January 1980


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Most discussions of lawyer-client decision making concern the difficult question of deciding when a lawyer must (or may) disregard his client's wishes because of conflict with some other significant interest outside the lawyer-client relationship. One of the ideological bases of the adversary system is a strong commitment to client control of decision making, which in theory must be balanced or reconciled with concerns about such control distorting the truth-finding functions of the legal system or causing harm to others. Little discussed until recently has been the fact that, despite this ideology, lawyers in many cases significantly control their clients' decisions and exert broad discretion over the means necessary to implement decisions.

Paying lip service to client control while maintaining professional control is not, of course, limited to the legal profession. It has been extensively commented on with regard to physicians, and a tort doctrine of "informed consent" has been developed as one means to limit such professional control. That doctrine requires physicians to give their patients the information necessary to make decisions about treatment. With regard to lawyers, similar questions concerning the provision of information to clients arise. In addition, however, a prior question regarding authority to make decisions is also present.

The traditional rule and practice has been to allocate decision-making authority around ends and means, with "ends" being the client's decision and "means" the lawyer's. This division, in theory, reconciles client control with professional...
prerogatives by allowing clients to define what they want from the relationship while allowing the lawyer-professional to apply his technical expertise unfettered by interference from the client. It takes, however, only several months of practice as a lawyer to realize that this "solution" does not reflect reality. Clients sometimes want to "meddle" in what lawyers feel are technical decisions; they sometimes want lawyers to pursue ends that the lawyer feels are undesirable for the client or morally repugnant. More important, the notion that clients have no legitimate interest in the decisions about the means used in representation is not true. Many of the decisions a lawyer makes in selecting appropriate means may be affected by a conflict of interest with the client. Beyond that, the division between means and ends is artificial. Decisions that lawyers might label technical are from the clients perspective part of the "ends" of representation.

The Code of Professional Responsibility is at best ambivalent in resolving this question of allocation of authority. Ethical Consideration 7-7 states:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.

As I have argued elsewhere, such language if given an expansive reading could conceivably give clients authority over almost every step taken in a case. On the other hand, the only Disciplinary Rule concerned with this issue states that a lawyer may "[w]here permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." But "permissible" is not defined.

In this review, I look at the Model Rules of Professional Conduct to see to what extent they are an improvement over the Code's treatment (or nontreatment) of the issue of allocating authority. In so doing I discuss how the Model Rules treat three related questions: (1) What decisions should clients control? (2) What discretion should lawyers have to decline to implement decisions ordered by the client but not prohibited by law or the rules of professional conduct? and

...
should the lawyer-client relationship be governed by rules or can we at best set only aspirational standards?

I. Client Decision Making and the Model Rules

The Model Rules, in contrast to the Code, seem to clearly favor client control over all aspects of representation. Rule 1.3(a), which is entitled Client Autonomy, states:

A lawyer shall accept a client's decisions concerning the objectives of the representation and the means by which they are to be pursued except as stated in paragraphs (b) and (c).

The accompanying Comments, however, begin to back away from the unequivocal language of the Rules. First, although the Comments reaffirm the client's "ultimate authority" over the purposes of legal representation, with regard to means they simply state the client has a right to be consulted. Two sentences later, however, the Comments state that the lawyer is bound "to respect the client's choice of objectives and discretion as to the means for pursuing them."
The last sentence of the Comments to Rule 1.3 then introduces a new distinction:

In questions of means, the lawyer should assume responsibility for wholly technical issues, but should defer to the client regarding such questions as the time and effort to be committed and concern for interests of third persons that might be adversely affected.

This uncertainty about the appropriate line between lawyer and client decision making is also reflected in Rule 1.4, concerning communication between lawyer and client. As the medical informed-consent cases illustrate, granting a decision-making right to a lay person without placing a corresponding duty of communicating information on the professional results in many instances in undermining the strength of the right to make decisions. Not only are clients unlikely to possess the information necessary for decision making, they may even be unaware that they have a decision to make.

