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On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client

Paul R. Tremblay*

The increasing recognition that the attorney-client relationship is governed by considerations of informed consent inevitably creates considerable uncertainty for attorneys representing clients whose competence is in question. The ideology of informed consent asserts that lawyers may act only, or primarily, on the direction of their clients. Lawyers serve, in this fundamental sense, as agents of their clients. The supposition that lawyers know what is best for their clients is no longer as accepted as it may have been in the

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past; instead, the profession has grown in the realization that the most effective lawyering decisions are made by clients themselves.\(^2\)

There are times, however, when a lawyer adhering to this ideology believes that the client, whether because of advanced age, mental or physical illness, or similar disability, is not capable of making informed choices, and if permitted to do so will injure himself or, at a minimum, fail to achieve the objectives of the representation. This Article attempts, at least in a preliminary fashion, to explore the avenues that might be open to an attorney in these circumstances. The term “preliminary” should be stressed, as the nature of the relationship between a lawyer and her possibly incompetent client is difficult to discern. The thoughts developed here can only begin to structure a workable theory for that interaction.

The issue of informed consent and the impaired client has been addressed seldom, if ever, in the legal context. The matter has been explored somewhat more fully in the medical context,\(^3\) where the ramifications of the informed consent doctrine in general have been debated more intensely.\(^4\) This Article's discussion of the role of the lawyer representing an impaired client, therefore, will

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2. See, e.g., D. Binder & S. Price, supra note 1, at 147-53; Freedman, A Lawyer Doesn't Always Know Best, 7 Hum. Rts. 28, 52 (1978); Shaffer, supra note 1, at 728; see also infra notes 31-48 and accompanying text.


It is not surprising that this issue has received greater attention in medical circles, because medical decisions are made almost invariably in the context of illness, which may impair consent and create hard choices for physicians. This fundamental difference between doctoring and lawyering, however, cannot justify the paucity of literature on competent informed consent in the legal context. Lawyers also represent ill clients, and the crises that precipitate a decision to seek legal help might impair rational decisionmaking.

draw on the suggestions developed for physicians, but for several reasons what works for medical professionals may not work equally well for lawyers.

The lawyer's great difficulty in proceeding with representation of a confused client should be apparent. The most obvious problem is the considerable tension between the ethical requirement that the lawyer permit the client to make decisions and the lawyer's considered judgment that to do so not only would fail to achieve the purposes of the representation but also would be to follow an instruction that the client would not give in more lucid times. Looming in the background is the doctrine of presumed competence, asserting that it is not permissible ethically or legally for one person (the lawyer) unilaterally to usurp the authority of another (the client) without either that person's consent or court permission. For lawyers in particular this dilemma is heightened because they face a peculiar role tension that may serve to prohibit any attempt on their part to obtain court permission to usurp a client's decisionmaking authority. A lawyer who seeks to establish a guardianship or similar proxy for her client will run afoul of numerous professional responsibility concerns, most notably those of loyalty.

5. This is especially true when the role of the family in proxy decisionmaking, and the role of persuasion and "fraternal correction" in obtaining consent, are addressed. See infra notes 220-31 and 276-85 and accompanying text.

6. To characterize the doctrine of informed consent as an "ethical requirement" may be an overstatement given the profession's lack of clarity on this issue. The prevailing ABA standards of professional responsibility are less than definitive on this point. See infra notes 105-36 and accompanying text. Nor have courts clearly mandated informed consent. See Maute, supra note 1, at 1085-1106 (discussion of cases on decisionmaking allocation). It would be fair to say that, in general, the authorities recognize the client's ultimate authority to make significant decisions that arise during the representation, albeit perhaps after considerable influence or persuasion by the lawyer, and that otherwise the lawyer is permitted wide latitude in choosing the means of accomplishing the client's goals. See Strauss, supra note 1, at 318-20; infra notes 26-28 and accompanying text.

7. There is authority from the medical context asserting that decisionmaking for an incompetent person must rest on what that person would have chosen were the person competent—an heuristic known as "substituted judgment." See, e.g., Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417, 430-31 (1977); S. Jordan, supra note 3, at 71-76; Robertson, Organ Donations by Incompetents and the Substituted Judgment Doctrine, 76 Colum. L. Rev. 48, 57-68 (1976).


zeal, and confidentiality. Yet if her client’s competence is seriously in doubt, the lawyer may not possess the agency authority to act at all on her client’s behalf.

The legal profession thus far has offered little meaningful guidance to those lawyers—and there are many—who find themselves in this quandary. The ethical standards promulgated by the American Bar Association seek to address this point, but in a fashion that on analysis is less than coherent. Some courts have addressed the question of the appropriate role for counsel appointed to represent allegedly incompetent wards or defendants in commitment, guardianship, or similar parens patriae or police power proceedings. The opinions of these courts, however, tend to be based on considerations other than informed consent or client choice, and hence are of less direct value to this inquiry. Courts have seldom, if ever, addressed this question in the context of civil representation of clients whose competence might be

the client. Model Code Canon 5; Model Rules Rule 1.7. See generally Patterson, Legal Ethics and the Lawyer’s Duty of Loyalty, 29 Emory L.J. 909 (1980); Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244 (1981) [hereinafter Conflicts of Interest].


12. Fundamentally, a lawyer’s authority to act on behalf of a client stems from her status as the client’s agent. “In our legal system, an attorney is [her] client’s agent and representative; the client retains ultimate authority over the conduct of litigation.” Prate v. Freedman, 583 F.2d 42, 48 (2d Cir. 1978). This principle not only permits courts to hold parties liable for the negligence of their chosen counsel, see Mazor, supra note 1, at 1121-34, but its accompanying effect is to deny a lawyer the power to act except under delegated authority, either explicit or implicit, from her principal. An incompetent principal possesses no authority to empower his agent. See Restatement (Second) of Agency §§ 20-21 (1958).

13. See Model Code, supra note 9, EC 7-12; Model Rules, supra note 9, Rule 1.14.

14. See infra text accompanying notes 105-36.

15. See, e.g., Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Quesnell v. State, 83 Wash. 2d 224, 517 P.2d 568 (1973); State ex rel Hawks v. Lazaro, 157 W. Va. 417, 202 S.E.2d 109, 125-26 (W. Va. 1974). Those who have commented on this issue have supported the notion that in cases of police power or parens patriae proceedings the role of the lawyer is to be a “zealous advocate.”

16. This Article addresses only the issues raised by representation of incompetent clients in civil proceedings. Its conclusions, therefore, will apply better in the civil than in the criminal arena. The distinction rests on differences in a lawyer’s role in the two contexts as well as on the divergent constitutional mandates. Nevertheless, issues raised by criminal practice are employed by analogy in the analysis. See infra note 219.

Criminal practice is different for the following reasons. Most important, the obligation of the defense attorney to obtain the acquittal of acquittable defendants is a paramount role, and may even transcend the duty to follow client wishes. For example, even if an accused wishes to plead guilty, such a plea may be inappropriate. See, e.g., Fed. R. Crim.
This Article will begin to assess critically the various options available to lawyers in this situation. It argues that the presumption of competence (and hence adherence to client choice even when seemingly not maximizing benefits) must remain the dominant approach to this problem, but that it need not remain the universal one. In certain cases, lawyers must recognize that a client's competence is seriously in question and that they therefore may interact with such a client differently than they do with unimpaired clients. This preliminary concession seems unavoidable; from there, unfortunately, the waters become more muddied. On reflection, however, it appears that the range of choices available to a lawyer in such circumstances is reasonably finite. She might (1) simply withdraw; (2) seek a guardian for her client, either by serving herself as the petitioner or by recruiting a third party to accomplish this task; (3) seek unofficial consent from a family member or close friend; (4) seek to persuade her client to make different and "better" choices (an approach that arguably is inappropriate with unimpaired clients);18 (5) proceed as a de facto guardian, simply making choices for her client without actual consent; or (6) continue to presume competence irrebuttably, follow-

11(F); North Carolina v. Alford, 400 U.S. 25 (1970); Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 YALE L.J. 1179 (1975). The civil attorney has no such obligation to "win" over the objections of her client. In addition, criminal defense lawyers are often appointed by the court precisely to play the role of putting the state to its proof. As noted below in the context of civil commitment appointments, the court-ordered designation of role transcends informed consent considerations, and therefore distinguishes such cases from other civil cases. This is not to imply that informed consent issues do not arise in criminal practice, or that the dilemmas arising from representation of a questionably competent criminal defendant are any less poignant. See Bennett, A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial, 53 Geo. Wash. L. Rev. 375, 381-87 (1985); Chernoff & Schaffer, Defending the Mentally Ill: Ethical Quicksand, 10 Am. Crim. L. Rev. 505 (1972). The American Bar Association recently has developed proposed standards for criminal justice mental health issues, particularly the question of incompetence to stand trial. ABA, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1984). For background and procedural history of the standards, see George, The American Bar Association's Mental Health Standards: An Overview, 53 Geo. Wash. L. Rev. 338 (1985).

