rights contract adequate when contract contained detailed waiver provisions and judge questioned defendant in court). Much of the case law concerns conflicts of interest. See § 122, Reporter's Note.

Comment d. Lawyer waiver of a client's duties. See § 38, Comment c, and Reporter's Note thereto.

Comment e. Contracts to increase a lawyer's duties. See Spivack, Shulman & Goldman v. Foremost Liquor Store, Inc., 465 N.E.2d 500 (Ill.App. Ct.1984) (lawyer who "guarantees" result of litigation liable if negligent in reaching that conclusion); 1 R. Mallen & J. Smith, Legal Malpractice § 15.4 (3d ed. 1989) (higher standard of care for lawyers claiming to be specialists). On restrictions on accepting clients that are unenforceable because in conflict with public policy, see, e.g., ABA Formal Opin. 94–381 (1994) (in view of ABA Model Rules of Professional Conduct, Rule 5.6(a) (1983), inside corporate counsel may not seek and outside lawyer may not give promise conditioning representation of corporation on undertaking never to represent anyone against corporation in future).

TOPIC 3. AUTHORITY TO MAKE DECISIONS

Introductory Note

Section

Introductory Note: This Topic addresses the allocation between client and lawyer of the authority to make decisions concerning the representation. It deals with authority only as between client and lawyer, describing rights that can in appropriate circumstances be enforced against the other or that disciplinary authorities can enforce against the lawyer. It does not deal with the authority of the lawyer to bind the client in dealings with courts and third parties, a subject considered in Topic 4.

Traditionally, some lawyers considered that a client put affairs in the lawyer's hands, who then managed them as the lawyer thought would best advance the client's interests. So conducting the relationship can subordinate the client to the lawyer. The lawyer might not fully understand the client's best interests or might consciously or unconsciously pursue the lawyer's own interests. An opposite view of the client-lawyer relationship treats the lawyer as a servant of the client, who must do whatever the client wants limited only by the

requirements of law. That view ignores the interest of the lawyer and of society that a lawyer practice responsibly and independently.

A middle view is that the client defines the goals of the representation and the lawyer implements them, but that each consults with the other. Except for certain matters reserved for client or lawyer to decide, the scope of the lawyer's authority is itself one of the subjects for consultation, with room for the client's wishes and the parties' contracts to modify the traditionally broad delegation of authority to the lawyer. This approach, accepted in this Restatement, permits a variety of allocations of authority.

The Topic first describes the lawyer's duty to inform and consult with a client (see § 20). Section 21 describes the power of client and lawyer to allocate authority and the presumptive allocation that prevails in the absence of specification. The Topic then considers authority that may always be exercised by the client (see § 22) and by the lawyer (see § 23). The final Section states qualifications that apply when the client's ability to decide is impaired (see § 24).

§ 20. A Lawyer's Duty to Inform and Consult with a Client

(1) A lawyer must keep a client reasonably informed about the matter and must consult with a client to a reasonable extent concerning decisions to be made by the lawyer under §§ 21–23.

(2) A lawyer must promptly comply with a client's reasonable requests for information.

(3) A lawyer must notify a client of decisions to be made by the client under §§ 21–23 and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment:

a. Scope and cross-references. This Section's general requirement that a lawyer inform and consult with a client is complemented by more particular requirements set forth elsewhere in this Restatement, for example the requirements that a lawyer make documents available to a client (see § 46) and disclose the basis or rate of the lawyer's fee (see § 38) and concerning the receipt of property of the client (see § 44). Other provisions require a client's informed consent to such matters as a client-lawyer contract (see §§ 18 & 19) and a lawyer's representation of a client despite a conflict of interest (see § 122). On a lawyer's counseling function, see § 94. For the requirement of lawyer honesty to clients, see § 16. For the application of this

Section to a client with diminished capacity, see § 24. On communicating with co-clients, see § 60, Comment *l*. As to when the duty to inform a client ends, see § 33, Comment *h*. For imputation of a lawyer's knowledge to a client or to other lawyers of the same firm, see §§ 28 and 132. A lawyer's failure to consult properly with a client may constitute ground for professional discipline (see § 5) and liability for damages and similar relief (see Chapter 4).

b. Rationale. Legal representation is to be conducted to advance the client's objectives (see § 16), but the lawyer typically has knowledge and skill that the client lacks and often makes or implements decisions in the client's absence. The representation often can attain its end only if client and lawyer share their information and their views about what should be done. Articulate and sophisticated clients typically call for frequent communication with their lawyers when a matter is important to them. The need to communicate and consult is evident when a decision is entrusted to a client who cannot make it wisely without a lawyer's briefing (see §§ 21 & 22). That need may also be present even in matters the lawyer is to decide (see §§ 21 & 23), because the lawyer's decision must seek the objectives of the client as defined by the client (see § 16). Discussion may cause both participants to change their beliefs about what should be done. In any event, the client may wish to take into account the lawyer's estimate of the probable results of a course of action.

Sometimes it might be unclear whether a decision relating to the representation is to be made by client or lawyer (see §§ 21–23), and here too consultation with the client is important. Discussion might lead client and lawyer to readjust the allocation of authority between them or to terminate the representation (see §§ 21 & 32).

Clients do not have a legally enforceable duty to communicate to the lawyer, except as provided under the law of misrepresentation. A client who does not disclose facts to a lawyer might be acting foolishly but is not liable to the lawyer, unless the nondisclosure renders the lawyer liable to a third party and thus entitled to claim indemnity from the client (see § 17, Comment *d*). The lawyer may also withdraw under the conditions stated in § 32.

c. Informing and consulting with a client. A lawyer must keep a client reasonably informed about the status of a matter entrusted to the lawyer, including the progress, prospects, problems, and costs of the representation (see Restatement Second, Agency § 381). The duty includes both informing the client of important developments in a timely fashion, as well as providing a summary of information to the client at reasonable intervals so the client may be apprised of progress in the matter.

Important events might affect the objectives of the client, such as the assertion or dismissal of claims against or by the client, or they might significantly affect the client-lawyer relationship, for example issues concerning the scope of the representation, the lawyer's change of address, the dissolution of the lawyer's firm, the lawyer's serious illness, or a conflict of interest. If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client. For example, a lawyer who fails to file suit for a client within the limitations period must so inform the client, pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw.

The lawyer's duty to consult goes beyond dispatching information to the client. The lawyer must, when appropriate, inquire about the client's knowledge, goals, and concerns about the matter, and must be open to discussion of the appropriate course of action. A lawyer should not necessarily assume that a client wishes to press all the client's rights to the limit, regardless of cost or impact on others. The appropriate extent of consultation is itself a proper subject for consultation. The client may ask for certain information (see Comment *d*) or may express the wish not to be consulted about certain decisions. The lawyer should ordinarily honor such wishes. Even if a client fails to request information, a lawyer may be obligated to be forthcoming because the client may be unaware of the limits of the client's knowledge. Similarly, new and unforeseen circumstances may indicate that a lawyer should ask a client to reconsider a request to be left uninformed.

To the extent that the parties have not otherwise agreed, a standard of reasonableness under all the circumstances determines the appropriate measure of consultation. Reasonableness depends upon such factors as the importance of the information or decision, the extent to which disclosure or consultation has already occurred, the client's sophistication and interest, and the time and money that reporting or consulting will consume. So far as consultation about specific decisions is concerned, the lawyer should also consider the room for choice, the ability of the client to shape the decision, and the time available. When disclosure to the client—for example, of a psychiatric report—might harm the client or others, the lawyer may take that into consideration (see Comment *d* hereto; § 24 & § 46, Comment *c*).

d. Client requests for information. A client is entitled to know how a lawyer is handling the client's matter and how it is progressing. The lawyer thus should respond in a timely and adequate manner to a client's request for information or to a client's general request to be

kept informed about specified matters (see generally Restatement Second, Trusts § 173).