Rule 1.4 attempts to meet this problem by requiring that a lawyer (1) periodically advise clients of the progress and status of matters; and (2) explain the significant aspects and foreseeable effects of alternative courses of action. My difficulty with Rule 1.4 is not with what it says, but with what it does not say. "Periodically" is a time dimension, but decision making is related to events, not just the passage of time. The Comments to Rule 1.4 begin by explaining that information is necessary to assist clients to make decisions regarding both ends and means. The decisions, however, for which information is now mandated are limited to "critical decisions." Further on, the lawyer is directed to explain general strategy and to consult the client on tactics that might injure or coerce others. The singling out of the issues that require consultation leaves the implica-

12. Consultation may influence decision making, see Melvin Aron Eisenberg, Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller, 92 Harv. L. Rev. 410, 414-18 (1978), but it is not the same as having authority to make the decision.

13. Although subsection (a)(2) could meet this objection if it is interpreted to require consultation at times other than required by subsection (a)(1), it can also be read to simply specify what has to be discussed during the periodic consultations required by the first subsection.
tion that noncritical decisions that do not involve injury or coercion to others do not require consultation. Under this reading a decision involving a potentially long delay would not warrant consultation with the client.

At a minimum, the Rules should reconcile the differences between the text of Rule 1.3(a), Rule 1.4, and the Comments. Is there a distinction intended between client control over ends and means? Is there a range of technical matters that are the lawyer's sole responsibility? Is there a difference between the client's power to make decisions and the lawyer's obligation to consult? Or, as Rule 1.3(a) seems to state, are all decisions the client's?

The dilemma, of course, is that, once these issues are raised, it is not easy to answer them via a set of rules. The solution of dividing authority along ends-means lines, as I stated earlier, breaks down. But all substitute formulations create their own difficulties.

One approach is that taken in the text of Rule 1.3(a)—the allocation of all decisions to the client. If, however, as part of this decision-making authority consultation is mandated for all decisions, for many clients such mandated consultation would be an expense they would prefer not to bear. On the other hand, if consultation is not mandated, the decision-making authority granted is likely to be meaningful for only those clients who need it least—the sophisticated repeat users of the legal system. And if we try to decide which situations should require consultation, then we have simply changed the line-drawing problem from one of drawing lines between decision-making powers to a similar one involving consultation. Beyond that, an allocation of all decisions to the client might infringe on important public and lawyer interests.14

There is, however, implied within the Model Rules and its Comments an approach to the line-drawing problem. It is to recognize ultimate client authority over all decisions as Rule 1.3(a) does, but also to recognize that consultation should be mandated only where it is reasonable to expect that the client would ordinarily desire such decision-making power. This appears to be what the Comments are doing when they refer to "critical decisions" or decisions that involve time and effort or harm to third persons. These are all categories of decisions for which it is reasonable to assume that clients would desire at least the opportunity to participate.15 The Comments, however, are not explicit that this distinction is being drawn. If this is what is intended (or should be intended), the Comments need to be redrafted. Furthermore, since the lawyer would determine which decisions were "critical" or involved "time and effort," he could avoid involving clients in decision making contrary to normal professional prerogatives. One could eliminate lawyers' discretion by allocating particular decisions to either the lawyer or the client. The problems would be to choose which category a decision belonged to. Beyond that, situations not capable of categorization would arise. If we allow discretion in categorizing situations, then we have only returned to the same problem. But, more important, perhaps the clarity we achieve by allo-

15. See Spiegel, supra note 3, at 72–112, for a discussion justifying using a test of reasonable client expectations. I would broaden the language of the Comments, however, to include situations where it is reasonable to expect client values to be involved.
cating decisions between lawyer and client is not always the dominant goal in the lawyer-client relationship. Ambiguous directives rather than clear rules allocating decision-making responsibility may be better for building a successful lawyer-client relationship. Before exploring this question, however, I will first look at the second question raised in the introduction—the lawyer’s right to decline certain actions.