17. This Article tends to neglect the profoundly impaired client and concentrates instead on clients whose competence is merely questionable. Such clients present more thorny difficulties for the lawyer, at least in the realm of informed consent. With plainly nonfunctioning individuals, the lawyer-client relationship has likely been established via a proper proxy consent or a court order; in such cases strict adherence to ordinary conceptions of informed consent may not apply. See infra notes 137-53 and accompanying text.

18. D. Binder & S. Price, supra note 1, at 205-06 (it is inappropriate for the lawyer to affect the client's decision except when the client has made an extremely detrimental decision).
ing her client’s requests regardless of consequences. These limited alternatives serve as the basis for this Article’s analysis. This list demonstrates that there is no option available that does not compromise some valued principles of the attorney-client relationship. Choosing or prioritizing among them, therefore, is no small task.

This Article concludes that, although all of these options are troublesome, they are not all equally acceptable from an ethical perspective. Withdrawal is not considered in any great detail, for it seemingly offers nothing except a sidestepping of the quandary. Petitioning for a guardian presents serious role and professional responsibility problems and is difficult to justify, although it may be warranted as the only plausible choice. Recruiting a third party to obtain a guardian resolves some, but clearly not all, of the professional responsibility concerns. It also creates additional ethi-

19. The list, and this Article as a whole, plainly refer only to instances in which the client’s failing competence becomes problematic after an attorney-client relationship has been established. The distinction is an important one. If the client has not consulted or retained the lawyer before his competence becomes impaired, the rights and responsibilities of the lawyer are very different from those discussed below. If no attorney-client relationship exists, the lawyer may be free to consult social service or mental health professionals in an attempt to assist the client. In addition, if relatives or agency personnel contact the lawyer on behalf of the failing client, as is typical, no attorney-client relationship is possible absent some legitimate, informed consent by the proposed client or his authorized proxy.

20. Depending on the stage of the proceedings, withdrawal may be an option for a lawyer who cannot maintain a continuing relationship with her client by reason of the latter’s decreasing faculties. The ABA Model Code and Model Rules each permit withdrawal under those circumstances. See Model Code, supra note 9, DR 2-110(C)(1)(d) (client by his conduct “renders it unreasonably difficult for the lawyer to carry out [her] employment effectively”); Model Rules, supra note 9, Rule 1.16(b)(5) (“the representation ... has been rendered unreasonably difficult by the client”). Although withdrawal may be available, it is not satisfactory from an ethical perspective. It may promote the lawyer’s peace of mind, but it leaves unappealing consequences in its wake: either the client’s cause is left abandoned (when successor counsel cannot be obtained), or the ethical problems are passed on to successor counsel, who repeats the process. A similar sentiment has been expressed regarding a lawyer’s choice to withdraw when faced with a client who intends to commit perjury. See Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1476 (1966) (withdrawal is “indefensible” on ethical grounds). Two other considerations about withdrawal deserve note. First, whether one can withdraw from litigation without revealing the client’s difficulties to the court is not at all clear, and yet to reveal those difficulties contravenes the ethical mandate to maintain the client’s confidences. See supra note 11, infra notes 191-92; cf. Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978) (revelation of perjury by withdrawal motion is prohibited). Second, once a client has lost competence the attorney may have no legal authority to continue the representation and thus may be mandated to withdraw, notwithstanding the ethical difficulties. The discussion below on proxy or substituted consent offers some suggestions on the available methods of continuing representation after the client arguably has ceased to function as a competent decisionmaker. See infra notes 221-31 and accompanying text.

21. See infra notes 188-93 and accompanying text.
cal problems. Reliance on a family member as a proxy decisionmaker is a rather attractive suggestion and tends to be the solution relied on most often by physicians. It is hardly a perfect solution because it leaves many conceptual inconsistencies unresolved. Persuasion is risky, but arguably more justifiable than it might initially appear, in that it minimizes role conflicts and recognizes some measure of client autonomy. Finally, this Article rejects the notion of lawyer as “de facto” guardian. The lack of accountability and side constraints, failure to serve the client’s autonomy needs, and invitation to lawyer overreaching all render this approach very suspect. Unfortunately, the ABA’s published ethical standards implicitly or explicitly have legitimated this type of unilateral usurpation of client decisionmaking. Section IV of this Article argues that such an approach is unwise.

I. The Tradition of Informed Consent

Before turning to the actual decisionmaking methods that lawyers might employ with impaired clients, certain preliminary matters must be addressed. Because the difficulties discussed in this Article arise predominantly as a result of the tensions imposed by the informed consent doctrine, the normative justifications for that doctrine must be considered. Only with some understanding of how and why informed consent controls the attorney-client relationship can we appreciate the dilemmas caused by attempts to diverge from its teachings.

Informed consent may be viewed from the two vantage points of practice and theory. Sometimes the two dovetail, but often they do not. It is apparent that informed consent is a rather inconsistent phenomenon in practice. There are segments of the bar, perhaps large segments, that do not practice “client-centered” law even though they are likely to accept the notion of lawyers as client agents. These lawyers are apt to decide for their clients as

22. See infra notes 194-206 and accompanying text.
23. See infra notes 220-31 and accompanying text.
24. See infra notes 263-95 and accompanying text.
25. See infra notes 232-61 and accompanying text.
26. The evidence for this conclusion is not entirely anecdotal, although informal observation of the practicing bar certainly supports this generalization. The empirical studies that have been performed show a pattern of non-client-centered lawyering. See J. Heinz & E. Laumann, supra note 1, at 101-04 (personal hemisphere lawyers possess greater control over their clients than do corporate hemisphere lawyers); D. Rosenthal, supra note 1, at 13-16, app. A; Alschuler, supra note 16. The most prominent spokesperson for this “professionalism” or “paternalist” view has been Talcott Parsons. See T. Parsons, The Professions and
often as clients do for themselves, and are apt to influence the decisions that clients make. For these lawyers, who implicitly accept the paternalism and professionalism ideologies, interaction with impaired clients presents fewer significant dilemmas, for the client’s ability to participate has never been a condition precedent for representation. Still, the matter is not entirely untroublesome, for virtually all lawyers recognize that clients are responsible for the major critical decisions in a case.

From the perspective of theory, the problem’s intractability is heightened. This perspective has been more recently articulated by scholars and critics of the bar who challenge what they perceive as paternalistic lawyering and professional dominance of the relationship. There is no doubt a significant segment of the bar shares this desire to be faithful to the underpinnings of informed consent. From this perspective, representing impaired clients is indeed troubling, for conventional notions of informed consent will not apply.

The remainder of this section will introduce the emerging theory of informed consent as viewed from the theoretical perspective. It will address briefly two of the more significant considerations. First, the normative question: Why is this doctrine justified or desirable? Second, the tactical question: How can lawyers best involve clients in the decisionmaking process?

A. The Client-Centeredness Model

A common approach to informed consent in the attorney-cli-
ent relationship may be referred to as "client-centeredness,"31 that is, the conviction that the client, and not the lawyer, should remain the primary decisionmaker. In exploring why this model is employed, it should be recognized that client-centeredness is at once both viscerally logical and perplexingly counterintuitive. It is logical because the lawyer, as an agent hired by a client to achieve some goal,32 will naturally look to her principal for direction and instructions. It is the client’s case, the client’s life and the client’s money paying the bill, so it makes sense for him to call the shots. Yet at the same time the notion is deeply discomforting and illogical to professionals and to adherents of the ideology of professionalism.33 It is precisely because the lawyer possesses skill, expertise, and training that she was hired by the client, and the idea of allowing, even encouraging, the less knowledgeable and less skilled party to be in charge seems plainly counterproductive.34

If client-centeredness is justified, it is because the counterintuitive objections prove to be less persuasive than they first appear. Client decisionmaking may be defended by a combination of deontological theories of autonomy and utilitarian arguments about effective representation. The autonomy concern is an important one.35 Just as a patient has a strong autonomy interest in

31. The phrase “client-centered” has become rather popular since employed by David Binder and Susan Price in their classic text on interviewing and counseling skills. D. BINDER & S. PRICE, supra note 1. It is very much an outgrowth of Carl Rogers’ theories of psychotherapeutic nonintervention. See C. ROGERS, ON BECOMING A PERSON (1961); C. ROGERS, COUNSELING AND PSYCHOTHERAPY (1942). Thomas Shaffer’s counseling techniques employ a similar client-centered and Rogerian approach. See T. SHAFFER & J. ELKINS, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL (2d ed. 1987); T. SHAFFER, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL (1976).

