of Model Rules 1.2 and 1.4.[330] The thrust of the rules and of the informed consent doctrine is to open the channels of communication.[331] By making it a duty to provide adequate information to clients, courts could foster confidence in the legal profession. A major criticism of lawyers is that they do not communicate,[332] and as a result many clients do not trust their lawyers.[333] The authors suggest that recognition of a duty to inform will foster rather than retard good attorney-client relationships.

IV. Conclusion

This Article has presented the basic case for creating a cause of action in legal malpractice law based on a theory of informed consent. Recognition of such an action would be consistent with the law as it applies to other professions, particularly medicine.

The ABA Model Rules of Professional Conduct[334] enumerate a professional responsibility to provide adequate information

330. MODEL RULES, *supra* note 9, Rules 1.2, 1.4.
331. *Id.*
332. *See* Peck, *supra* note 1, at 1307.
333. *Id.*
334. MODEL RULES, *supra* note 9.

enabling informed consent of clients in a number of distinct areas. These requirements can and should be recognized as establishing a civil duty to obtain the client's informed consent in those situations articulated by the Rules. Such a duty should be actionable in situations where a lawyer's breach causes injury. The standard for disclosure and for causation should be an objective one based upon the reasonable attorney and reasonable client.

Whether the informed consent action should be extended to other situations in the future is beyond the scope of this Article. The limits of the action can evolve over time as courts evaluate the developing standard using the experience of actual cases. The duty to inform is unlikely at any time in the future to become a pervasive responsibility subject to civil liability whenever the client does not get his way. While greater client control of litigation and enhanced requirements that attorneys provide enough information to permit informed decisionmaking are laudable goals and important principles, they fall short of requiring the imposition of civil liability for their violation in all situations. As described in this Article, the informed consent action is both workable and desirable. It will promote better communication between attorneys and their clients, while affording protection to clients in situations where lawyers breach this fundamental duty.