II. Lawyer Refusal to Engage in Conduct Ordered by a Client

So far we have been looking at whether client decision making should extend into areas that might be labeled “means” or “tactics” largely from the perspective of the client. The opposite side of this problem is whether there are public and lawyer interests that would justify resisting this extension and, indeed, even justify having lawyers make decisions about ends. Perhaps if legitimate public and lawyer interests were given recognition, lawyers would have less resistance to allowing client decision making. The exceptions to Model Rule 1.3(a) concern themselves with the need for such recognition: Rule 1.3(b) reconciles client autonomy with public interests, and Rule 1.3(c) concerns lawyers’ interests.

Rule 1.3(b) requires a lawyer to disregard his client’s instructions where the client’s decision violates the law or the rules of professional conduct. Hence, to find out what limitations this exception places on client decision making we must look to all the other rules. If one disagrees with the (sometimes controversial) limitations that the Model Rules draw on client decision making, then criticism should be directed at those rules, not at Rule 1.3(b). The exception set forth in paragraph (c) of Rule 1.3 presents more difficulty.

16. In my earlier article, I stated my preference for the categorization approach. See Spiegel, supra note 3, at 123–33. I now believe there are strong reasons having to do with building relationship that at least counsel caution on the question of whether clarity should be the dominant goal. See pp. 1010–15 infra.

17. Where public interests are involved we would expect a rule requiring certain conduct; where only the lawyer’s interests are involved we would expect a rule giving the lawyer discretion. But see Philip Shuchman, Relations Between Lawyers in Roscoe Pound–American Trial Lawyers Foundation, Final Report, Annual Chief Justice Earl Warren Conference on Advocacy in the United States: Ethics and Advocacy 73, 93–94 (Washington, D.C.: Roscoe Pound–American Trial Lawyers Foundation, 1978), arguing that lawyers might prefer mandatory rules because such rules help insure that everybody conforms to the same standard of behavior, thereby diminishing the need to police other lawyers.

18. Essentially, however, this returns us to the classic problems of professional responsibility: What should a lawyer do about the client who intends to commit perjury? Must lawyer reveal confidences that constitute crime or fraud?

19. This is not to deny that there may be occasion for principled disobedience to the Rules. See Geoffrey C. Hazard, Jr., Ethics in the Practice of Law 10 (New Haven, Conn.: Yale University Press, 1978); Comment, The Lawyer’s Moral Paradox, 1979 Duke L.J. 1335, 1346–48. Cf. Richard Wasserstrom, Lawyers and Revolution, 30 U. Pitt. L. Rev. 125 (1968); Gary Bellow & Jeanne Ketteson, From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice, 58 B.U.L. Rev. 337, 370–71, 387 (1978). Such disobedience, however, would be justified by the application of a particular rule or a wholesale attack on the validity of the profession setting the rules for its own regulation. The basic notion that the client’s rights to make demands upon his lawyer are limited by external substantive rules still seems valid to me. See L. Ray Patterson, The Limits of the Lawyer’s Discretion and the Law of Ethics: National Student Marketing Revisited, 1979 Duke L.J. 1251, 1260–61. If one wishes to build principled disobedience into the rules a place to start might be via the enforcement process. See the suggestion of Bellow & Ketteson (supra, at 388) that we look for ways of encouraging lawyers who for reasons of conscience either have not followed a rule or barely managed to stay within its bounds to seek review and debate of their conduct.
It allows the lawyer to decline to pursue a lawful course of action "pursuant to Rule 1.5(b)." Rule 1.5(b) states that a lawyer may decline to take action he considers repugnant or imprudent if: (1) before undertaking representation he adequately discloses his intention to limit assistance in specified respects; or (2) during representation and after adequate disclosure he obtains the client's consent to the limitation. When a client does not consent or changes his mind after not objecting to a prerelationship limitation, then neither Rule 1.3 nor Rule 1.5 govern; instead we must look to Rule 1.16—the rule on withdrawal. That rule states that, if no material prejudice to the client will result, the lawyer can withdraw for any reason. If material prejudice to the client will result, the lawyer can withdraw only if the client insists on engaging in illegal or unjust conduct or fails to fulfill an obligation to the lawyer regarding the lawyer's services. And although it is not self-evident from the text, the Comments to Rule 1.16 explicitly state that a client's failing to honor an agreement limiting assistance pursuant to Rule 1.5 is within the meaning of "failing to fulfill an obligation to the lawyer regarding the lawyer's services."