32. See supra note 12.

33. Soon-to-be professionals seem to share the same perplexity. The author’s experience in a clinical setting with students first exposed to the client-centered counseling theories of David Binder and Susan Price, D. BINDER & S. PRICE, supra note 1, has shown not infrequent reluctance by students to delegate or return decisionmaking authority to the client. Their reasoning generally follows the counterintuitive analysis described in the text.

34. These arguments apply to, and are asserted by, doctors who are asked to permit patients to make final medical decisions notwithstanding the doctor’s greater expertise. If you are a good doctor, your patients trust you; and if you are going to be their doctor, you had better trust them. You tell them to do something, and they do it—which is a form of consent. I do not think you can tell a patient exactly the situation no matter how hard you try, unless he happens to be a physician or a scientist. PROCEEDINGS OF THE CONFERENCE ON THE ETHICAL ASPECTS OF EXPERIMENTATION WITH HUMAN SUBJECTS 34 (1967) (remarks of David D. Rutstein, M.D., Harvard Medical School), quoted in Note, Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship, 79 YALE L.J. 1533, 1537 n.10 (1970).

35. See Spiegel, supra note 1, at 73-77; Strauss, supra note 1, at 336-41. The concept of autonomy is the fundamental root of informed consent in medicine as well. See J. CHI-
maintaining control over his body, a client possesses an equally significant autonomy interest in controlling his affairs, in assuring that his values are expressed, and in avoiding control and manipulation by another who may have greater status. Permitting a client to make the significant decisions, particularly when the choice made is contrary to the lawyer's preference, fosters autonomy and tends to ensure that client values are realized.

The autonomy argument for informed consent is in some ways easier to make than the effective representation argument. Stating alone the autonomy argument is not counterintuitive. It makes sense for clients to have the responsibility for their own affairs. The difficult objection to autonomy concerns the role of the lawyer's expertise and skill. Although critics might acknowledge autonomy as a deeply held value, they would nevertheless argue that fostering autonomy by allowing unskilled laypersons navigating in arcane waters to make misguided and ill-considered decisions seems quite perverse.

The response to this objection has been utilitarian and empirical. The professionalism argument assumes that decisions made in the context of legal representation have correct answers—solutions that can be divined by the application of expertise, training, and

DRESS, supra note 4, at 59-65. In an early medical informed consent opinion, Judge Cardozo wrote: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault." Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914); see also R. BURT, supra note 4; J. MILL, ON LIBERTY (1859); Capron, Informed Consent in Catastrophic Disease Research and Treatment, 123 U. PA. L. REV. 340, 366-69 (1974) (protection of status as "human being"); Shultz, From Informed Consent to Patient Choice: A New Protected Interest, 95 YALE L.J. 219 (1985) (patient autonomy should be protected and recognized as distinct legal interest).

Critics of informed consent generally deny neither the impact that professional dominance has on autonomy, nor that autonomy is an important interest. Instead they point to the inherent conflict (in the case of medicine) between preserving autonomy and fostering good health. See P. APPELBAUM, C. LIDZ & A. MEISEL, supra note 4, at 28-31. When the two are perceived to be in conflict, critics charge that health interests should prevail. See Chayet, Informed Consent of the Mentally Disabled: A Failing Fiction, 6 PSYCHIATRIC AN- NALS 295 (1976); Meisel, supra note 3, at 413-18 (summarizing the criticisms).


37. See Spiegel, supra note 1, at 75-76.

38. See Wasserstrom, supra note 29, at 15-24 (lawyers' manipulation of clients and treatment of clients as nonpersons is morally objectionable); Simon, supra note 29, at 52-59.

39. T. SHAFFER, supra note 1, at 3-20; Shaffer, supra note 1, at 728-30.

skill to a given set of facts. This assumption, however, is faulty. Lawyers make such decisions by applying somewhat fixed principles to facts that are usually ambiguous, and by analyzing how a factfinder or arbiter (jury, judge, appellate panel) or perhaps an opposing party, is apt to apply those principles to the facts. The "science" of predicting legal results is notoriously imprecise, even if some generally confident assessments can be made in cases with clearer law, less disputed facts, and a known factfinder. The premise of the professionalism argument is the assumption that legal decisionmaking is susceptible to reasoned analysis, and that skilled and expert analysis will result in more effective decisionmaking. Although a significant part of the decisionmaking process indeed involves sophisticated and technical analysis, and thus cannot be accomplished successfully without expertise, not all of the process involves such analysis. Much of it involves subjective, value-based assessments of the relative attractiveness of choices. This part of the decisionmaking process cannot be accomplished by an expert technician; in fact, it probably can be accomplished adequately only by the person who will suffer the consequences of the decision.

In fact, most decisions made in the context of legal representation consist of assessing risks. Most options available to clients, whether litigants or those seeking planning advice, involve choosing, under conditions of uncertainty, among relative advantages and disadvantages. Even when the economic and legal consequences of a particular option are clear (e.g., litigation may be very likely to achieve the objective sought), various nonlegal consequences inevitably influence the choice (e.g., the stress, publicity, or duration of litigation might be of serious concern to the cli-

43. G. Bellow & B. Moulton, supra note 42, at 1004-17.
44. As an example, consider an experienced criminal defense attorney working in a conservative, blue-collar community. She might be very confident in her prediction to a black defendant, charged with a violent crime and against whom several respected white police officers will testify, claiming to be eye witnesses, that acquittal is almost an impossibility. Such certainty of fact and law, however, is normally quite rare.
45. See Spiegel, supra note 1, at 100-04; D. Binder & S. Price, supra note 1, at 135-55.
46. For a sophisticated treatment of how decisions are made under conditions of uncertainty, see D. Kahneman, P. Slovic & A. Tversky, Judgment Under Uncertainty: Heuristics and Biases (1982).
ent). 47 Because choices must be based on values, risk aversion, social and psychological consequences, and the like, and not strictly on legal analysis, the client generally is in a superior position to make the "correct" choice on those fronts. The role of skill, expertise, and legal judgment remains critical, of course, for only with the lawyer's considered assessment of the legal and financial consequences of the options can the client properly weigh risks and determine which option he prefers. 48 The lawyer employs professional skill to define and explore all options available and to help the client determine how his choice will affect his interests or values. The client's knowledge of his own interests and values requires that the final choices be his.

Informed consent ideology and its preference for client-based decisionmaking are rooted in philosophical, psychological, and strategic considerations. Compared to the professionalism model, informed consent fosters more client autonomy, increases client satisfaction, and achieves "better" results. This constitutes the principled rationale underlying the informed consent doctrine in the legal profession. 49

Even under the informed consent doctrine there are, of course,

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47. D. Binder & S. Price, supra note 1, at 138-40; T. Shaffer, supra note 31, at 180-93 (importance of feelings as facts to be dealt with in counseling process).

48. D. Binder & S. Price, supra note 1, at 143-44; Spiegel, supra note 1, at 104. Proponents of a medical informed consent doctrine present similar arguments in favor of patient decisionmaking. See, e.g., Meisel, supra note 3, at 420-21:
The duty of disclosure aids in the realization of those goals [protecting physical and psychic integrity] by enabling (although neither assuring nor requiring) the patient to make the decision whether to be treated both on the basis of information about the treatment which is supplied by the doctor and information about other concerns subjective to the patient, to which only he presumably has access. [Footnote omitted.]
See also Note, Informed Consent and the Dying Patient, 83 YALE L.J. 1632, 1646 (1974); Note, supra note 34, at 1534-35.

49. This brief review of the premises of informed consent necessarily neglects some of the considerations that run counter to the doctrine. Questions about the viability of the doctrine focus on the client's ability to understand complex legal considerations, whether clients want to understand and play an active participant role, and whether clients who are under the pressures of legal difficulties in fact are better in tune with their own needs, values, and interests. For discussion of some of these matters, see D. Rosenthal, supra note 1, at 7-27; Spiegel, supra note 1, at 85-115; Katz, supra note 40 (similar issues in medical context). For the purposes of this Article, fuller exploration of this aspect of the informed consent debate is not necessary. The Article's discussion of informed consent and the impaired client proceeds on the assumption that the considerations described in the text are valid and that the doctrine is otherwise workable. Only under such an assumption will consideration of an impaired client exception to the informed consent doctrine matter. It should be noted, however, that in contrast to the serious debate in the literature about medical informed consent, see Meisel, supra note 3, little has been published critical of the doctrine as applied to lawyers.
decisions that will still be made by the lawyer with little or no client input. The lawyer may make decisions that are not apt to affect the client or the case significantly, such as the order of calling witnesses, arranging schedules, or the propriety of filing a motion.50 (Of course, depending on the facts of the case, each of these examples may affect the client significantly and, therefore, could require consent.) Logistics, efficiency, the lawyer’s interest in his craft,51 and professional responsibility52 all dictate that clients cannot possess universal and exclusive decisionmaking authority.