The lawyer may refuse to comply with unreasonable client requests for information. Sometimes a lawyer may have a duty not to disclose information, for example because it has been obtained in confidence from another client or because a court order limits its dissemination. Under extreme circumstances a lawyer may keep information from a client for that client's benefit, as in the case of a mentally incapacitated client (see Comment *c* hereto; § 24). As discussed in § 46, Comment *c*, certain internal law-firm information may also be kept from a client.

e. Matters calling for a client decision. When a client is to make a decision (see §§ 21 & 22), a lawyer must bring to the client's attention the need for the decision to be made, unless the client has given contrary instructions (see § 21(2)). A lawyer must ordinarily report promptly to the client a settlement offer in a civil action or a proposed plea bargain in a criminal prosecution. Further disclosure is required when a proposed settlement is part of an aggregate settlement involving claims of several clients. Before a client signs a contract, for example, the lawyer ordinarily should explain its provisions. In addition to legal considerations, advice properly may include economic, social, political, and moral implications of the courses of action open to the client (see § 94(3)). The lawyer ordinarily must explain the pros and cons of reasonably available alternatives. The appropriate detail depends on such factors as the importance of the decision, how much advice the client wants, what the client has already learned and considered, and the time available for deliberation.

REPORTER'S NOTE

Comment b. Rationale. See generally D. Rosenthal, Lawyer and Client: Who's in Charge? (1974); Martyn, Informed Consent in the Practice of Law, 48 Geo. Wash. L. Rev. 307 (1980). On a client's lack of duty to communicate with a lawyer, see Miami Int'l Realty Co. v. Paynter, 841 F.2d 348 (10th Cir.1988) (client not liable for negligent misrepresentation).

Comment c. Informing and consulting with a client. On a lawyer's general duty to communicate with a client, see, e.g., ABA Model Rules of Professional Conduct, Rule 1.4(a) (1983) ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information"); Baker v. Humphrey, 101 U.S. 494, 500, 11 Otto 494, 500, 25 L.Ed. 1065 (1879) ("It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive.... "); F.D.I.C. v. Clark, 978 F.2d 1541 (10th Cir.1992) (failure to inform corporate client's board of officers' fraud); Shalant v.

State Bar, 658 P.2d 737 (Cal.1983) (failure to notify client who had been sued); State v. Dickens, 519 P.2d 750 (Kan.1974) (failure to find that client had died); In re Sullivan, 494 S.W.2d 329 (Mo.1973) (failure to notify that charges against client had been dismissed); State ex rel. Oklahoma Bar Assoc. v. O'Brien, 611 P.2d 650 (Okla. 1980) (failure to tell client that client had lost trial and appeal); Annot., 80 A.L.R.3d 1240 (1977). On the duty to inform a client of matters relating to the client-lawyer relationship, see, e.g., Hughes v. Consol–Pennsylvania Coal Co., 945 F.2d 594, 617 (3d Cir. 1991) (lawyer liable for fraud damages for failure to disclose conflict of interest); Mayo v. State Bar, 587 P.2d 1158 (Cal.1978) (lawyer representing executor did not disclose lawyer's debt to estate); Nichols v. Keller, 19 Cal.Rptr.2d 601 (Cal.Ct.App.1993) (lawyer bringing worker-compensation claim liable for not informing client of possible tort claim); Carlson v. Fredrikson & Byron, 475 N.W.2d 882 (Minn.Ct.App.1991) (malpractice liability for failure to disclose conflict only when conflict required withdrawal); In re Carrigan, 452 A.2d 206 (N.J.1982) (lawyer's failure to notify of new address); In re Tallon, 447 N.Y.S.2d 50 (N.Y.App.Div.1982) (failure to disclose malpractice); Vollgraff v. Block, 458 N.Y.S.2d 437 (N.Y.Sup. Ct.1982) (failure to disclose dissolution of firm); Crean v. Chozick, 714 S.W.2d 61 (Tex.Ct.App.1986) (failure to disclose malpractice tolls statute of limitations).

Comment d. Client requests for information. ABA Model Rules of Professional Conduct, Rule 1.4(a) (1983); In re Cook, 526 N.E.2d 703 (Ind. 1988), cert. denied, 493 U.S. 1023, 110 S.Ct. 727, 107 L.Ed.2d 746 (1990) (client requested monthly status and expenses reports); In re Maloney, 620 S.W.2d 362 (Mo.1981) (repeated failure to answer letters); In re Sullivan, 494 S.W.2d 329 (Mo.1973) (client requested breakdown of services rendered); In re Riccio, 517 N.Y.S.2d 791 (N.Y.App.Div.1987) (failure to respond as part of general neglect of clients).

Comment e. Matters calling for a client decision. For the duty to inform a client of a settlement or plea-bargain offer, see ABA Model Rules of Professional Conduct, Rule 1.4, Comment ¶ [1] (1983); ABA Model Code of Professional Responsibility, EC 7–7 (1969); Moores v. Greenberg, 834 F.2d 1105 (1st Cir.1987); Johnson v. Duckworth, 793 F.2d 898 (7th Cir.), cert. denied, 479 U.S. 937, 107 S.Ct. 416, 93 L.Ed.2d 367 (1986); Joos v. Drillock, 338 N.W.2d 736 (Mich.Ct. App.1983); State v. Simmons, 309 S.E.2d 493 (N.C.Ct.App.1983); Rizzo v. Haines, 555 A.2d 58 (Pa.1989). For the duty to inform a client of an adverse decision so that the client can decide whether to appeal, see, e.g., In re Craven, 390 N.E.2d 163 (Ind.1979) (civil case); Pires v. Commonwealth, 370 N.E.2d 1365 (Mass.1977) (criminal case). On a lawyer's duty to inform a client in connection with decisions the client is to make, see ABA Model Rules of Professional Conduct, Rule 1.4(b) (1983) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"); id. Rule 1.8(g) (aggregate settlement; clients must be informed of other claims being settled); Spector v. Mermelstein, 361 F.Supp. 30 (S.D.N.Y.1972), aff'd in part, rev'd in part, 485 F.2d 474 (2nd Cir.1973) (facts raising questions about loan client contemplates making); Ramp v. St. Paul Fire & Marine

Ins. Co., 269 So.2d 239 (La.1972) (consequences of contract); Somuah v. Flachs, 721 A.2d 680 (Md.1998) (failure to advise client at outset that lawyer was not licensed in state where suit would be filed gave client cause to discharge); Wood v. McGrath, 589 N.W.2d 103 (Neb.1999) (malpractice for failure to advise of fact that legal issue relevant to case was unsettled in controlling jurisdiction, although decided favorably in several others); Annot., 8 A.L.R. 4th 660, 676–84 (1981) (details and consequences of plea bargain).

§ 21. Allocating the Authority to Decide Between a Client and a Lawyer

As between client and lawyer:

(1) A client and lawyer may agree which of them will make specified decisions, subject to the requirements stated in §§ 18, 19, 22, 23, and other provisions of this Restatement. The agreement may be superseded by another valid agreement.

(2) A client may instruct a lawyer during the representation, subject to the requirements stated in §§ 22, 23, and other provisions of this Restatement.

(3) Subject to Subsections (1) and (2) a lawyer may take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client, consulting with the client as required by § 20.

(4) A client may ratify an act of a lawyer that was not previously authorized.