Does this structure adequately protect the lawyer's interests? It does deal with two of the most important lawyer interests. Allowing the lawyer to refuse imprudent actions protects the lawyer's interest in craft and reputation; allowing him to refuse repugnant actions protects his interests in adhering to a set of personal morals. Moreover, the Model Rules, by explicitly allowing lawyers to set limits on their representation and to withdraw if the client insists on conduct violating those limits, have resolved the question whether zealous advocacy would prevent setting such limitations. The Code, by contrast, had language that would support an interpretation either way.20 And given that the lawyer should have knowledge of the typical situations that may arise, the requirement that he discuss his personal set of limitations before commencing representation does not seem onerous. It also seems to be the minimum to which the client is entitled.21 On the other hand, economic pressures will prevent some lawyers from explicitly telling clients that they intend to limit representation, because clients will have the option of seeking other lawyers who would impose no such restrictions. Rules that placed across-the-board limitations on all lawyers would eliminate the advantage for the lawyer willing to engage in "repugnant actions."22 However, since the enforcement of such subjective rules would in turn be impractical, from the lawyer's perspective the rules as proposed in the draft are adequate.

Are the Model Rules adequate from the client's perspective? Here I have more difficulty. I am concerned about whether a lawyer's disclosure to a client, before undertaking representation, of his intention "to limit assistance in specified respects" justifies limitations later on. Such a provision could be justified on

20. See the discussion of conditioned representation in Bellow & Kettleson, supra note 19, at 358-60.
two grounds: (1) that the client's consent is implied in his retaining the lawyer following disclosure or (2) that once the client learns of the limitations by such a disclosure, the lawyer's interests in avoiding certain conduct outweigh any of the client's interests.

It is unclear which of these grounds the proposed Model Rules rely on. Rule 1.5(b)(2) explicitly requires lawyers to obtain client consent if "during representation" a situation arises in which a lawyer wishes to limit his assistance. Before representation is assumed, Rule 1.5(b)(1) simply requires the disclosure of limitations on assistance. Arguably, no difference is meant; consent is implied by the client retaining the lawyer after the disclosure. If this is what is meant, it would be clearer if the words "obtaining client consent" were also inserted in Rule 1.5(b)(1).

It is possible, however, that the Rules were drafted in this manner deliberately to eliminate disputes over whether clients can meaningfully consent prior to representation. At the beginning of the lawyer-client relationship, understanding the significance of lawyer limitations is likely to be difficult for some clients, particularly those individuals who seldom use legal services. Furthermore, even assuming the requisite knowledge, some clients, such as legal services and defender clients, have no realistic option to seek alternative services. Therefore, to impute consent in all situations would be artificial.

If I am correct about these difficulties, then the issue is not merely a drafting one that can be cured by inserting "consent" into Rule 1.5(b)(1). Rather, the issue is whether, given an imperfect world, the lawyer's interest in avoiding conduct that he finds imprudent or repugnant should be allowed to override the client's interest in using a lawyer to advance the client's ends. Although I think that the Model Rules' requirement that lawyers should be honest with their clients about the limitations they would like to place on their services is an important advance over the Code, I would suggest that the provisions on prudence and repugnance be deleted because they are overbroad and unnecessary. With regard to prudence, the lawyer's interest in his craft and reputation is already partially protected by provisions that prohibit the lawyer from filing pleadings or motions that lack good ground to support them or from making representations about legal authority that the lawyer knows to be inaccurate or misleading. Moreover, since withdrawal on the basis of imprudence would be couched in terms of professional judgment, it is the response that is most difficult for a lay person to rebut. Indeed, lawyers are more likely to make moral judgments for clients in the guise of technique than they are to face those differences directly.