B. The Counseling Process

The commitment to client decisionmaking will not be meaningful unless lawyers employ counseling skills and methodologies that safeguard that right. Because of the disparity of status and power within the attorney-client relationship,53 a lawyer who expresses a preference for one option while telling the client to decide whether to accept it is unlikely to obtain “informed consent.” Under ordinary circumstances,54 a client will not be likely to resist the subtle or not-too-subtle influences of his lawyer. To the extent the lawyer recommends a decision that the client adopts, the advantages of client-centeredness are lost.55

50. The Model Rules of Professional Conduct expressly allocate decisions about “means,” as opposed to “objectives,” to the lawyer. Model Rules, supra note 9, Rule 1.2, comment A1. The Model Code implies the same allocation. See Model Code, supra note 9, EC 7-7; see also Maute, supra note 1, at 1098 (supporting this general division of responsibility); Spiegel, The New Model Rules of Professional Conduct: Lawyer-Client Decisionmaking and the Role of Rules in Structuring the Lawyer-Client Dialogue, 1980 AM. B. FOUND. RES. J. 1003, 1007-15. But see Spiegel, supra note 1, at 101 (the decision to try a case before a judge or jury may involve considerations not only of which factfinder will be most favorable, but also of client preference regarding the audience for his story).

51. Spiegel, supra note 1, at 117.

52. Id. The ABA’s professional responsibility standards make clear the lawyer’s duty to reject her client’s instructions when to do otherwise would constitute fraud, illegal conduct, or ethical breach. See Model Code, supra note 9, DR 7-102(A); Model Rules, supra note 9, Rule 1.2(d).

53. See Wasserstrom, supra note 29, at 21-22 (lawyers dominate clients). See generally Simon, supra note 29 (same); but see Heinz, supra note 1, at 902-04 (corporate lawyers dominate clients far less).

54. “Ordinary circumstances” refers to the “personal client hemisphere,” as opposed to the “corporate client hemisphere.” See J. HEINZ & E. LAUMANN, supra note 1, at 384; Heinz, supra note 1, at 905.

55. However, not all of the benefits identified by proponents of informed consent are lost by the approach described in the text. The process of lawyer recommendation with client input and final veto, while not encouraging client-based decisionmaking, nevertheless involves client participation in the process. This participation has inherent benefits. See D. Rosenthal, supra note 1, at 19-20 (satisfaction increases with client participation in deci-
With these concerns in mind scholars have sought to develop counseling methods that minimize lawyer influence on client decisionmaking. The most frequently taught counseling model, developed by David Binder and Susan Price, is premised explicitly on lawyer neutrality. It seeks to foster neutrality by both limiting lawyer decisionmaking and monitoring the lawyer's subtle and nonverbal communications. According to this model, the lawyer's role is to identify consequences and to assist her client in assessing those consequences in light of his needs and values, without asserting any opinion regarding the advisability of any options. The model purposefully avoids the use of any form of persuasion, for persuasion is apt to be successful, defeating the purposes of client decisionmaking. Only in the case of a "difficult client" does the Binder and Price model contemplate more judgmental and less

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56. It is surprising that so little has been written in the medical context about the role of persuasion and doctor influence on patient decisionmaking, given the obvious impact that this can have on the realization of informed consent. Some authorities, such as the President's Commission on Ethics in Medicine, simply assume its acceptability. See 1 MAKING HEALTH CARE DECISIONS, supra note 3, at 66, 77-78. Recently more thoughtful approaches have at least considered the impact of physician influence, although to the extent that persuasion occurs it is seldom criticized. See J. KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT, 156-59 (1984); Thompson, supra note 55, at 111.

57. The Binder and Price model serves as the most widely used model within clinical education programs for teaching client counseling skills. See Frank & Krause, Book Review, 18 CREIGHTON L. REV. 1427, 1427 n.3 (1985) (survey performed by authors).


59. Id. at 166, 168.

60. Id. at 166.

61. Critics of informed consent in medicine argue that such influence is never absent, and thus the concept of free patient choice is illusory, "because disclosure can (and indeed usually will) be made by the physician in such a way as to assure that the patient agrees to the treatment." Meisel, supra note 3, at 416 (making hypothetical argument of critics) (citing Beecher, Some Guiding Principles for Clinical Investigation, 195 J.A.M.A. 1135, 1135 (1966) ("patients will, if they trust their doctor, accede to almost any request he cares to make"); see also Ingelfinger, Informed (But Uneducated) Consent, 287 NEW ENG. J. MED. 465, 466 (1972). Notwithstanding this real risk, the medical profession does not appear to have developed or encouraged a standard of dialogue for the physician-patient relationship that would call for neutral and nonjudgmental communication of information by the doctor. See supra note 56.

Whether a profession can ever develop a truly neutral and noninfluencing method of interaction between professional and client is very questionable. Robert Burt has pointed out mutuality and interdependence of all interactive choices. R. BURT, supra note 4, passim.
neutral tactics.62 They suggest that in appropriate cases it is permissible for the lawyer to provide her opinion of the best option,63 and in more extreme cases for her to seek to persuade the client not to make "extremely detrimental" decisions.64 While Binder and Price allude only briefly to more serious forms of intervention, they apparently concede that the informed consent process to which they are so firmly committed might not apply to less rational clients.65

62. See D. Binder & S. Price, supra note 1, at 192-210. "Difficult clients" are defined by the authors as:
   (1) Clients who are extremely indecisive.
   (2) Clients who insist upon obtaining the lawyer's opinion of what should be done.
   (3) Clients who have already reached a decision and are not interested in considering other alternatives.
   (4) Clients who, in the lawyer's judgment, are making extremely detrimental decisions.

Id. at 192.

63. Id. at 197-200. The authors distinguish between "independent decision makers" and "passive decision makers." Id. at 197. The former are strong-willed, capable individuals who want to hear what the lawyer would choose so as to add that fact to their deliberative package. Binder and Price conclude that there is little risk in offering opinions to those clients. Id. at 198. Passive decisionmakers, on the other hand, expect lawyer advice and will likely be influenced by it. Id. at 66. The authors caution that giving opinions to such clients is risky, but may be unavoidable if client frustration is too great. Id. at 200.

64. Id. at 203-10.

65. Id. at 204-07. The development of a rationale for an impaired client exception to Binder and Price's model may lead to a more general reevaluation of the model itself. Although an in-depth critique of that model is not appropriate for this Article (nor, admittedly, has one been developed adequately by this author), some concerns about how Binder and Price perceive the attorney-client interaction deserve brief mention.

One thematic concern is the model's perception of lawyer neutrality, conceptualized to create a feeling of separateness and objectivity vis-a-vis the client. The model's description of the process of interviewing and counseling minimizes, or eliminates, the factor of relationship. By setting up a separate, neutral lawyer who only slightly influences client decisions, and who interacts mechanically with clients, the model diverges from important theories of interpersonal interaction.

There are those who view the interaction as far more complex, a "rhythmic psychological ballet" in which the roles and feelings of each party are critical to the performance. A. Straus, Mirrors and Masks: The Search for Identity 55 (1959), quoted in Elkins, Book Review, 30 Vand. L. Rev. 923, 931 (1977). The realization that one party's responses in an interaction are inextricably bound up with the perceptions, feelings, and needs of the other party is generally accepted. R. Burt, supra note 4, at 43-45. The role of transference and countertransference in relationships, including attorney-client relationships, has been suggested as an important focal point from which to study and understand the counseling process. T. Shafer, supra note 31, at 161-80; A. Watson, The Lawyer in the Interviewing and Counseling Process 24, 24-25 (1976). By emphasizing the dichotomy of lawyer choice versus client choice (an heuristic that is also maintained to a large degree in this Article), Binder and Price objectify a much more fluid, dynamic, and dialectic process, overlooking the fact that decisions are mutually interactive. This point is made elegantly by Robert Burt in his discussion of physicians, and his suggestions apply equally well to lawyers. R. Burt,
The remainder of this Article will explore more fully the conclusion suggested by Binder and Price that "difficult" clients warrant more intervention and less neutrality from their lawyers. The remedies Binder and Price suggest—opinions and occasional persuasion—will be analyzed along with more paternalistic remedies, such as pursuing guardianship or taking over the decisionmaking process. The purpose is not to critique Binder and Price. Rather, it is to explore the rationale for, and the limits of, the "special" treatment that they have recognized as appropriate for "special" clients.

