**2.4: Client as Principal**

*I planned each charted course, each careful step along the byway. And more, much more than this, I did it my way.*[[1]](#footnote-0)

**Decisions Reserved to Clients**

As the principal, the client has the sole authority to make certain important decisions about their legal representation. Model Rule 1.2(a) provides that an attorney must respect a client’s decisions about the goals of representation and consult with the client about the means of achieving those goals. It also identifies particular decisions that are reserved to the client:

* In a civil case:
  + whether to settle.
* In a criminal case:
  + how to plead
  + whether to waive jury trial
  + whether to testify in a criminal case.

However, attorneys retain considerable discretion to make decisions about how to pursue representation, so long as those decisions are consistent with the client’s decisions, and implicitly authorized by the client as necessary to representation. In other words, the client is entitled to specify the goals of representation, but not to control the attorney’s every decision in pursuit of those goals.

| [**Model Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer/) |
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| 1. 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. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. |

| **Restatement (Third) of the Law Governing Lawyers § 22 (2000)** |
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| 1. As between client and lawyer, subject to Subsection (2) and § 23, the following and comparable decisions are reserved to the client except when the client has validly authorized the lawyer to make the particular decision: whether and on what terms to settle a claim; how a criminal defendant should plead; whether a criminal defendant should waive jury trial; whether a criminal defendant should testify; and whether to appeal in a civil proceeding or criminal prosecution. 2. A client may not validly authorize a lawyer to make the decisions described in Subsection (1) when other law (such as criminal-procedure rules governing pleas, jury-trial waiver, and defendant testimony) requires the client's personal participation or approval. 3. Regardless of any contrary contract with a lawyer, a client may revoke a lawyer's authority to make the decisions described in Subsection (1). |

| **Restatement (Third) of the Law Governing Lawyers § 23 (2000)** |
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| As between client and lawyer, a lawyer retains authority that may not be overridden by a contract with or an instruction from the client:   1. to refuse to perform, counsel, or assist future or ongoing acts in the representation that the lawyer reasonably believes to be unlawful; 2. to make decisions or take actions in the representation that the lawyer reasonably believes to be required by law or an order of a tribunal. |

| [***Bronson v. Borst*, 404 A. 2d 960 (D.C. App. 1979)**](https://scholar.google.com/scholar_case?case=5332284888043986925) |
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| **Summary:** Bronson hired Borst to be his attorney to help him recover money from a car accident. Borst negotiated a $6,000 settlement, but Bronson clearly told him not to accept it. After multiple failed attempts at communication, including a letter suggesting that Bronson find a new attorney if he does not accept the settlement, Borst accepted the settlement a day before the statute of limitations ran without Bronson’s permission. The Superior Court enforced the settlement through a declaratory judgment, agreeing with Borst’s reasoning that if he did not accept the settlement Bronson would have lost all chance of recovery, and accepting the settlement was a reasonable and justified step in representing his client well. The Appellate Court reversed, stating that regardless of the good faith of the attorney, absent specific authority, an attorney cannot accept a settlement offer on behalf of a client, and a client is not bound by settlements accepted without his express consent. |

Eugene C. Bronson here appeals from an adverse decision in a declaratory judgment action filed against him to enforce a settlement agreement and for the payment of attorney's fees and costs, arguing that the trial court erred in holding that an attorney does not need specific authority to accept a settlement on behalf of his client. We reverse.

I

The material facts are largely undisputed. On May 1, 1972, appellant’s automobile was struck by an automobile owned by Mattos, Inc. In order to pursue a claim for personal injuries caused by the accident, appellant retained appellee Borst under a general retainer agreement which provided only for the usual contingency basis of payment, i.e., Borst was to receive one-third of any judgment recovered.

Borst was able to negotiate a $6,000 settlement of appellant's claim with Mattos’ insurer, but when he informed appellant of the proposed agreement, appellant made it clear to Borst that he would not accept the offer of settlement. From then on relations between Borst and his client became strained. Bronson, who at the time resided outside the District, failed to respond to Borst’s communications, which included a letter in which Borst suggested that if Bronson was unable to accept the settlement, he might wish to retain new counsel. On April 30, 1975, the day before the statute of limitations ran, Borst, on behalf of his client Bronson, accepted the settlement offer.