Comment:

a. Scope and cross-references. This Section governs the authority of a lawyer as between client and lawyer. With respect to third persons, see Topic 4. A lawyer who acts without authority may be required to pay damages suffered by a client (see § 27, Comment *f*; Chapter 4), disciplined by professional authorities (see § 5), or subjected to other sanctions (see, e.g., §§ 30 & 110). When a lawyer does have authority to act under this Section, it follows that the client is bound as against third persons (see § 26). A lawyer who has acted with apparent authority (see § 27), for example to settle a case, binds the client as against third persons. Moreover, a lawyer's violation of a criminal defendant client's proper instruction would not necessarily invalidate a resulting conviction (see Comment *d* hereto).

The fact that a lawyer's act is authorized does not necessarily preclude liability to the client. For example, a client who has autho-

rized a lawyer to file a suit in whatever court the lawyer thinks appropriate may still have a malpractice claim if the lawyer negligently causes harm to the client by filing in a court lacking jurisdiction (see Chapter 4).

This Section is limited by § 22, describing decisions that a client may not irrevocably delegate to a lawyer, and § 23, describing a lawyer's authority to reject certain instructions of a client. Standards for determining the validity and construction of client-lawyer contracts are set forth in §§ 18 and 19 (see also § 24 (clients under disabilities)).

b. Rationale. Allocation of authority between client and lawyer can influence both the outcome of a representation and the balances of power and respect within it. What allocation of authority a client desires may vary from client to client, from lawyer to lawyer, from case to case, and from issue to issue.

The lawyer begins with broad authority to make choices advancing the client's interests. But the client may limit the lawyer's authority by contract or instructions. The lawyer or the client may insist at the outset of the representation on an agreement defining the lawyer's authority. The lawyer is also protected if the client ratifies the lawyer's unauthorized act. Ideally, clients and lawyers will discuss decisionmaking authority, making allocations that both understand and approve. A lawyer who acts beyond authority is subject to disciplinary sanctions and to suit by the client (see § 27, Comment *f*, & Chapter 4).

c. Agreements. This Section recognizes broad freedom of clients and lawyers to work out allocations of authority (see Restatement Second, Agency § 376). Different arrangements may be appropriate depending on the importance of the case, the client's sophistication and wish to be involved, the level of shared understandings between client and lawyer, the significance and technical complexity of the decisions in question, the need for speedy action, and other considerations. The principal limits on this freedom are §§ 22 and 23 (see also § 19).

Contracts between clients and lawyers under this Section may specify procedures for making decisions as well as the person who is to decide. In a litigation context, for example, there might be agreement that the lawyer will submit monthly litigation plans to the client for approval or that the lawyer will not take depositions without the client's approval.

Under § 18 a contract concerning authority reached after the representation begins must be fair and reasonable to the client. A lawyer, for example, may not by threatening to withdraw during the representation obtain a client's agreement that the lawyer will have authority to settle the case (see § 22). On the effect of a client instruction modifying a client-lawyer contract, see Comment *d* hereto.

d. Client instructions. A client may give instructions to a lawyer during the representation about matters within the lawyer's reasonable power to perform, just as any other principal may instruct an agent (see Restatement Second, Agency § 385). As the client learns about the lawyer and the matter during the representation, the client might modify instructions to the lawyer accordingly.

A lawyer is not required to carry out an instruction that the lawyer reasonably believes to be contrary to professional rules or other law (see § 23(1) & Comment *c* thereto; see also § 32, Comment *d*) or which the lawyer reasonably believes to be unethical or similarly objectionable. A lawyer may advise a client of the advantages and disadvantages of a proposed client decision and seek to dissuade the client from adhering to it (see § 94(3) & Comment *h* thereto). However, a lawyer may not continue a representation while refusing to follow a client's continuing instruction. For example, if a client instruction violates a valid client-lawyer contract (see § 19, Comment *d*), the lawyer must nonetheless follow the instruction or withdraw (see § 32(3)(g)) (see generally Restatement Second, Agency § 385(2)). A lawyer may, after obtaining any required court permission, withdraw from the representation if the instructions are considered repugnant or imprudent (see § 32(3)(f)) or render the representation unreasonably difficult (see § 32(3)(h)) or if other ground for withdrawal exists under § 32.

Illustration:

1. Plaintiff, a lawyer, retains Lawyer to assert a claim against Defendant. Lawyer and Plaintiff agree that Lawyer shall be free to cooperate with Opposing Counsel concerning timing of pretrial discovery and other nonsubstantive matters. Subsequently, Plaintiff directs Lawyer to violate a general assurance that Lawyer had given to Opposing Counsel. Lawyer does not believe that Plaintiff's instruction is contrary to professional rules or other law. Lawyer is permitted to withdraw from the case if Plaintiff persists. If the tribunal refuses to permit Lawyer to withdraw, Lawyer must comply with Plaintiff's instruction, unless the matter is one addressed in § 23.

A client who has instructed a lawyer to act in a specified way, having received adequate advice about the risks of the proposed course of action (see § 20), cannot recover for malpractice if the lawyer follows the client's instructions and harm results to the client.

Client instructions given to a lawyer do not nullify the lawyer's apparent authority to act for the client in dealings with tribunals and third persons (see § 27), unless the latter have actual knowledge of the client's instructions. A lawyer's failure to follow valid client instructions in a criminal case does not necessarily constitute ineffective assistance of counsel rendering a conviction invalid.

A contract concerning the lawyer's authority can be made prior to the lawyer's employment or, subject to § 18, after the employment has begun. However, such a contract must comply with § 19, and a client may discharge a lawyer who refuses to modify a contract (see § 32(1)). On client instructions that are repugnant but not illegal, see § 23, Comment *c*.

e. A lawyer's authority in the absence of an agreement or instruction. A lawyer has authority to take any lawful measure within the scope of representation (see § 19) that is reasonably calculated to advance a client's objectives as defined by the client (see § 16), unless there is a contrary agreement or instruction and unless a decision is reserved to the client (see § 22). A lawyer, for example, may decide whether to move to dismiss a complaint and what discovery to pursue or resist. Absent a contrary agreement, instruction, or legal obligation (see § 23(2)), a lawyer thus remains free to exercise restraint, to accommodate reasonable requests of opposing counsel, and generally to conduct the representation in the same manner that the lawyer would recommend to other professional colleagues.

Signing a client's name to endorse a settlement check, however, is normally unauthorized and indeed may be a crime. A lawyer's presumptive authority does not extend to retaining another lawyer outside the first lawyer's firm to represent the client (see Restatement Second, Agency § 18), although a lawyer may consult confidentially about a client's case with another lawyer.

Because a lawyer is required to consult with a client and report on the progress of the representation (see § 20(1)), a client ordinarily should be kept sufficiently aware of what is occurring to intervene in the representation with instructions as to important decisions.

A lawyer often must make a decision without sufficient time to consult with the client. During a hearing, for example, decision must be made whether to object to another party's question, probe further answers of a witness, or seek a curative instruction. Such matters often involve technical legal and strategic considerations difficult for a client to assess. Sometimes a lawyer cannot reach a client within the time during which a decision must be made. In the absence of a contrary agreement or instruction, lawyers have authority to make such decisions. Generally, in making such decisions, the lawyer proper-

ly takes into account moral considerations and appropriate courtroom and professional decorum.

f. Ratification by a client. A client may ratify a lawyer's unauthorized act by explicit consent, by knowingly accepting its benefits, or by other conduct manifesting knowing approval after the act (see § 22, Comment *c;* Restatement Second, Agency § 416). For the effect of ratification on the rights of clients and third parties against each other, see Topic 4. Ratification does not bar disciplinary proceedings against a lawyer, although the fact that the client ratified the unauthorized decision may be relevant in appraising the lawyer's conduct. As between lawyer and client, ratification does not absolve the lawyer if the client was obliged to affirm the lawyer's act in order to protect the client's interests or was induced to ratify by the lawyer's misrepresentation or other misconduct. The law governing ratification of acts by lawyers is the same as that applicable to other agents (see Restatement Second, Agency, Chapter 4).