II. ASSESSING DIMINISHED COMPETENCE

An overarching question preliminarily dominates this inquiry: If lawyers believe their clients are less than competent, may they treat them differently? Before this Article addresses how lawyers might treat such clients differently, it will answer that preliminary question affirmatively, first by offering two examples of client behavior that might cause a lawyer to question the client's competence, and second by addressing the question more directly, albeit more theoretically.

A. Two Examples

Example 1—Imagine a lawyer representing Mr. H, an elderly widower previously diagnosed as suffering from mental illness. The lawyer has represented Mr. H in his attempt to obtain old age and disability benefits. For the sake of simplicity, assume that the lawyer is publicly financed and thus charges no fee.\(^{66}\)

\(^{66}\) Publicly funded lawyers have been available to poor, elderly people since 1965 under Title III-B of the Older Americans Act, a federal program that provides funding for social services, including legal services, to the nation's elderly. 42 U.S.C. § 3001; 45 C.F.R. § 1321.73.


For lawyers representing paying clients, the fundamental issues remain the same, but their resolution may be much more complex. For instance, a client with failing faculties may neglect to pay his lawyer's fees. If the lawyer wants to sidestep the ethical dilemma raised...
Mr. H has recently been exhibiting symptoms of the beginning stages of Alzheimer's disease. The present problem is triggered when he calls his lawyer to tell her that he has received some official looking papers that he does not understand. She goes to his house, which he has owned for thirty-five years, and reviews the papers. The documents include an eviction notice from a real estate speculator who claims that he now owns Mr. H's home. The lawyer recognizes the name of the speculator as an unscrupulous foreclosure sale operator who has obtained fraudulent title to many homes in recent years. The speculator claims title to the house based on a lien contract that may have been forged or that Mr. H may have signed without understanding its nature.

Mr. H is terribly distraught about the prospect of losing his home. He calls the lawyer repeatedly, sometimes crying, other times angrily demanding that she resolve the matter immediately. The lawyer's research shows that she has a very strong case for by the client's incompetence, she might use failure to pay as a basis for withdrawal. See Model Code, supra note 9, DR 2-110(C)(1)(f); Model Rules, supra note 9, Rule 1.16(b)(4), comment ¶ 8. Whether a lawyer properly may cease representation under such circumstances is not clear, particularly if the client would be prejudiced or if the lawyer believes that failure to pay is the result of the client's illness. See C. Wolfram, Modern Legal Ethics 543 (1986). On the other hand, a lawyer whose fees have been neglected may have a greater incentive to intervene to have a lawful proxy appointed for the client, because the proxy (who might even be the lawyer herself) could resume payment of the client's obligations (including, of course, the unpaid attorney's fees).

Alternatively, the client may pay the fees and proceed to demand action that the lawyer believes is short-sighted and not competently reasoned. In such circumstances the lawyer may feel financial pressure to comply with the client's wishes. This quandary at least approaches a conflict of interest between the lawyer, who needs income, and the client, who will pay only if the lawyer refrains from interfering with the client's illogical choices. Cf. Evans v. Jeff D., 106 S. Ct. 1531 (1986) (Brennan, J., dissenting) (noting potential conflict of interest between civil rights lawyer and client when attorney's fees claim must be waived as condition of settlement offer favorable to client).

Although employing a publicly funded lawyer in the hypothetical simplifies the issue considered in this Article, it could also create additional ethical issues not apparent in this example. The most prominent and difficult problem faced by such lawyers is caused by their perceived role as "elder advocates," who can be called on to intervene on behalf of elders by social service providers, without any request from the affected elder. Even though it is tempting, both morally and emotionally, to play out this "muckraker" role, lawyers have no authority to take legal action on behalf of any person without either that person's consent or authorized proxy consent.

67. Alzheimer's disease is a form of "senile dementia," a primary degenerative dementia that includes a confusional stage marked by a decline in memory. See American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (3d ed.) (DSM III) 290 (1980); Stanley, Senile Dementia and Informed Consent, 1 Behav. Sci. & L. 57, 58-59 (1983). As the disease approaches its dementia phase, memory, judgment, reasoning, and psychomotor functioning decline progressively. Id. at 59. There is no known cure for the disease. Id.
injunctive relief and damages. When she meets with Mr. H to counsel him about the case and her plans to file suit, he has become increasingly confused, suspicious, and angry. He denies her permission to file any paper in a public court, telling her that his deceased sister and the devil are behind this, and that filing any papers in court—even an answer to the eviction complaint—will cause his sister and the devil to harass him more. After several counseling sessions, during which his descriptions of persecution increase in detail and vigor, as does his refusal to authorize any legal action, Mr. H finally accuses the lawyer of being party to the speculator’s fraud and in league with the devil and fires her. Mr. H has neither the money to hire a private lawyer nor any family or other support network. From prior experience the lawyer is confident that the speculator will not hesitate to enforce his default judgment by evicting Mr. H so that he can sell the home.  

Example 2—Suppose a lawyer has been retained by Mr. M, a seventy-year-old nursing home resident who wants to challenge the shabby treatment he receives in the home. Assume again that the representation is free, and that Mr. M was referred to the lawyer by his adult daughter, to whom he had complained about the facility and its staff. After having participated actively in an attorney-client relationship with his lawyer, Mr. M suffers a stroke. As a result, his ability to reason diminishes considerably and the lawyer finds it very difficult to have a meaningful conversation with him. He remains cooperative, but the lawyer fears too much so—he seemingly will agree to anything she suggests.

The lawyer must now consider whether to file a lawsuit, perhaps even a class action, against the home. There are obvious risks in this strategy. Not only would Mr. M likely be the recipient of further mistreatment because of his “troublemaker” status, but there is also a slim chance that, if the lawsuit were to reach the attention of public health officials, they might decertify the facility for Medicaid purposes, forcing Mr. M to find another home. Further complicating this decision is the likelihood that the lawyer could recover her fees if the suit were successful.

These examples, only two among an infinite number raising

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68. This example is based on a composite of two clients represented in the past by the author. The type of fraudulent foreclosure/speculation scam described, sadly, was common in South Central Los Angeles in the late 1970s and early 1980s. See, e.g., 1000 Could Lose Homes, Los Angeles Times, Feb. 5, 1979, at 1, col. 1.

69. See supra note 66.
comparable tensions, present very difficult personal and professional choices for a lawyer. In either case doing nothing seems unconscionable, but doing anything seems unethical. The lawyer's first consideration must be whether it is appropriate to act on her own assessment of her client's competence. Only if she concludes that it is appropriate may she proceed to consider how, if at all, she is to intervene.

B. The Question of Competence

Before deciding whether to intervene on behalf of Mr. H or Mr. M, a lawyer would need to consider the question of their competence, for it is only if they are incompetent that intervention could possibly be justified. The competence issue divides into three elements. First, one must accept the premise that incompetence exists, that is, that there are persons who, because of some type of disability, are not choosing their actions and are not able to appreciate and judge the quality of their conduct. Second, having accepted the first premise, one must be able to distinguish incompetent behavior from competent but different, foolish, or unwise.

70. Other writers have offered their own examples of client behavior that tempts intervention. See D. Binder & S. Price, supra note 1, at 203-04; Luban, Paternalism and the Legal Profession, 1981 Wis. L. Rev. 454, 455-56.

71. This point might not be absolute, but it is generally accepted as a premise of paternalism. The paternalism arguments presented in this Article draw on a "weak" version of legal paternalism, which posits that voluntary self-inflicted harm is not harm at all, and that intervention is therefore appropriate only if a showing is made that the harmful choice is involuntary. Feinberg, Legal Paternalism, 1 CANADIAN J. PHIL. 105, 108 (1971) states:

[T]he reasons for this are that the coercion required to prevent such harm is itself a harm of such gravity that it is likely in the overwhelming proportion of cases to outweigh any good it can produce for the one coerced; and moreover, individuals themselves . . . can know their own true interests better than any outsiders can, so that outside coercion is almost certain to be self-defeating.