With regard to the provision on repugnance, I have somewhat less concern. If a lawyer attempts to withdraw from a case because of a sense of repugnance, the

23. See Bellow & Kettleson, supra note 19.
25. Geoffrey Hazard, the reporter for the Commission drafting the Model Rules, discusses the use of what he calls "peremptory advice" to a client. "Peremptory advice" is cast in purely technical terms compelling a single conclusion. The use of such technical advice comes into play where the lawyer is willing to assume responsibility for the client's decision because he believes what the client is about to do is morally wrong. Hazard, supra note 19, at 146-49.
client is on a more even basis with regard to the judgment being made. However, the Model Rules' new provision that allows a lawyer to seek withdrawal when his client asks him to engage in conduct that is unjust protects the lawyer in many of the same situations the provision on "repugnance" does and has several advantages. First, the repugnance standard is purely subjective while the unjust standard for some lawyers may be more objective and thus may require a lawyer to think more seriously about whether he is imposing his own standards on the client. Second, if justice is at least partially what the legal system is about, there seems something more appropriate about requiring justification in terms of this end than in allowing repugnance to be the justification for denying clients service.

I would, however, require that the client be told at the beginning of representation about the particular lawyer's intentions as a condition of withdrawal under the "unjust" standard. For example, Rule 3.1 of the Model Rules allows the lawyer an option, in civil cases, to tell the other side of favorable evidence and to refuse to offer evidence that the lawyer believes "with substantial reason to be false." I believe there is substantial argument for the position that not taking these options would be unjust. However, given that these are options, not requirements, a lawyer should be required to inform his client that this is the type of representation he provides. It may be that requiring such disclosure will lead to fewer lawyers taking the "just" option; and it may be that many clients will not understand the significance of the limitation, but as I stated above, such disclosure seems to me the minimum to which a client is entitled.

III. Rules and Relationships

The preceding sections have been concerned with some of the substantive questions arising from the Model Rules provisions on allocating authority between lawyer and client. But it is not only in the substance of the rules that the Model Rules have departed from the Code of Professional Responsibility. The structure is also different. One of the distinctive features of the Code was its division between Ethical Considerations and Disciplinary Rules. The Model Rules reject this division in favor of stating mandatory rules with only accompanying commentary. By looking at the notion of using rules to govern the relationship between lawyer and client, I hope to provide insight into whether the Model Rules' rejection of the Code's distinction between aspirational and man-

26. The Code has provisions that allow a lawyer to withdraw when the client makes it unreasonably difficult for the lawyer to effectively carry out his job, or in matters not pending before a tribunal, when a client insists on conduct contrary to the lawyer's judgment. DR 2-110(C)(1)(c), (e) supra note 10. There is some evidence that the latter provision may have been inserted in the Code to allow withdrawal for ethical reasons. See Spiegel, supra note 3, at 131 n.380 (1979); Annotated Code of Professional Responsibility, supra note 10, at 124.

27. E.g., some lawyers will consider an unjust act to be one that hinders the search for truth and thus can lead to a case being wrongly decided. This standard is at least somewhat more objective than personal moral repugnance.

datory rules is sound. In so doing I also hope to clarify some of the difficulties involved in framing appropriate substantive rules.

In order to meaningfully affect decision-making patterns between lawyer and client there has to be more than an exchange of paper or words going from lawyer to client. The exchange has to involve qualities of participation and involvement that enable the client to genuinely understand the decision to be made. In addition, part of the value of clients being more involved in decision making is the effect such involvement might have on the quality of the lawyer-client relationship. Howard Lesnick states:

I've come to a curious conclusion. I honestly do not think it matters which position the attorney takes—to leave the final decision with the client or insist on keeping it—so much as I think it matters whether the attorney makes either decision in a way which respects the concerns of both attorney and client, and treats the client as an understanding independent person, with interests and sensibilities separate from the attorney, and the ability and obligation to assume responsibility for his or her decisions.