Illustration:

2. Acting against Client's instructions, Lawyer negotiates a plea bargain with Prosecutor under which Client will plead guilty to pending criminal charges and receive a 10–year sentence. Client, learning of the bargain, discharges Lawyer and communicates with Prosecutor who states that, although Prosecutor would have agreed to a more lenient bargain, Prosecutor, believing that Lawyer deceived Prosecutor by claiming to have Client's authorization, declines to renegotiate the plea bargain. Client's only choice is therefore to affirm the bargain or to go to trial, in which event it is probable that, should Client be convicted, the court will impose a substantially longer sentence. Client elects to accept the bargain and pleads guilty, receiving the 10–year sentence. Client's election does not prevent professional discipline or bar whatever malpractice claim Client may have against Lawyer for the unauthorized plea bargain.

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Comment c. Agreements. See § 16, Comment *f,* and Reporter's Note thereto; § 17, Comment *d;* §§ 18 and 38; McInnis v. Hyatt Legal Clinics, 461 N.E.2d 1295 (Ohio 1984) (lawyer liable for violating agreement to keep divorce out of newspaper, even though service of process required some form of publication).

Comment d. Client instructions. People v. Frierson, 705 P.2d 396 (Cal.

1985) (error for trial judge to allow counsel to make no defense in murder trial and postpone evidence of diminished capacity to sentencing hearing when judge knew that defendant wanted defense raised); Lieberman v. Employers Ins. of Wausau, 419 A.2d 417 (N.J.1980) (lawyer liable for settling against insured's instructions); State v. Ali, 407 S.E.2d 183 (N.C. 1991) (criminal defendant's wish not to challenge juror prevails over lawyer's view); Vandermay v. Clayton, 984 P.2d 272 (Or.1999) (lawyer liable for consenting to removal of contract clause client wanted); Olfe v. Gordon, 286 N.W.2d 573 (Wis.1980) (lawyer liable for disobeying instructions to arrange for client to have first mortgage); Jarnagin v. Terry, 807 S.W.2d 190 (Mo.Ct.App.1991); R. Mallen & J. Smith, Legal Malpractice § 8.7 (3d ed. 1989). For instances in which a lawyer's disobedience of client instructions was held not to be ineffective assistance of counsel, see Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); Gustave v. United States, 627 F.2d 901 (9th Cir.1980). Illustration 1 is a close paraphrase of and agrees with the result in Restatement Second, Agency § 385, Comment *a*, Illustration 2.

Comment e. A lawyer's authority in the absence of an agreement or instruction. See generally ABA Model Rules of Professional Conduct, Rule 1.2(a) (1983) ("A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued"; paragraphs (c), (d), and (e) concern limitation of the objectives of a representation with a client's consent, a lawyer's obligation not to counsel or assist criminal or fraudulent behavior, and a lawyer's duties when a client expects assistance that the lawyer may not lawfully give); Spiegel, Lawyers and Client Decisionmaking: Informed Consent and the Legal Profession, 128 U. Pa. L. Rev. 41 (1979); Maute, Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct, 17 U.C. Davis L. Rev. 1049 (1984); Siegel, Abandoning the Agency Model of the Lawyer–Client Relationship: A New Approach for Deciding Authority Disputes, 69 Neb. L. Rev. 473 (1990); § 26, Reporter's Note. On a lawyer's lack of authority to endorse a check made out to the client without explicit authorization, see Palomo v. State Bar, 685 P.2d 1185 (Cal. 1984); Morris v. Ohio Casualty Ins. Co., 517 N.E.2d 904 (1988); State v. Musselman, 667 P.2d 1061 (Utah 1983) (forgery prosecution). But cf., e.g., Navrides v. Zurich Ins. Co., 488 P.2d 637 (Cal.1971) (when lawyer forged client's endorsement on check and opposing party paid it, opposing party's liability was discharged). On a lawyer's lack of authority to retain another lawyer not from the first lawyer's firm to represent a client without the client's consent, see Grennan v. Well Built Sales of Richmond County, Inc., 231 N.Y.S.2d 625 (N.Y.Sup.Ct.1962); People v. Betillo, 279 N.Y.S.2d 444 (N.Y.Sup.Ct.1967); 1 Mallen & Smith, Legal Malpractice 279 (3d ed.1989); E. Wood, Fee Contracts of Lawyers 284–88 (1936); see Koehler v. Wales, 556 P.2d 233 (Wash.Ct.App.1976) (vacationing lawyer may arrange for substitute if clients are notified).

Comment f. Ratification by a client. L.F.S. Corp. v. Kennedy, 337 S.E.2d 209 (S.C.1985) (claim of malpractice in failing to follow client's settlement instructions barred by

client's acceptance of settlement); see Greene v. Greene, 437 N.Y.S.2d 339 (N.Y.App.Div.1981) (claim that lawyer improperly persuaded client to make lawyer trustee not barred unless client was aware of claimed breaches at time of alleged ratification). See § 22, Comment *c*, and Reporter's Note thereto; § 26, Comment *e*, and Reporter's Note thereto.

§ 22. Authority Reserved to a Client

(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).

Comment:

a. Scope and cross-references. This Section specifies decisions that fall outside a lawyer's presumptive authority (see § 21(3)) and that a client may always choose to make, regardless of any contrary contract with a lawyer. Authorization to make these decisions (for example, to settle a civil claim) generally may be revocably delegated to a lawyer (see Comment *c* hereto). Law may prohibit even such a limited authorization for decisions such as whether to waive jury trial in a criminal case (see Comment *d* hereto). The law of wills, for example, would not allow a client to authorize a lawyer to write and sign new wills for the client from time to time. The client-lawyer relationship itself implies some decisions reserved to the client. Thus a client and lawyer could not enter into a valid contract that only the lawyer would have the authority to decide what would benefit the client (see § 16), what information the client could receive from the lawyer (see §§ 20 & 46), or when the relationship would end (see § 32). Rules that limit waiver of client rights (see, e.g., §§ 19, 122, & 126) likewise limit contracts authorizing a lawyer to waive those rights. The authority recognized by this Section must be exercised in accor-

dance with applicable procedural rules and other law. A client who wishes to plead guilty, for example, must obtain the court's acceptance of the plea after the court follows applicable procedures to ascertain its voluntariness.

b. Rationale. Because a representation concerns a client's affairs and is intended to advance the client's lawful objectives as the client defines them (see § 16), the client has general control over what the lawyer does. Some decisions are so vital to a client that a reasonable client would not agree to abandon irrevocably the right to make the decisions with the help of the lawyer's advice.

Limits on delegation are especially appropriate for decisions that concern important rights. In criminal prosecutions, moreover, a public interest requires preserving the trial or plea as a personal encounter with the defendant, rather than a transaction conducted entirely by agents.

c. *Delegation, authorization, and ratification; settlements.* This Section forbids a lawyer to make a settlement without the client's authorization. A lawyer who does so may be liable to the client or the opposing party (see § 30) and is subject to discipline. In some circumstances, the opposing party may enforce the settlement against the client (see § 27). The Section also prohibits an irrevocable contract that the lawyer will decide on the terms of settlement. A contract that the lawyer as well as the client must approve any settlement is also invalid (but compare § 125, Comment *f* (contract restricting client's right to bargain away attorney-fee award)).