Borst thereafter filed suit in Superior Court for a declaratory judgment to enforce the settlement he had accepted and for payment therefrom of attorney’s fees and costs. Under oath, at trial, Borst testified to the above facts and to his reasons for accepting the compromise. He said he felt that if he did not accept the settlement, Bronson would have lost all chance for recovery. Since he had received no direction from Bronson after the letter explaining why settlement was necessary and suggesting new counsel should Bronson wish to pursue the claim, Borst maintained that he had no alternative to the reasonable and justified step of accepting the settlement. Borst testified he felt that the claim was without merit since Bronson claimed a 100% disability resulting from a previous accident and therefore he could not hope to receive a jury award larger than the settlement offer. Borst also stated that Bronson was unwilling or unable to assume the responsibility of paying for expert witnesses and other court costs. The parties agreed that there existed no specific and explicit authority in Borst to accept a settlement offer to compromise appellant's claim.

Bronson conducted a vigorous, but inartful, cross-examination. Frequently the trial judge admonished Bronson that his questioning was argumentative and advised that he would have an opportunity later to take the stand and present his case. After Borst left the stand, however, the trial judge asked Bronson to present support in the law for his case. When Bronson completed his statement, the judge ruled for Borst without giving Bronson the opportunity to take the stand and testify under oath.

II

Appellant’s first argument is that the trial court erred, as a matter of law, in holding that the settlement agreement at issue was binding on him. His analysis is that an attorney without express authority cannot accept for his client any settlement regardless of the merits of the client's case or the attractiveness of the settlement offer. That conclusion was stated succinctly in Ashley v. Atlas Mfg. Co., D.C., 7 F.R.D. 77 (1946). In Ashley, the court confronted a courtroom settlement to which counsel for both parties assented in open court. Although the court judged from the tenor of the agreement and the manner in which the attorney for defendant announced the agreement in the presence of the defendant that the attorney had specific authority to settle the case, the court noted that

as a matter of law it is true, strictly speaking, an attorney has no right, without special authority, to make a compromise for his client.

Appellee argues that given the circumstances, his action in accepting the settlement in the face of his client's objections was reasonable and justified. He maintains that had he not so accepted the compromise offer, his client’s claim would have been barred by the statute of limitations and his chances for recompense could have been lost forever. To file the suit as his client demanded, appellee contends, would have been a wholly futile and costly endeavor. Finally, appellee argues that his client was either ignorant of the high cost of litigation or was unwilling to bear the responsibility of making the expenditures; presumably the client expected his attorney to bear the expense of litigation.

In his brief to this court, appellee offers no support in the law for the above proposition. At trial, he relied on Mullen v. People's Drug Stores, D.C.Mun.App., 124 A.2d 309 (1956), for the proposition that “one who is represented by counsel is bound by his actions.” Id[. at 310](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1956113731&originatingDoc=Ie3e89224345311d986b0aa9c82c164c0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), citing Turner v. Erwin, D.C.Mun.App., 99 A.2d 222 (1953). Both Turne*r* and Mullen, however, are inapposite to the issue here. In Turner, the court saddled the client with his attorney’s negligence in not appearing to answer a complaint. In upholding a default judgment, the court noted that “one who comes into court through counsel of his own choice is bound by the actions of his counsel.” In Mullen, the issue was whether a client is bound by the trial tactics of his attorney; specifically, the decision not to call a witness whose testimony would have gone to stipulated facts.

Whether to penalize a party for his counsel’s failure to appear in court and whether to bind a client to his attorney’s trial tactics present issues distinct from the issues here. In the two former situations, the inquiry concerns the execution by the attorney of the services that, by contract, he must perform for his client. In the instant case, we must analyze actions which counsel was neither duty bound nor authorized to perform.

We agree with appellant that regardless of the good faith of the attorney, absent specific authority, an attorney cannot accept a settlement offer on behalf of a client. Mr. Borst felt that he had no option but to accept the settlement offer for fear that the cause of action would be barred. Such a fear was unfounded. Mr. Bronson had made his stand clear; he wanted to pursue his claim. If Mr. Borst had ethical or financial reservations about continued representation of Mr. Bronson, he could have terminated the relationship well before the statute ran or he could have filed the suit and requested leave of the court to withdraw early in the litigation. Regardless of the options available to him, appellee chose one route that was, or should have been, foreclosed to him. Accordingly, we reverse the judgment of the trial court which purports to enforce the settlement agreement.