See also J. Childress, supra note 4, at 17; J. Mill, On Liberty 101 (1978 ed.). By contrast, the "strong" version of paternalism would permit interference with voluntary and reasoned choice in order to protect the decisionmaker. Feinberg, supra, at 120. (Note that interference to protect third parties is not paternalism. See Dworkin, Paternalism, in Morality and the Law 107, 108 (S. Wasserstrom ed. 1971).) Justification for "strong" paternalism is obviously more difficult, but for present purposes that battle need not be fought. The issue presented in this Article is how to respond when the client's self-destructive actions may be involuntary. Assume for the sake of argument that a voluntary choice, however harmful, must be respected, but that a delusional one need not be. This inquiry thus focuses on the "easy" question and sidesteps the more difficult paternalism questions raised by competent but self-destructive decisionmakers.

behavior. "Competent but ... ." behavior cannot be restrained (unless it is harmful to third parties, which is an entirely different consideration73). Third, the lawyer must define her role in such a determination. She needs to know whether she, qua lawyer, ought to be permitted to conclude that a client is impaired and based on that judgment treat that client differently.74

This Article accepts the first premise. There are, of course, contrary points of view. Some argue eloquently and persuasively that the behavior our culture labels mental illness is little more than culturally deviant. They claim that such behavior is labeled mental illness merely because it is different, and not because it is the product of any documented disorder or malfunction.75 Thus, the individuals who are categorized as mentally ill in fact have control over their actions; they act differently because they choose to do so. Because they could choose to do otherwise, one must respect their choices as long as they do not harm third parties.76 The concept of choice or "control" is critically significant in mental health law because the fundamental reason for the law's treatment of per-

73. This inquiry is confined to the ethical issue of intervention to prevent client self-injury, and not intervention to prevent the client from injuring a third party. Third party harm is an entirely different concern. It can be a much simpler issue, as when a client intends to commit a serious crime that will cause death or substantial bodily injury. Most, perhaps all, ethical standards freely permit lawyers to intervene to prevent such harm. See Model Code, supra note 9, DR 4-101(C)(3); Model Rules, supra note 9, Rule 1.6(b)(1) (each permits disclosure of client intention for purpose of preventing crime). It can also be just as difficult an issue, as when a client seeks to pursue a "noxious scheme" that is lawful but unjustly harmful to a third person. Scholars continue to debate the proper lawyer role in such circumstances. Compare, e.g., Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 1060, 1082-87 (1976); Pepper, The Lawyer's Amoral Ethical Role: A Defense, a Problem and Some Possibilities, 1986 Am. B. Found. Res. J. 613 (in defense of the lawyer's amoral role), with Luban, The Adversary System Excuse, in The Good Lawyer 83 (D. Luban ed. 1983) (critical of the amoral characterization); Simon, supra note 29, at 130-44.

74. "Different treatment" usually means more restrictive of rights and privileges. This realization does not damn the endeavor; it merely recognizes that paternalism, even benign paternalism, necessarily infringes on the client's freedom. Dworkin, supra note 71, at 110. It is important to note, however, that it is too often abusive. See Mitchell, The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetents, 52 S. Cal. L. Rev. 1405 (1979); Comment, The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?, 73 Yale L.J. 676 (1964); Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190 (1974).


76. Morse, supra note 75, at 572-77 ("[c]laiming that a crazy person could not do otherwise is little more than an intuitive hunch, a post hoc moral justification employed to reach the result of differential legal treatment").
sons with alleged mental disorders, (e.g., insanity pleas, guardianship, commitment, and antipsychotic medication) is that these individuals are acting with diminished control over their harmful or self-destructive actions. Accepting the contrary theory, that mental illness is mere labeling of otherwise neutral behavior, provides an easy solution for the lawyer. She can assume, for example, that Mr. H has chosen to sacrifice his home and his health, a choice that she must respect. Her assumptions about Mr. M are a bit more complicated. How she responds to his nonresponsiveness is addressed later.

Such a view of mental illness is not, of course, the dominant one in either law or psychiatry. The prevailing scientific and legal attitude is that some people are mentally ill, i.e., have less control over their behavior and thought processes than people who are considered better adjusted. They do not choose to act "crazy" and contrary to their conventional interests. Because society recognizes mental illness and countenances extraordinary treatment of the mentally ill, it is important to determine the proper role of a lawyer representing an impaired client. That inquiry must assume, at least arguendo, that mental illness as conventionally recognized does exist.


78. See infra text accompanying notes 180-83.

79. The law generally regards mental illness as a real phenomenon rather than a matter of mere behavior categorization. Every state in the Union has developed a scheme for commitment of the mentally ill. See Developments in the Law, supra note 74 (review of all state statutes). The prevalence of the insanity defense is also a fundamental recognition that certain individuals do not possess the requisite control over their behavior to warrant punishment for their actions. See, e.g., Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); M'Naughten's Case, 8 Eng. Rep. 718 (1843); Model Penal Code § 4.07(1) (Proposed Official Draft 1962).

80. The theories of Thomas Szasz are hardly the conventional view within modern psychiatry. For an assessment of the psychiatric doctrine supporting the concept of lack of competence and the desirability of benign intervention, see Readings in Law and Psychiatry (R. Allen, E. Ferster, & J. Rubin eds. 1975); R. Reisner, Law and the Mental Health System 491 (1985); A. Stone, supra note 77, at 43-66; Developments in the Law, supra note 74, at 1212-20.

81. The term "crazy" was adopted by Professor Morse, supra note 75, having followed the lead of Professor Alan Stone of Harvard, as a "nonjargon term that both describes the behavior considered mental disorder and avoids unwanted connotations." Id. at 554 n.44.

82. It may be, see infra text accompanying notes 96-101, that as a matter of professional responsibility lawyers may not conclude that eccentric client behavior is mental illness, even though nonlawyers would reach such a conclusion. If such a prohibition exists, it should be the result of the lawyer's role as a faithful advocate and not because of the theory that mental illness is a myth.

83. A final reason to proceed under the assumption that sometimes mental illness is
The conventional wisdom in psychiatry, medicine, philosophy, and law supports the conclusion that mental illness, physical disability, and other sources can create the phenomenon known as "incompetence," which is intended to mean inability to arrive at a reasoned decision. A person may be competent for some matters but incompetent for others; the concept is fluid and dynamic. Persons who are functionally incompetent are entitled to paternalism, because they are likely to suffer harm without having chosen that harm. Society's approach to children exemplifies this point. We readily accept paternalistic treatment of young children. With children one can, in theory at least, "determine" lack of competence by using a rather arbitrary age level. With adults, however, the distinction between competence and lack of competence is obviously much harder to define.

not a myth is the substantial evidence that diseases associated with aging, and in particular Alzheimer's disease, do in fact disrupt the ordinary reasoning processes, preventing the patient from exercising free choice. See, e.g., Gunn, *Mental Impairments in the Elderly: Medical-Legal Assessments*, 25 AM. J. GERIATRICS Soc'y 193 (1977); Lange, *Geriatric, Psychiatric and Legal Aspects of the Mental State of the Aged*, 4 LEGAL MED. Q. 161 (1980); Stanley, supra note 67, at 59. The fact that such diseases are physical and involve actual organ deterioration makes it difficult to argue that people suffering from them should be allowed to behave destructively.


87. The analogies between representing children and representing incompetent adults are too prominent to ignore. Although our statutes tend to define competence for children by means of the purely arbitrary and actuarial tools of chronological age, even that attempt to hide from the problem is not fully successful. See, e.g., *IJA-ABA STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES* 8-9 (1980) (lawyers representing mature, independent-minded children may serve as advocates for the children's desires rather than their best interests).

Much has been written on the topic of defining and recognizing competence, yet the concept remains elusive. To a large extent the term remains a legal one, and its boundaries often have been drawn by courts. It is, however, essentially a matter of psychology or perhaps philosophy. The most important task for the legal standard of competency is to distinguish effectively between foolish, socially deviant, risky, or simply "crazy" choices made competently, and comparable choices made incompetently. Although incompetent behavior may be restrained, identical compe-

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89. See, e.g., Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232, 1236 (1976) ("Mrs. Candura's decision may be regarded by most as unfortunate, but on the record in this case it is not the uninformed decision of a person incapable of appreciating the nature and consequences of her act"); Rogers v. Commissioner, 390 Mass. 489, 458 N.E.2d 308 (1983).