In the absence of a contrary agreement or instruction, a lawyer normally has authority to initiate or engage in settlement discussions, although not to conclude them (see § 21). A client may authorize a lawyer to negotiate a settlement that is subject to the client's approval or to settle a matter on terms indicated by the client. In class actions, special rules apply; a court, after notice and hearing, may approve a settlement negotiated by the lawyer for the class without the approval of named representatives or members of the class (see § 14, Comment *f*).

The Section allows a client to confer settlement authority on a lawyer, provided that the authorization is revocable before a settlement is reached. A client authorization must be expressed by the client or fairly implied from the dealings of lawyer and client. Thus, a client may authorize a lawyer to enter a settlement within a given range. A client is bound by a settlement reached by such a lawyer before revocation.

Client revocation of the lawyer's authority to make a decision covered by this Section has prospective effect only. Revocation does

not by itself entitle the lawyer to withdraw. Because the client retains the nondelegable right to revoke, doing so does not constitute repugnant or imprudent conduct, breach of obligation to the lawyer, or conduct rendering the representation unreasonably difficult within the meaning of § 32(3). In some circumstances, however, a client's revocation of authority may be among other circumstances warranting withdrawal, for example if the client revokes authority as part of an effort to defraud a third person.

d. Decisions specified by this Section. The decision to settle is reserved to the client, as described in Comment *c* hereto, because a settlement definitively disposes of client rights.

Constitutional criminal law requires decisions about three matters to be made personally by the client: whether to plead guilty, whether to waive jury trial, and whether to testify. Delegation of those decisions to a lawyer, even a revocable delegation, is not permitted. Guilty pleas in criminal prosecutions have drastic effects for the client. The legal system has strong interests in requiring the defendant to participate personally in securing pleas that are not susceptible to later claims of involuntariness. A criminal defendant's decision whether to waive the right to jury trial or to testify also involves surrender of basic constitutional rights and implicates the defendant's autonomy and participation in the trial.

Whether to appeal is an issue much like whether to settle, and that decision is likewise subject only to revocable delegation.

e. Comparable decisions. The rule of this Section also applies to decisions that are substantially equivalent to those specifically described. Just as lawyers cannot settle a claim without client authority, they cannot enter a stipulation or consent judgment that will similarly foreclose client rights. The principles applicable to settlements also apply to significant contracts outside the litigation context, for example to contracts to sell the client's real estate. A client may authorize a lawyer to act in such matters, but otherwise the lawyer lacks authority.

Whether a decision falls within this Section depends on factors such as the following: how important the decision is for the client; whether the client can reach an informed decision on authorizing the lawyer; whether reserving decision to the client would necessitate interrupting trials or constant consultations; whether reasonable persons would disagree about how the decision should be made; and whether the lawyer's interests may conflict with the client's.

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Comment c. Delegation, authorization, and ratification; settlements. On reservation of ultimate settlement authority to the client, see ABA Model Rules of Professional Conduct, Rule 1.2(a) (1983) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter"); ABA Model Code of Professional Responsibility, EC 7-7 (1969); Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892 (10th Cir.1975) (contract that lawyer could settle case if majority of plaintiffs approved does not bar dissenters from rejecting settlement); Lockette v. Greyhound Lines, Inc., 817 F.2d 1182 (5th Cir.1987) (client effectively revoked settlement authority); In re Lewis, 463 S.E.2d 862 (Ga.1995) (contingent-fee contract purporting to give lawyer full authority to settle is invalid); Lieberman v. Employers Ins. of Wausau, 419 A.2d 417 (N.J.1980) (lawyer liable to client for settling after client revoked settlement authority). Compare, e.g., County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990) (settlement of class action by lawyer with court approval). On the invalidity of a client-lawyer contract requiring the lawyer to consent to any settlement, see Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp., 530 F.Supp. 910 (E.D.Pa.1981); Cummings v. Patterson, 442 S.W.2d 640 (Tenn.Ct.App. 1968); 1 S. Speiser, Attorneys' Fees 203 (1973); cf. Jones v. Feiger, Collison & Killmer, 903 P.2d 27 (Colo.Ct. App.1994) (invalidating contract authorizing lawyer to withdraw if client unreasonably refused to settle). On the sanctions imposed on a lawyer for settling without authority, see Lieberman v. Employers Ins. of Wausau, supra (damage liability); In re Miller, 625 P.2d 701 (Wash.1981) (discipline); Annot., 92 A.L.R. 3d 288 (1979) (discipline).

A client may employ various means to confer authority to settle. E.g., Edwards v. Born, Inc., 792 F.2d 387 (3d Cir.1986) (court could find authority when client repeatedly declined lawyer's request to specify settlement amount, saying that was lawyer's job); First Fed. Savings & Loan Assoc. v. C.P.R. Constr., Inc., 689 P.2d 981 (Or.Ct.App.1984) (retainer contract); Federal Land Bank v. Sullivan, 430 N.W.2d 700 (S.D.1988) (client knew that lawyer was making settlement offers and said nothing); see Smedley v. Temple Drilling Co., 782 F.2d 1357 (5th Cir.1986) (insurer had general authority from insured to settle claims against insured). See generally Annot., 90 A.L.R. 4th 326 (1991); § 26, Reporter's Note. Authorizing a lawyer to negotiate does not by itself authorize the lawyer to approve the settlement without consulting the client. Bursten v. Green, 172 So.2d 472 (Fla.Dist.Ct.App.1965); Johnson v. Tesky, 643 P.2d 1344 (Or. Ct.App.1982). For ratification of an unauthorized settlement, see, e.g., Navrides v. Zurich Insurance Co., 488 P.2d 637 (Cal.1971) (client sued on settlement contract); Nagymihaly v. Zipes, 353 So.2d 943 (Fla.Dist.Ct.App. 1978) (client accepted benefits under contract); Annot., 5 A.L.R. 5th 56 (1992); § 26, Comment *e*, and Reporter's Note thereto.

Comment d. Decisions specified by this Section. ABA Model Rules of Professional Conduct, Rule 1.2(a) (1983) ("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."). For decisions reserved to a client being criminally prosecuted, see Taylor v. Illinois, 484 U.S. 400, 418 n.24, 108 S.Ct. 646, 657, 98 L.Ed.2d 798 (1988) (dictum) (plea; jury trial); Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983) (dictum) (plea; jury trial; testify for self; appeal); Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) (appeal); Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (go to trial); Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942) (waive jury); Smith v. Armontrout, 857 F.2d 1228 (8th Cir.1988) (waive appeal); United States v. Leggett, 162 F.3d 237 (3d Cir.1998), cert. denied, ___ U.S. ___, 120 S.Ct. 167, 145 L.Ed.2d 141 (1999) (testify for self); ABA Standards Relating to the Administration of Criminal Justice 4-5.2(a) (2d ed. 1982).

For decisions in civil litigation, see Comment *c*, supra (settlement); on the decision to appeal, see Soliman v. Ebasco Servs., Inc., 822 F.2d 320 (2d Cir.1987); In re Sherburne, 492 N.Y.S.2d 349 (N.Y.Sur.Ct.1985); In re Paauwe, 654 P.2d 1117 (Or.1982).