Finding that the trial court erred in its application of the law, we reverse the decision of the trial court and remand the cause for proceedings not inconsistent with this opinion.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Can an attorney accept a settlement offer on behalf of his client if the statute of limitations on the claim is about to run out and the client is incommunicado? |
| 1. Under Model Rule 1.2 it states “A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.” Why did the court not find that the client’s failure to communicate with the attorney constituted implied authority to accept the settlement? |

**Impaired Clients**

Attorneys often represent clients who have an impaired ability to make or express decisions. For example, attorneys often represent minors, who cannot make legally binding decisions. Attorneys may also represent people with physical impairments that affect their ability to express their decisions, or mental impairments that affect their ability to make decisions that are in their own best interests.

When an attorney represents a legally, physically, or mentally impaired client, the client remains the principal and is entitled to dignity and respect. Accordingly, the attorney must provide relevant information to the client, consult with the client, and pursue the client’s wishes, whenever it is possible and in the client’s best interests.

Sometimes, impaired clients have legal representatives empowered to make decisions on their behalf. In that case, the attorney must ordinarily obey the decisions of the legal representative. But the attorney must also inform the client about those decisions, and consult with the client whenever possible.

Regardless, the attorney must always put the client’s interests first. If the attorney represents the impaired client directly, then the attorney has a fiduciary duty to the client, and must ensure that the legal representative’s actions are in the client’s best interests. If the attorney represents the legal representative, then the attorney has a fiduciary duty to the legal representative, but still must ensure that the legal representative respects its own fiduciary duty to the client. 

Sometimes, it is unclear whether a client is impaired. The client may be unable to communicate with the attorney, unable to make consistent decisions, unable to make good decisions, or unwilling to conform to social expectations. These are hard cases. If a direct attorney-client relationship is untenable, the attorney should seek the appointment of a legal representative. But if the attorney can represent the client directly, then the attorney must act in the client’s best interests. This can create a conflict, if the attorney believes that the client’s instructions are inconsistent with the client’s best interests. Should the attorney obey the client?

| [**Model Rule 1.14: Client with Diminished Capacity**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/) |
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| 1. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. 2. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. 3. Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests. |

| **Restatement (Third) of the Law Governing Lawyers § 24 (2000): A Client with Diminished Capacity** |
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| 1. When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, physical illness, mental disability, or other cause, the lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interests of the client as stated in Subsection (2). 2. A lawyer representing a client with diminished capacity as described in Subsection (1) and for whom no guardian or other representative is available to act, must, with respect to a matter within the scope of the representation, pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions. 3. If a client with diminished capacity as described in Subsection (1) has a guardian or other person legally entitled to act for the client, the client's lawyer must treat that person as entitled to act with respect to the client's interests in the matter, unless:    1. the lawyer represents the client in a matter against the interests of that person; or    2. that person instructs the lawyer to act in a manner that the lawyer knows will violate the person's legal duties toward the client. 4. A lawyer representing a client with diminished capacity as described in Subsection (1) may seek the appointment of a guardian or take other protective action within the scope of the representation when doing so is practical and will advance the client's objectives or interests, determined as stated in Subsection (2). |

| [***People v. Bolden*, 99 Cal. App. 3d 375 (Cal. Ct. App. 1979)**](https://scholar.google.com/scholar_case?case=17983723939537380097) |
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| **Summary:** Bolden was denied effective assistance of counsel when his counsel offered evidence of Bolden’s incompetence although Bolden desired to be found competent. Two psychiatrists testified that Bolden wasn’t competent because he was suffering delusions (he thought the people he assaulted—his father and brother—were aliens from outer space). Bolden argues that although under the Penal Code, a judge who doubts the mental competence of the defendant may ask the attorney’s opinion of the defendant’s competence, this is a violation of the attorney-client privilege. The court found that an attorney’s opinion about his client’s competence does not reveal confidential information. The court held that Bolden’s attorney provided effective assistance to his client. |

Samuel Othello Bolden, Jr., appeals the order finding him mentally incompetent to stand trial based upon a jury verdict of incompetence. Bolden contends he was denied due process by Penal Code section 1368 which requires his attorney to give an opinion of his client's competence, and was denied effective assistance of counsel when his counsel offered evidence of his incompetence although Bolden desired to be found competent.