If this view is correct, that the spirit and quality of the interchange between lawyer and client is of utmost significance, then the usefulness of mandatory rules is open to serious question. Indeed, there are some who would argue not only that mandatory rules are unlikely to improve the quality of the lawyer-client relationship, but also that the adoption of rules such as those proposed in the Model Rules will affect the relationship adversely.

Those who argue that rules will affect the relationship adversely seem to reach this conclusion from one of two perspectives. According to the first perspective, because the Rules acknowledge the possibility that a lawyer might deceive a client or lack commitment to the client's best interests, the Rules will breed distrust in the client. This view confuses the normative goal of trust with the question of how one creates trust. Ignoring the reality of conflict will not create trust; at best it will only create the image of trust.

According to the second perspective, lawyers may regard the rules as mere formalities that can be manipulated. Indeed it has been argued that the clearer the rule the more it will seem to have only formal qualities whose underlying spirit can justifiably be evaded. Moreover, it is argued that this evasion in the Model Rules' provisions regarding disclosure to the client will take the form of perfunctory disclosures similar to the Miranda warnings read by the police. The atmosphere created by these Miranda-type warnings will then breed distrust.

34. At the 1979 ABA convention, Monroe Freedman criticized the Model Rules for requiring the lawyer to advise the client of relevant ethical and legal limitations upon the lawyer's services because this in effect would be requiring "Miranda warnings."
suspect, however, the analogy to *Miranda* is somewhat askew. Lawyers very well may take protective evasive actions, but since they have some need to have a future relationship with the "object" of the warnings, the "warnings" are more likely to be revealed through ways that are off-handed or sugarcoated.

The possibility, however, that lawyers may take evasive actions is a serious one. This possibility raises a second general set of arguments about rules and relationships, whether they work. They cannot work if lawyers find formal ways of compliance that evade the real meaning of the rules. There is, however, a deeper problem. Coerced actions of community do not have the same subjective meaning as voluntary actions. Hence the fact that a rule exists that is being complied with changes the meaning of the actions for both parties. Therefore, to the extent the rules are intended to improve a relationship, they can never work.35

The above argument then suggests that, at best, rules involving allocating decision-making authority between lawyer and client can only have nominal formal effect, thus bringing into question the whole effort. Moreover, with regard to the Code's distinction between mandatory and aspirational rules, the argument also suggests that by abolishing this distinction the Model Rules have created an unresolvable dilemma. The rules must either limit themselves to those areas where formal compliance is sufficient or encompass areas where rules will not work, with the attendant risks of causing disrespect for the whole effort. Aspirational ethics, on the other hand, resolve this dilemma by allowing the expression of the sentiment while avoiding the pretense of enforcement.

The preamble to the Model Rules acknowledges this difficulty in stating that the Model Rules do not "exhaust the moral and ethical considerations that should inform a lawyer for no worthwhile human activity can be completely defined by legal rules." True! But this response is more one of avoidance than resolution. Nowhere within the Model Rules is there offered a rationale for abandoning the Ethical Considerations.36 One possibility is simplicity. The tripartite distinction between Disciplinary Rules, Ethical Considerations, and Canons is cumbersome to use in practice. Rules with commentary are simpler. Moreover, the comments can accomplish many of the same goals as the Ethical Considerations.37

Dean Patterson, a consultant to the ABA Commission on Professional Standards, suggests another rationale.38 For a variety of reasons, lawyers view the Code as something less than mandatory. The use of Ethical Considerations re-


36. Of course, the present Code does not accomplish its avowed aim of separating aspirational ethics from mandatory rules in a satisfactory manner. It is inconsistent and too frequently treats issues in the ethical considerations that should be part of the mandatory rules. Beyond that its pretensions open it up to charges of being simply public relations material. If this, however, were the only problems with the notion of separating the Code into ethical considerations and disciplinary rules, the appropriate solution would be redrafting, not abandonment.


inforces this view. Therefore, in order to counteract the past, the Model Rules must be presented as “black letter law.”