90. See P. Appelbaum, C. Lidz & A. Meisel, supra note 4; Roth, Meisel & Lidz, supra note 88.

91. See T. Beauchamp & J. Childress, supra note 84; Luban, supra note 70; Miller, supra note 85.

92. The "outcome test" (whether the choice itself seems "crazy") of determining competency is based on tautological reasoning and has been rejected by courts and commentators. See Colyar v. Third Judicial Dist. Court, 469 F. Supp. 424, 432 (D. Utah 1979). The court in Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232, 1235 (1976) refused to permit doctors to measure competence by the medical rationality of the choice, for the definition of competence would then be circular. See also Luban, supra note 70, at 466:

The trick is to come up with a notion of incompetence that is not self-justifying and self-serving. Thus, it would clearly be wrong to say something like, "You don't really want that. You just think you do because your decisionmaking mechanisms are impaired. How do I know? If they weren't impaired you wouldn't want that!"
tent behavior may not. This distinction fosters and protects autonomy, dignity, and responsibility. A person may have a right to choose to harm himself or to forego benefits, but a person who harms himself, not by choice but because of illness, should be restrained. To make this distinction, competence has been defined in terms of process and not in terms of result. Most definitions focus on the capacity to make choices based on understanding and appreciation of the facts and the situation; the quality or substance of the ultimate choice is not a determinant.

Even with a workable definition of competence, a difficult question remains. If we accept paternalism as a reasonably liberal approach to preventing harm to those who cannot make reasoned decisions, what is the role of the lawyer whose client appears to meet that definition? In some ways, the answer to this question comprises the remainder of this Article, but some initial thoughts seem appropriate. First, substantive law recognizes a presumption of competence, which generally may not be overcome except by a judicial determination. Second, again as a matter of law, one

93. See Feinberg, supra note 71, at 111-12. Some qualification of this statement is necessary because there are many lawful paternalistic acts that restrain entirely free, competent choice. We are not free, for instance, to take illicit drugs or, in some states, to ride motorcycles without helmets. We may neither hire laypersons to represent us in court, even if it saves us money, nor consent to representation by lawyers whose independent professional judgment is impaired by a conflict of interest. See, e.g., Moore, Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy, 61 Tex. L. Rev. 211, 232-40 (1982) (favoring paternalism to protect clients in some cases). Under certain social and political circumstances, our culture accepts paternalism even when it restrains competent choice harmful only to oneself. (There are arguments that in each example just given the proscribed conduct also harms third parties, but such arguments are tenuous at best.)

This Article assumes that such paternalism is not justifiable in lawyering decisions, just as it is not in health care decisions. It is the heart of the informed consent doctrine that clients may choose their own (lawful) harm. The government's authority to override competent choice is not generally available to private actors.

94. This is particularly true if the harm is significant or irreversible. See Dworkin, supra note 71, at 123.

95. See, e.g., 1 Making Health Care Decisions, supra note 3, at 169; Appelbaum & Roth, supra note 72, at 1467; R. Reisner, supra note 80, at 505.


97. This legal mandate, however, is seldom followed by the medical profession, at least in non-life-threatening circumstances. See, e.g., Annas & Densberger, supra note 86, at 564 ("[m]ost competence determinations, of course, are not front page news. They are made routinely in our nation's hospitals and nursing homes without fanfare or resort to the
party generally may not usurp the decisionmaking authority of another without court approval,\(^98\) consent of the other party,\(^99\) or some limited common law or statutory advance authorization.\(^100\)

Third, an involuntary delegation of decisionmaking authority or a judicial determination of incompetence is generally viewed as a serious deprivation of rights, and is often accompanied by procedural protections such as the right to a hearing and perhaps to counsel.\(^101\)

Because a finding of incompetence is equivalent to a deprivation of rights that ordinarily requires court approval, one possible response to the question of the lawyer's responsibility to an apparently incompetent client is that the lawyer may not make such a determination. Not only must the lawyer remain loyal to her client, but in addition no such deprivation should occur in any context without judicial approval. Thus, the informed consent doctrine should—indeed must—apply and the client's directions must be followed. The argument is that a lawyer representing an impaired client without a guardian, conservator, or appointed agent is essentially boxed in by the operation of the legal presumption. She can neither disregard, nor can she seek to overcome, the presumption because to do either would make the lawyer her client's adversary. Because she is a lawyer, or more precisely because her relationship with her client is a lawyer-client relationship, she must not be permitted to question her client's competence or decisions. She must carry out his decisions as long as it is not illegal or unethical to do so.

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\(^98\) Guardianship is the ordinary mechanism for lawful substitution of one decisionmaker for and on behalf of another. See Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 Ariz. L. Rev. 599, 601-02 (1981).


\(^101\) See *infra* note 190.
This argument is unsatisfactory. Consider the two examples above. Adherence to conventional informed consent practice in such cases is not only painful to the lawyer but may be morally irresponsible. The dilemma is plain: it may be morally wrong to intervene, and it may be morally wrong not to intervene. What is needed, and what is attempted in the following sections of this Article, is to arrive at some balance between these competing moral imperatives. Absent a significant stride in moral philosophy, the conflict cannot be neatly resolved.

III. Suggestions From the Profession

Although the issue of informed consent for the incompetent client has not been addressed in the legal context to the same extent as in the medical context, the profession has offered some guidance for lawyers who find themselves representing impaired clients. While the doctrine of informed consent plays a minor explicit role in these formulations, they do contain an implicit resolution of the client-centeredness/paternalism tension. This section first reviews the ABA’s ethical standards and then the trend of case law and commentator analysis to explain how the informed consent considerations have been sacrificed to paternalism in those forums.

A. Suggestions From the ABA

The American Bar Association has recognized the difficulty in applying conventional approaches to client decisionmaking to clients who are less able to make competent decisions. The Code of Professional Responsibility ("Code" or "Model Code") deals with this issue obliquely. The more recent Model Rules of Professional Conduct ("Rules" or "Model Rules") attempt a more forthright approach to the problem. The guidance offered by each, however, either is too incoherent and ambiguous to be meaningful or is unjustified in its delegation of authority to the lawyer.

102. See Macklin, supra note 88, at 373 ("[t]he person capable of resolving the theoretical conflict in ethics that underlies disputes [between autonomy and beneficence] arising at the applied level would make a significant contribution to twentieth century moral philosophy").
1. The Model Code—The Code, while providing no mandatory guidance on this question, addresses it in an "Ethical Consideration" ("EC"). Ethical Consideration 7-12 recognizes that "[a]ny mental or physical consideration of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities on the lawyer." The Code identifies the "additional responsibilities" as follows: (1) a lawyer must look to the legal representative, rather than to the client, for authority if such a representative exists; (2) she "may be compelled in court proceedings" to make decisions on behalf of a client if no representative exists; (3) if the lawyer must make decisions for her client, she must "act with care to safeguard and advance the interests of [her] client;" and (4) the lawyer is reminded that "obviously [she] cannot perform any act or make any decision which the law requires [her] client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent."

Taken together, EC 7-12's guidance approves of lawyer usurpation of client decisionmaking authority in court, but seemingly not elsewhere, and always with the client's best interests in mind. It recognizes, however, that some decisions are exclusively for the client or his legal representative. Together with EC 7-7, which states that certain decisions are to be made "exclusively" by the client and are "binding" on the lawyer, EC 7-12 raises a host of

103. The Model Code's "ethical considerations" are aspirational rather than mandatory. See Model Code, supra note 9, preliminary statement ("The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations"). The ethical considerations tend to address matters that the drafters felt were not appropriate subjects for black letter law exhortations. See Frankel, Book Review, 43 U. Chi. L. Rev. 874, 881 (1976) (ethical considerations are matters of morality, rather than law, and "can be regulated by the blunt instruments of the law only at great risk to liberty, fairness, and other values").

104. Model Code, supra note 9, EC 7-12.

105. Id.

106. Id. (emphasis added).

107. Id. (emphasis added).

108. Id.

109. Model Code, supra note 9, EC 7-7. That provision reads as follows:
In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on
questions. First, one might wonder whether the decisions that must be made by the client under EC 7-7 are those that the lawyer is prohibited from making under EC 7-12; if so, the lawyer’s obligation to competent and incompetent clients is precisely the same. 110 This conclusion seems nonsensical given the inclusion of EC 7-12 as a set of different standards for representing incompetent clients. A more sensible construction is that EC 7-12 permits the lawyer to make decisions that otherwise would be “exclusively” for the client under EC 7-7. The decisions that a lawyer may not make even under EC 7-12 presumably include those that would require nondelegable action by the client, e.g., making a will, voting, or oath-taking. 111 The Code does not indicate the basis for giving the lawyer power to make decisions that otherwise are exclusively for the client; one would assume that the drafters relied on principles of agency and implied consent. 112 However, the reasonableness of assuming such a delegation of authority is very questionable. 113

It is also unclear what the drafters mean by the “interests” of the client. As discussed below, a “best interests” standard may be distinguished from a “substituted judgment” standard as well as

whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

110. For instance, under EC 7-7, only the client can decide whether to waive an affirmative defense. If that is the type of decision that is beyond the scope of the lawyer under EC 7-12, then the lawyer has the same authority whether the client is competent or incompetent. This hardly seems logical given the Model Code’s special treatment of incapacitated clients. But see D. Binder & S. Price, supra note 1, at 205-06 n.3 (EC 7-12 does not contemplate lawyer decisionmaking on issues reserved to the client by EC 7-7); Comm. on Prof. Ethics of the Assoc. of the Bar of the City of New York, Inquiry Reference 81-32 (same).