Bolden was charged with robbery, two counts of assault with intent to murder, and two counts of assault with a deadly weapon. Criminal proceedings were suspended to determine if Bolden was competent to stand trial. The first jury trial on the issue of competence was declared a mistrial after the jury was unable to reach a verdict. New counsel was appointed for the retrial. Two psychiatrists testifying for the People said Bolden was not competent to stand trial, as he was suffering delusions. He believed the people he was charged with assaulting, his father and brother, were actually aliens from outer space who were inhabiting the bodies of his father and brother.

Out of the jury's presence Bolden’s counsel explained to the court his client wanted to testify on his own behalf and wanted to be found competent to stand trial. While counsel felt he had a duty to pursue his client’s desires, he also felt he had a duty to represent his client’s best interests. He had been told by professional people a not-guilty-by-reason-of-insanity defense was available for his client. He felt he needed his client’s cooperation to pursue this defense. Bolden’s current mental state interfered with such cooperation. Counsel’s solution to this dilemma was to place Bolden on the witness stand to testify to his competence, and then to offer his own psychiatric witness who testified Bolden was not competent to stand trial.

After 10 minutes of deliberation, the jury returned a verdict of not competent to stand trial. Bolden was committed to Patton State Hospital for treatment.

Penal Code section 1368 requires a judge who doubts the mental competence of the defendant to “inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent.” Bolden contends this section violates the attorney-client privilege by requiring the attorney to reveal knowledge gained in the course of his relationship with his client.

This statute does not, however, require the disclosure of a confidential communication. “What the attorney observes of or hears from his client is not always privileged. It is apparent that some ingredient of disclosure or revelation is essential to the element of communication.” Although an attorney's opinion of his client's competence may be principally drawn from confidential communications he has had with that client, merely giving the opinion does not reveal any protected information.

A “confidential communication” is defined as “information transmitted between a client and his lawyer in the course of that relationship and includes a legal opinion formed and the advice given by the lawyer.” Bolden latches onto the words “legal opinion” and argues the opinion of competence is a legal opinion which is protected. The statute, however, uses “legal opinion" to specify one type of information protected. Substituting "legal opinion” for “information” in the statutory language, we see the type of legal opinion protected by the privilege is one “transmitted between a client and his lawyer,” not one, as here, initially transmitted between the lawyer and the court.

Bolden contends even if the attorney’s opinion of mental competence does not always reveal a confidential communication, in this case the psychiatrists who examined him based their opinions in part upon specific communications occurring between Bolden and his first counsel. Bolden cites us to only one place in the record where such communication is mentioned. There the psychiatrist testified Bolden's former attorney said Bolden believed the aliens inhabiting his father's body were from outer space. However, even assuming Bolden's former attorney improperly revealed privileged information to the psychiatrists, there was no prejudice to Bolden from the revelation as Bolden himself also told the psychiatrists, and testified in court, alien imposters had taken over the bodies of his family and others.

Bolden contends he was denied effective assistance of counsel, since he did not receive “the kind of legal assistance to be expected of a reasonably competent attorney acting as a conscientious, diligent advocate.” No complaint is made about the skill of his attorney or the attorney’s dedication to his client. Bolden’s contention is the attorney was acting in what he felt was the best interest of his client rather than as an advocate of his client's position. By his attorney “siding” with the People in offering evidence of incompetence, Bolden contends, his desire to be found competent went unrepresented.

Diligent advocacy does not require an attorney to blindly follow every desire of his client. An attorney can ordinarily make binding waivers of many of his client's rights as to matters of trial tactics. When the attorney doubts the present sanity of his client, he may assume his client cannot act in his own best interests and may act even contrary to the express desires of his client. To do otherwise may cause prejudicial error.

Bolden’s attorney provided effective assistance to his client.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Given the severity of the client’s delusions, would the court have found that the attorney breached his duty if he had disclosed privileged information when the court requested the attorney’s opinion regarding his client’s mental competence? |
| 1. Imagine that this was a civil case, would the holding differ? |

**Further Reading:**

1. Paul Anka, *My Way* (1967). [↑](#footnote-ref-0)