Comment e. Comparable decisions. For decisions that hold unauthorized lawyer acts that in effect bar trial in civil disputes, see, e.g., Davis v. Black, 406 So.2d 408 (Ala.Civ.Ct.1981) (stipulation that client's case will be governed by result in other party's test case); Roscoe Moss Co. v. Roggero, 54 Cal.Rptr. 911 (Cal.Dist.Ct.App. 1966) (consent to summary judgment); In re Rosenthal, 446 A.2d 1198 (N.J.1982) (lawyer did not tell client case was about to be dismissed); Wilder v. Third Dist. Committee, 247 S.E.2d 355 (Va.1978) (lawyer dismissed suit, believing any judgment uncollectible); Graves v. P.J. Taggares Co., 616 P.2d 1223 (Wash.1980) (stipulations conceding central issues); see ABA Model Code of Professional Responsibility, EC 7-7 (1969) (waiver of affirmative defense). For other matters, see, e.g., Taylor v. Illinois, 484 U.S. 400, 418 n.24, 108 S.Ct. 646, 657, 98 L.Ed.2d 798 (1988) (dictum) (criminal defendant's right to be present during trial); Clemmons v. Delo, 124 F.3d 944 (8th Cir.1997), cert. denied, 523 U.S. 1088, 118 S.Ct. 1548, 140 L.Ed.2d 695 (1998) (criminal defendant; right to confront witness); United States v. Olano, 934 F.2d 1425 (9th Cir.1991) (consent to presence of alternative jurors during deliberations); Schafer v. Barrier Is. Station, Inc., 946 F.2d 1075 (4th Cir. 1991) (execute contract); Lowenfield v. Phelps, 817 F.2d 285 (5th Cir.1987) (decision to proceed with alibi rather than insanity defense), aff'd as to other issues, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); Blanton v. Womancare Inc., 696 P.2d 645 (Cal. 1985) (submission to arbitration); Graves v. P.J. Taggares Co., supra (waiver of previously demanded jury trial); Note, An Attorney's Implied Authority to Bind His Client's Interests and Waive His Client's Rights, 3 J. Leg. Prof. 137, 143 (1978) (no implied authority to make contracts).

§ 23. Authority Reserved to a Lawyer

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.

Comment:

a. Scope and cross-references. This Section describes powers and obligations of a lawyer that neither a contract with a client nor a client's instruction may oblige a lawyer to forgo. Compare § 21 on allocation of authority between client and lawyer and § 22 on authority that a client may not irrevocably delegate. Although this Section, like §§ 21 and 22, deals directly with rights and obligations only as between lawyer and client, it also affects the authority of a lawyer to bind a client in dealings with third persons: if a decision falls within the lawyer's inherent authority under this Section, the client cannot disclaim the lawyer's act (see § 21, Comment *a*, & § 26(3)). On a lawyer's authority generally to bind the client with respect to third persons, see Topic 4.

b. Rationale. This Section protects certain public interests. Subsection (1) seeks to discourage unlawful acts. Subsection (2) seeks to avoid evasions by lawyers of their professional responsibilities and accommodates the need of the legal system to expedite litigation by authorizing lawyers to make immediate decisions.

c. Performing or assisting acts believed to be unlawful. A contract by an agent to help the principal to perform an unlawful act is unenforceable (see Restatement Second, Agency § 411). The rule has special force when applied to lawyers. Lawyers who exercise their skill and knowledge so as to deprive others of their rights or to obstruct the legal system subvert the justifications of their calling. Unlawful acts include all those exposing a lawyer to civil or criminal liability, including procedural sanctions, or discipline for violation of professional rules. A lawyer may refuse to perform an act the lawyer reasonably believes to be unlawful even if the client has agreed to indemnify the lawyer against any resultant sanctions, even though nonfrivolous arguments can be made that the act is lawful, even when counseling the act of the client or nonclient would not subject the lawyer to liability, and even though some jurisdictions subject lawyers to discipline for assisting only those acts known to be criminal or fraudulent.

If a lawyer acts lawfully in exercising professional judgment to assist a client in a case of doubtful legality, neither the client nor any third person may recover damages from the lawyer solely on the

ground that the lawyer had the power not to assist the client (see §§ 51 & 52).

This Section does not authorize a lawyer to refuse to assist a client in performing an act that might obligate the client to a third person but that would not ordinarily be considered unlawful. For example, a lawyer may not under this Section disobey a client's instruction to file a nonfrivolous discovery motion simply because the lawyer reasonably believes that the client will not prevail and will therefore be required to pay the opposing party's court costs. In proper instances, a lawyer may counsel a client to commit a violation of law in order to protect the client's rights, for example when a court order can be appealed only by violating it and being held in contempt (see § 94, Comment *e*).

A lawyer's discretion not to assist client conduct prevails, in the event of a conflict, over the client's authority stated in § 22. If time and other circumstances permit, the client should be afforded an opportunity to abandon the unlawful course of action, to persuade the lawyer that it is lawful, or to retain another lawyer. Thus the lawyer may not ordinarily decline to carry out a client's instruction pursuant to this Section without first consulting with the client (see § 20). The lawyer should advise the client about alternative courses of action, which may include the lawyer's withdrawal from the representation (see § 32). If the problem is foreseeable before the lawyer is retained, the lawyer should advise the prospective client then (see § 15) or decline to accept the case (see § 14, Comment *b*). In exercising the authority conferred by this Section, a lawyer should avoid causing a client unnecessary harm.

If a client's proposed course of action is repugnant but not illegal, the lawyer may decline the representation (see § 14, Comment *b*) or, if consistent with adequate representation, may accept it only on condition that the lawyer will not be required to perform or assist such acts (see § 16). Because the lawyer is more familiar with the vicissitudes of representation and with the lawyer's own moral standards, the lawyer bears the burden of seeking such a contract. With respect to taking moral considerations and professional courtesy into account, see § 21, Comment *e*. However, a lawyer has no right to remain in a representation and insist, contrary to a client's instruction, that the client comply with the lawyer's view of the client's intended and lawful course of action. On a lawyer's right to withdraw based on repugnance or imprudence of a client's intended acts, see § 32(3)(f).

d. Matters entrusted to lawyers by law. The legal system requires counsel to act immediately and definitively in many matters. Trials and hearings cannot be adjourned for client consultation when-

ever a decision is necessary, nor allowed to proceed subject to reversal if a client claims not to have been consulted or to have given directions that the lawyer disobeyed.

Lawyers therefore have inherent authority, not subject to alteration by contract with their clients, to act and decide for clients when the legal system requires an immediate decision without time for consultation. Whether a decision falls in that category depends on the requirements of procedural systems and orders of tribunals, as well as on such circumstances as the availability of the client for immediate consultation and the effect of interruption for consultation on the orderly and effective presentation of the client's matter. The lawyer must keep the client informed of the progress of the matter (see § 20) and must comply, when time permits, with the client's expressed wishes to be consulted about specified matters (see § 21(2)). Courts have discretion to grant adjournments and extensions when appropriate to permit such consultation. A client may give advance instructions, which the lawyer must honor to the extent that court rules and professional obligations permit.

Some jurisdictions entrust additional matters to lawyers, for example by requiring a lawyer to inform the court of a client's arguable incompetence to stand trial (see § 24, Comment *d*). Applicable law often authorizes government lawyers to make certain decisions for a governmental client (see § 97(1)).

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Comment c. Performing or assisting acts believed to be unlawful. ABA Model Code of Professional Responsibility, DR 7-101(B)(2) (1969) allows a lawyer to "Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal." On the prohibition of counseling or assisting illegal conduct, see id., DR 7-102(A)(7); ABA Model Rules of Professional Conduct, Rule 1.2(d) (1983) ("A lawyer shall not counsel a client te engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law"); C. Wolfram, Modern Legal Ethics 692–706 (1986); Hazard, How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?, 33 U. Miami L. Rev. 669 (1981). See also Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) (lawyer's refusal to help client commit perjury not ineffective assistance of counsel even though lawyer deterred client from taking stand); Maness v. Meyers, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975) (lawyer may not be punished for counseling client to violate court order in good-faith effort to appeal constitutional claim); People v. Schultheis, 638 P.2d 8 (Colo.1981) (lawyer

not required to call witness reasonably believed to be perjurious despite client's instructions).