I would like to suggest a third rationale that is related to Patterson’s in that it emphasizes the communicative effect of the structure of the rules. The distinction between aspirational ethics and rules is related to the view that many of the ethical decisions an attorney must make are private and inherently subjective. By being structurally separate, the Ethical Considerations vividly communicate the separateness of the private from the public and the separateness of our own moral judgments from the rules of society. This separateness of the public and private, the objective and the subjective, is an important element of liberal ideology. It has been seen as necessary to protect individual liberty from the coercive power of the state. Those who consider it important to separate aspirational ethics from rules usually argue that the distinction is necessary to prevent intolerable coercion. Our problem today, however, is to move beyond this point to one where, rather than keeping these dualities separate, we allow them both to express themselves.

How to do this is, of course, the problem. The insights of liberal thought are not wrong so much as incomplete. The problems of the effects of rules on relationships are real. If we return to our concern for the lawyer-client relationship, is there a way of thinking about rules and relationships that moves us beyond a separation of aspirational ethics from rules but does not relegate us to having simply formal requirements?

Although I have no firm answer to this question, two recent books—one by Robert Burt and the other by Richard Sennett—suggest an approach. If one views the provisions regarding lawyer and client as structures that create dialogue, rather than as scripts that prescribe, there may be possibilities in rules that can at least partially contribute toward building relationships.

39. Id. at 525–28.
40. See Lon L. Fuller, The Morality of Law 15 (rev. ed. New Haven, Conn.: Yale University Press, 1974) (“Morality of duty finds its closest cousin in the law, while the morality of aspiration stands in intimate kinship with aesthetics”); Judith N. Shklar, Legalism 43, 44 (Cambridge, Mass.: Harvard University Press, 1964) (characterizing the views of “legalists” as: law being external, social, objective, and coercive while morals are internal, individual, subjective, and arbitrary).

See also Hazard’s discussion of the views of participants in a symposium on lawyers’ ethics, Hazard, supra note 19, at 4 (“professional ethics . . . product of personal deliberations”).

41. It has been my experience both as lawyer and teacher that discussions of professional responsibility issues oscillate between these poles of rules and ethics. First, the problem is viewed as one of rules and the lawyers’ games of statutory construction and line drawing dominate the discussion. The discussion then swings to the other pole—the ethics pole—and invariably ends with some expression that it is all subjective and therefore each individual has to make up his own mind. What is lacking is a mode of discourse that encompasses both poles in a satisfactory manner. See Gary Bellow & Bea Moulton, The Lawyering Process 117–20 (1978) for the only discussion of this dilemma that I am aware of in a law book designed for teaching professional responsibility issues.


43. See the discussion in Frankel, supra note 28, at 877–82. Compare the discussion in Shklar, supra note 40, at 37–38, 43 (positivist insistence on separation of law and morals is to prevent political oppression).

44. See Unger, supra note 42.

This approach tries to encompass both substance and process, recognizing that "pure substance" has the problems of rigidity, with its consequent rebellion against rules, and that "pure process" has the problem of being simply an empty vessel. Therefore, we find Burt proposing with regard to doctors and their patients that the law should not make either the patient or the doctor the final decision maker, nor should it solely rely on an approach that requires the patient to sign a piece of paper labeled "informed consent." To take these positions is to ignore the realities of the interaction between two people. Beyond that, these "solutions" pose the question of authority as having only an either/or answer and ignore the various in-between possibilities. Rather, courts should use informed-consent principles, according to Burt, to assure conversation between doctor and patient. A form of monologue, as with our stereotype of *Miranda* warnings, does not fulfill this requirement. Moreover, Burt suggests in his most controversial proposal that in some cases the law should avoid giving answers to the parties before and during disputes. It should require them to talk, take action, and negotiate about authority without knowing the exact legal requirements. It is to be hoped then, that face-to-face interaction will displace the image of rules.