Comment d. Matters entrusted to lawyers by law. See Frank v. Bloom, 634 F.2d 1245 (10th Cir.1980) (disobedience to client's instruction on matters of trial strategy did not forfeit lawyer's fee); Applegate v. Dobrovir, Oakes & Gebhardt, 628 F.Supp. 378 (D.D.C.1985) (no malpractice suit for refusing to introduce specific items of evidence at trial); People v. Wilkerson, 463 N.E.2d 139 (Ill.App.Ct.1984) (exchange of stipulations to chains of custody of prosecution and defense evidence over defendant's in-court objection is not evidence of inadequate defense). Some authorities seem to recognize a broader authority of lawyers to control litigation decisions, especially in criminal cases. E.g., State v. Poindexter, 318 S.E.2d 329 (N.C.Ct.App.), cert. denied, 322 S.E.2d 563 (N.C.1984) (no error for trial court not to require lawyer to present defendant's self-defense claim); ABA Standards Relating to the Administration of Criminal Justice § 4-5.2(b) (2d ed.1982) (lawyer decides after consultation what witnesses to call, whether and how to cross-examine, what jurors to accept or strike, what trial motions to make, all other strategic and tactical decisions). Such formulations may be influenced by authorities dealing, not with decisionmaking authority between lawyer and client, but with the authority of a lawyer to bind a client in dealings with third persons. See, e.g., Taylor v. Illinois, 484 U.S. 400, 417–18, 108 S.Ct. 646, 657–58, 98 L.Ed.2d 798 (1988) (except in instances of inadequate representation of counsel, client is bound by lawyer decisions to forgo cross-examination, not call witnesses, violate discovery obligations); Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (appellate counsel's refusal to argue point urged by client is not inadequate assistance of counsel warranting collateral attack on appellate decision). On informing the court of a client's arguable incompetence to stand trial, see § 24, Comment *d*, and Reporter's Note thereto.

§ 24. A Client with Diminished Capacity

(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 mat-

ter, 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:

(a) the lawyer represents the client in a matter against the interests of that person; or

(b) 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).

Comment:

a. Scope and cross-references. This Section recognizes adjustments to the client-lawyer relationship that are required when a client has diminished capacity to make decisions in the representation. See also § 31, Comment *e*, stating that a client's incompetence does not automatically terminate a lawyer's authority, and § 14, Comment *c*, on the liability of an incompetent client to pay for legal services constituting "necessaries." On the role of lawyer and client in defining the scope of the representation, see § 19.

b. Rationale. An unimpaired client can define the client's own objectives (see § 19), confer with counsel (see § 20), and make important decisions (see §§ 21 & 22). To the extent a client is incapable of doing so and no other person is empowered to make such decisions, the lawyer's role in making decisions will increase. An alternative is to appoint a guardian for the client, but that may be expensive, not feasible under the circumstances, and embarrassing for the client. In some cases, different views about the client's welfare may be presented by opposing counsel for a tribunal's decision. This Section recognizes that a lawyer must often exercise an informed professional judgment in choosing among those imperfect alternatives. Accordingly, each Subsection applies based on the reasonable belief of the lawyer at the time the lawyer acts on behalf of a client described in Subsection (1).

c. Maintaining a normal client-lawyer relationship so far as possible. Disabilities in making decisions vary from mild to totally incapacitating; they may impair a client's ability to decide matters generally or only with respect to some decisions at some times; and they may be caused by childhood, old age, physical illness, retardation, chemical dependency, mental illness, or other factors. Clients should not be unnecessarily deprived of their right to control their own affairs on account of such disabilities. Lawyers, moreover, should be careful not to construe as proof of disability a client's insistence on a view of the client's welfare that a lawyer considers unwise or otherwise at variance with the lawyer's own views.

When a client with diminished capacity is capable of understanding and communicating, the lawyer should maintain the flow of information and consultation as much as circumstances allow (see § 20). The lawyer should take reasonable steps to elicit the client's own views on decisions necessary to the representation. Sometimes the use of a relative, therapist, or other intermediary may facilitate communication (see §§ 70 & 71). Even when the lawyer is empowered to make decisions for the client (see Comment *d*), the lawyer should, if practical, communicate the proposed decision to the client so that the client will have a chance to comment, remonstrate, or seek help elsewhere. A lawyer may properly withhold from a disabled client information that would harm the client, for example when showing a psychiatric report to a mentally-ill client would be likely to cause the client to attempt suicide, harm another person, or otherwise act unlawfully (see § 20, Comment *b*, & § 46, Comment *c*).

A lawyer for a client with diminished capacity may be retained by a parent, spouse, or other relative of the client. Even when that person is not also a co-client, the lawyer may provide confidential client information to the person to the extent appropriate in providing representation to the client (see § 61). If the disclosure is to be made to a nonclient and there is a significant risk that the information may be used adversely to the client, the lawyer should consult with the client concerning such disclosure.

A client with diminished capacity is entitled to make decisions normally made by clients to the extent that the client is able to do so. The lawyer should adhere, to the extent reasonably possible, to the lawyer's usual function as advocate and agent of the client, not judge or guardian, unless the lawyer's role in the situation is modified by other law. The lawyer should, for example, help the client oppose confinement as a juvenile delinquent even though the lawyer believes that confinement would be in the long-term interests of the client and has unsuccessfully urged the client to accept confinement. Advancing the latter position should be left to opposing counsel.

If a client with diminished capacity owes fiduciary duties to others, the lawyer should be careful to avoid assisting in a violation of those duties (cf. § 51(4)).

d. Deciding for a client with diminished capacity. When a client's disability prevents maintaining a normal client-lawyer relationship and there is no guardian or other legal representative to make decisions for the client, the lawyer may be justified in making decisions with respect to questions within the scope of the representation that would normally be made by the client. A lawyer should act only on a reasonable belief, based on appropriate investigation, that the client is unable to make an adequately considered decision rather than simply being confused or misguided. Because a disability might vary from time to time, the lawyer must reasonably believe that the client is unable to make an adequately considered decision without prejudicial delay.

A lawyer's reasonable belief depends on the circumstances known to the lawyer and discoverable by reasonable investigation. Where practicable and reasonably available, independent professional evaluation of the client's capacity may be sought. If a conflict of interest between client and lawyer is involved (see § 125), disinterested evaluation by another lawyer may be appropriate. Careful consideration is required of the client's circumstances, problems, needs, character, and values, including interests of the client beyond the matter in which the lawyer represents the client. If the client, when able to decide, had expressed views relevant to the decision, the lawyer should follow them unless there is reason to believe that changed circumstances would change those views. The lawyer should also give appropriate weight to the client's presently expressed views.

A lawyer may bring the client's diminished capacity before a tribunal when doing so is reasonably calculated to advance the client's objectives or interests as the client would define them if able to do so rationally. A proceeding seeking appointment of a guardian for the client is one example (see Comment *e*). A lawyer may also raise the issue of the client's incompetence to stand trial in a criminal prosecution or, when a client is incompetent to stand trial, interpose the insanity defense. In such situations, the court and the adversary process provide some check on the lawyer's decision.

In some jurisdictions, if a criminal defendant's competence to stand trial is reasonably arguable, the defendant's lawyer must bring the issue to the court's attention, whether or not the lawyer reasonably believes this to be for the client's benefit. That should not be considered a duty to the client flowing from the representation and is not provided for by this Section.

A lawyer must also make necessary decisions for an incompetent client when it is impractical or undesirable to have a guardian appointed or to take other similar protective measures. For example, when a court appoints a lawyer to represent a young child, it may consider the lawyer to be in effect the child's guardian ad litem. When a client already has a guardian but retains counsel to proceed against that guardian, a court often will not appoint a second guardian to make litigation decisions for the client. Other situations exist in which appointment of a guardian would be too expensive, traumatic, or otherwise undesirable or impractical in the circumstances.