Sennett, the nonlawyer, is not concerned with legal requirements in his book on authority. But he too emphasizes the illusion of polar answers. He sees authority being exercised through paternalism (an authority of false love) and autonomy (an authority that denies love and connection with others). Moreover, the fear of being deceived or overpowered by authority can lead to the false opposite of denying the legitimacy of any authority. Sennett concludes that in a society such as ours, where substantive agreement on the legitimacy of authority (or rules) is frequently absent, we must look for solutions (or structures) that make the question of authority more visible and negotiable. Face-to-face encounters are one way to do this.

I have not done justice to the complex arguments underlying both of these books, but I hope that the parallels to our problem of the lawyer-client relationship are clear. The solution to the problem of lawyer domination is not necessarily to allow client domination; the solution to the dilemma of rules is not necessarily to eliminate rules. To deny the lawyer some of his professional authority is not to claim there is no authority of expertise that the lawyer can and should exercise.

Moreover, with regard to the specific issues discussed earlier in this article, the

47. Burt, *supra* note 45, at 43-45, 118-19. Burt relies heavily on psychiatric theory to support his conclusions, but I believe that one can accept the conclusion about the need to take account of interaction without accepting whole cloth the psychiatric theory.
49. Sennett, *supra* note 45, at 185-86.
structural approach suggests there may be virtue in the Model Rules not allocating specific decisions to either lawyer or client but instead using a more ambiguous directive that admonishes the lawyers to allow clients to make decisions that clients have a legitimate interest in making. Similarly, the notion of face-to-face encounter suggests why the Model Rules' present requirement of prererepresentation agreements is not desirable. There is a need for dialogue at that time, but there is also a need for dialogue later. Finally, it is important to identify which elements of professional authority lawyers wish to preserve. Therefore, it is important that the Rules attempt to give recognition to legitimate lawyer interests.59

Of course, the notion of structure is not a panacea. It can collapse into the emptiness of pure process or be viewed as rigid rules that should be evaded. Moreover, it is uncertain what rules by themselves can accomplish without changes in the world outside.51 Still, perhaps because I am a lawyer, I hold onto the belief that the insight that rules do not determine conduct does not make rules irrelevant. And what better place to test the possible relevance of rules to relationships than with the rules that govern ourselves as lawyers.

IV. Conclusion

First, since I have not stated this explicitly earlier, despite the above criticisms, in my view the Model Rules are a substantial improvement over the Code. As Dean Kelly has stated, the Rules lack the pious tone of the Code and therefore are easier to respect.52 Moreover, with regard to the substantive issue of lawyer and client decision making, the Rules come closer than the Code to dealing with the issue directly and, in my opinion, correctly. Second, however, as discussed above, the Rules still suffer some of the problems of the Code of inconsistency and of appearing to resolve a problem that upon further reading is left unresolved. Whether this is due to haste or compromise I do not know, but the Rules need further revision at least in the areas I have explored here. Third, and perhaps most important, if the Model Rules are viewed as part of a process of intensive re-examination of basic issues affecting both the legal profession and society rather than as the “black letter” embodiment of the answers to our problems, they will have proved to be valuable whether or not they are adopted. For what we need is not only dialogue between us and our clients but also dialogue between ourselves as lawyers.


51. See Griffiths, supra note 29. Both Burt and Sennett devote insufficient attention to the problem of whether the changes they advocate can be meaningful in the absence of changes in the structures of professional and economic domination. On the other hand I believe that authors such as William Simon go too far in the other direction when they appear to reject completely the value of changes in individual relationships because such changes are not preceded by social and economic change. See William H. Simon, Homo Psychologicus: Notes on a New Legal Formalism, 32 Stan. L. Rev. 487 (1980).