It is often difficult to decide whether the conditions of this Section have been met. A lawyer who acts reasonably and in good faith in perplexing circumstances is not subject to professional discipline or malpractice or similar liability (see Chapter 4). In some situations (for example, when a lawyer discloses a client's diminished capacity to a tribunal against a client's wishes), the lawyer might be required to attempt to withdraw as counsel if the disclosure causes the client effectively to discharge the lawyer (see § 32(2)(c)).

e. Seeking appointment of a guardian. When a client's diminished capacity is severe and no other practical method of protecting the client's best interests is available, a lawyer may petition an appointment of a guardian or other representative to make decisions for the client. A general or limited power of attorney may sometimes be used to avoid the expense and possible embarrassment of a guardianship.

The client might instruct the lawyer to seek appointment of a guardian or take other protective measures. On the use of confidential client information in a guardianship proceeding, see § 61 and § 69, Comment *f*.

A lawyer is not required to seek a guardian for a client whenever the conditions of Subsection (4) are satisfied. For example, it may be clear that the courts will not appoint a guardian or that doing so is not in the client's best interests (see § 16 & Comment *d* hereto).

f. Representing a client for whom a guardian or similar person may act. When a guardian has been appointed, the guardian normally speaks for the client as to matters covered by the guardianship. (When under the law of the jurisdiction a client's power of attorney remains in effect during a disability, the appointee has such authority.) The lawyer therefore should normally follow the decisions of the guardian as if they were those of the client. That principle does not apply when the lawyer is representing the client in proceedings against the guardian, for example, in an attempt to have the guardianship terminated or its terms altered. The law sometimes authorizes the client to bypass a guardian—for example, when a mature minor seeks a court

order authorizing her to have an abortion without having to disclose her pregnancy to her parents or guardians. The lawyer may also believe that the guardian is violating fiduciary duties owed to the client and may then seek relief setting aside the guardian's decision or replacing the guardian (see also § 51(4)). If the lawyer believes the guardian to be acting lawfully but inconsistently with the best interests of the client, the lawyer may remonstrate with the guardian or withdraw under § 32(3)(d) (see § 23, Comment *c*).

When a guardian retains a lawyer to represent the guardian, the guardian is the client.

REPORTER'S NOTE

Comment c. Maintaining a normal client-lawyer relationship so far as possible. ABA Model Rules of Professional Conduct, Rule 1.14(a) (1983) ("When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client"); see ABA Model Code of Professional Responsibility, EC 7–12 (1969); Institute of Judicial Administration–ABA, Juvenile Justice Standards, Standards Relating to Counsel for Private Parties 3.1(b), 3.5 (1980) (decisionmaking and informing client); Alvord v. Wainwright, 731 F.2d 1486 (11th Cir.), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984) (lawyer bound to follow wish of defendant found competent to stand trial to raise alibi but not insanity defense); Lessard v. Schmidt, 349 F.Supp. 1078 (E.D.Wis. 1972) (defendant in civil commitment proceeding constitutionally entitled to advocate, not merely guardian who decides what is best for defendant); In re Crane, 449 N.E.2d 94 (Ill.1983) (discipline of lawyer who failed to explain basis of large fees to clients who had recently come of age); In re M.R., 638 A.2d 1274 (N.J.1994) (lawyer for retarded person must advocate client's stated custody preference); Quesnell v. State, 517 P.2d 568 (Wash.1973) (lawyer in civil commitment proceeding may not waive jury trial for client and should communicate with client).

Comment d. Deciding for a client with diminished capacity. ABA Model Rules of Professional Conduct, Rule 1.14, Comment ¶ [2] (1983) (lawyer must sometimes act as de facto guardian); ABA Model Code of Professional Responsibility, EC 7–12 (1969) (lawyer compelled to decide should act to advance client interests); see Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 Utah L. Rev. 515. For examples of lawyer decisionmaking, see People v. Bolden, 160 Cal. Rptr. 268 (Cal.Dist.Ct.App.1979) (lawyer, in best interests of client, may argue client's incompetence to stand trial even though client disagrees); State v. Aumann, 265 N.W.2d 316 (Iowa 1978), reh'g denied, 268 N.W.2d 288 (Iowa 1978) (proper for lawyer to appeal incompetence-to-stand-trial issue against client's wishes); State ex rel. A.E., 448 So.2d 183 (La.Ct.App.

1984) (proper to proceed with hearing to terminate parental rights of comatose mother represented by counsel); Juvenile Justice Standards, Reporter's Note to Comment *c*, supra, § 3.1(b)(c)(3) (lawyer representing juvenile incapable of considered judgment may stay neutral or support least intrusive intervention warranted by circumstances); see United States v. Marble, 940 F.2d 1543 (D.C.Cir. 1991) (where client competent to stand trial, client and not court decides whether to plead guilty by reason of insanity); Uniform Probate Code §§ 4–407 & 5–303 (appointed lawyer in guardianship or conservatorship proceeding has authority and duties of guardian ad litem); C. Wolfram, Modern Legal Ethics 159–163 (1986).

On the duty of defense counsel in some jurisdictions to raise the issue of incompetence to stand trial regardless of the impact on the client, compare State v. Haskins, 407 N.W.2d 309 (Wis.Ct.App.1987) (lawyer must raise issue); ABA Standards Relating to the Administration of Criminal Justice § 7–4.2(c) (2d ed. 1982) (same) with Enriquez v. Procunier, 752 F.2d 111 (5th Cir.1984), cert. denied, 471 U.S. 1126, 105 S.Ct. 2658, 86 L.Ed.2d 274 (1985) (tactical reasons may warrant not raising issue).

Comment e. Seeking appointment of a guardian. ABA Model Rules of Professional Conduct, Rule 1.14(b) (1983) ("A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest"); Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 Utah L. Rev. 515, 559–567 (discussing pros and cons of seeking guardianship). At times, a tribunal may require the appointment of a guardian ad litem. E.g., Noe v. True, 507 F.2d 9 (6th Cir.1974); Pettengill v. Gilman, 232 A.2d 773 (Vt. 1967). For the lawyer's duty to defer in most circumstances to decisions made for the client by the guardian, see ABA Model Rules of Professional Conduct, Rule 1.14, Comment ¶ [3] (1983); ABA Model Code of Professional Responsibility, EC 7–12 (1969); Juvenile Justice Standards, Reporter's Note to Comment *c*, supra, at 3.1(b)(c)(1); Brode v. Brode, 298 S.E.2d 443 (S.C.1982) (criticizing lawyer's appeal from order approving sterilization of retarded minor, to which guardian had consented on showing of medical and other dangers).

Comment f. Representing a client for whom a guardian or similar person may act. See Metropolitan Life Ins. Co. v. Carr, 169 F.Supp. 377 (D.Md.1959) (lawyer or guardian may apply to the court for instructions if there is doubt as to the facts to which guardian may properly stipulate); In re Sippy, 97 A.2d 455 (D.C.1953) (lawyer retained by mother cannot represent minor daughter in disobedient child-commitment proceeding initiated by mother, when daughter bas retained other counsel); In re Fraser, 523 P.2d 921 (Wash.1974) (when guardian improperly seeks pay out of ward's funds, lawyer may disobey guardian's order to withdraw, until replacement lawyer is found); ABA Model Rules of Professional Conduct, Rule 1.14, Comment ¶ [4] (1983) (lawyer representing guardian who acts adversely to ward may have duty to prevent or rectify that misconduct).