111. See Note, supra note 100, at 1009.

112. For example, the drafters might have assumed that the creation of the attorney-client relationship implies delegation of authority in cases of incompetence. See Maute, supra note 1, at 1089-92; Spiegel, supra note 1, at 77-85 (citing Parsons, Research With Human Subjects and the “Professional Complex,” 98 Daedalus 325 (1969)); Shores Co. v. Iowa Chem. Co., 222 Iowa 347, 268 N.W. 581 (1936) (implicit authority for attorney to waive jury trial); Rose v. Oliveira, 116 R.I. 277, 287, 342 A.2d 601, 606 (1975) (attorney authorized to take necessary legal and professional actions by virtue of representation); cf. Wainwright v. Sykes, 433 U.S. 72, 93-94 (1977) (Burger, C.J., concurring) (conduct of trial including decisions whether to make certain objections is delegated to attorney).

113. See Spiegel, supra note 1, at 77-85 (attorney-client relationship does not give rise to any implied decisionmaking authority). Compare the medical model, in which entering into a relationship is insufficient to imply consent to any particular treatment, however beneficial. See, e.g., Shultz, supra note 35, at 225 (citing Canterbury v. Spence, 464 F.2d 772, 782 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972)).
an “advocacy” standard. Under EC 7-12 should a lawyer in court with an incompetent client act according to what the client would have wanted (substituted judgment), what the lawyer thinks best for the client (best interests), or what the law most allows (advocacy)? The Model Code does not answer this question. One thing does seem clear—the lawyer should not do what the client wants unless it happens to coincide with the approach chosen by the lawyer.

Finally, the reason for restricting the lawyer’s power to override her client’s wishes to in-court representation is not at all apparent. The Code does not offer any guidance to lawyers representing incompetents in non-litigation or pre-litigation contexts (except, perhaps, to follow EC 7-7). Each of the possible reasons for drawing this distinction—court representation is more important, keeping client confidences is more important in court lest the judge be prejudiced, or implied consent is more justifiable in litigation—cannot withstand scrutiny. Thus, the Model Code is generally paternalistic, at least in the litigation context. In fact, in that context it delegates authority to lawyers quite generously. Overall, however, it raises more questions than it answers, most notably regarding non-court activity, and


115. The most probable construction of EC 7-12's language is that the lawyer should perform a “best interests” analysis and act accordingly. See, e.g., VA. STATE BAR LEGAL ETHICS COMM. LEO 570 (1984) (lawyer to act “in the best interest of the client”); STATE BAR OF MICH., COMM. ON PROF. & JUD. ETHICS, INF. OP. CI-1055 (1984) (same). For further discussion of that approach, see infra notes 143-44 and accompanying text.

116. Although litigation affects important client rights and is a central part of lawyering, it is not the predominant context of lawyer-client interaction. It is not more important, therefore, to protecting client interests than are non-litigation functions such as negotiation or planning. See, e.g., L. BROWN & E. DAUER, supra note 42, at xix; Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754, 768 (1984); Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 951 (1979).

The Code’s apparent limitation of de facto authority to the courtroom might be justified by the need for confidentiality vis-a-vis the judge. The Code drafters might argue that if the lawyer’s choice is between acting as de facto guardian and revealing the client’s disability to the court, the lawyer must avoid the revelation. Although this is both a long-standing professional concern in other contexts, such as whistleblowing, see Note, The Attorney’s Duty to Reveal a Client’s Intended Future Criminal Conduct, 1984 DUKE L.J. 582, and an important concern in this context, it simply does not follow that revealing the client’s disability violates the client’s rights any less than does usurping the client’s decisionmaking authority. Nor is it clear that disclosure of client confidences outside the courtroom is of any less concern.
otherwise it is close to meaningless in its guidance to the practicing bar.\textsuperscript{117} The propriety of and justification for its implied delegation of decisionmaking authority to lawyers is discussed below.\textsuperscript{118}

2. The Model Rules—The Model Rules of Professional Conduct treat this thorny issue much more directly. The Rules generally follow the approach of EC 7-12 but offer important differences as well. Model Rule 1.14 contains two separate and potentially incongruous mandates for lawyers representing clients whose "ability to make adequately considered decisions in connection with the representation is impaired."\textsuperscript{119} Rule 1.14(a) first requires that "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."\textsuperscript{120} The Comment to this Rule makes two observations on this point, neither supporting the interpretation that the client should make the decisions. First, the lawyer should continue to treat a disabled client with respect,\textsuperscript{121} and second, the presence of a guardian or legal representative does not remove the lawyer's general obligation to maintain communications with the client.\textsuperscript{122} The Comment further notes, in an interpretation for which there is no apparent authority in the language of the Rule,\textsuperscript{123} that if there is no guardian or legal representative,

\begin{itemize}
\item \textsuperscript{117} For similar sentiments, see D. Herman, Representing the Respondent in Civil Commitment Proceedings, ABA Center for Professional Responsibility Monograph Series 20 (1985).
\item \textsuperscript{118} See infra notes 232-60 and accompanying text.
\item \textsuperscript{119} MODEL RULES, supra note 9, Rule 1.14(a).
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id. comment ¶ 2.
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Compare Rule 1.14 with the comment. The Rule makes two points: (1) the lawyer should maintain a normal attorney-client relationship with the disabled client; and (2) the lawyer may seek a guardian or "take other protective action" when the lawyer reasonably believes that the client cannot adequately act in his own interest. It may be argued that the de facto guardianship language in the comment obtains its authority from the "other protective action" language of the Rule. The ordinary interpretation of that language, however, is "protective services," which generally means intervention by some agency or person authorized to assist and protect those at risk. See, e.g., Regan, Protective Services for the Elderly: Commitment, Guardianship, and Alternatives, 13 WM. & MARY L. REV. 569 (1972).

The comments to the Model Rules are intended to serve merely as interpretive guidelines. See MODEL RULES, supra note 9, preamble ("[t]he comments are intended as guides to interpretation, but the text of each Rule is authoritative"); see also A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 21 (1984) (the Comments often "strike out on their own," and the Model Rules do not satisfactorily resolve questions about the enforceability of the Comments); cf. Rotunda, The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag, 63 OR. L. REV. 445 (1984) (discussing a Comment going far beyond language of Rule).
\end{itemize}
“the lawyer often must act as de facto guardian.”

Thus, from the Comment interpreting the ambiguous language of the Rule, it is fair to conclude that maintaining, “as far as reasonably possible,” a normal client-lawyer relationship does not mean adhering to normal notions of informed consent.

The second part of the Rule permits the lawyer to seek the appointment of a guardian, but only when the lawyer reasonably believes that the client cannot adequately act in his own interest. This suggestion, however, is not mandatory. Thus, in light of the Comment, it is fair to assume that the lawyer has the discretion to choose either to act as de facto guardian or to seek appointment of a proper, authorized guardian, except that seeking appointment of a guardian is restricted to certain more serious disabilities.

To the extent the Rule encourages appointment and use of authorized legal representatives, it is consistent with the traditional

124. MODEL RULES, supra note 9, Rule 1.14 comment ¶ 2.
125. Even though the Rule retreats from requiring client decisionmaking, its attempt to increase client participation in decisionmaking (a fair inference from its recommendation of maintaining normal communication between lawyer and client) is laudable. It has been shown that increased participation leads to greater client satisfaction. See D. ROSENTHAL, supra note 1, at 169; Maute, supra note 1, at 1051 n.2.
126. MODEL RULES, supra note 9, Rule 1.14(b).
127. The language of the Rule is “A lawyer may seek the appointment of a guardian . . . .” Id. (emphasis added). The preamble to the Model Rules states that certain rules “generally cast in the term ‘may,’ are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.” MODEL RULES, supra note 9, scope.

This discretionary language replaced the mandatory language of prior drafts. The earliest public draft of Rule 1.14(b) read as follows: “(b) A lawyer shall secure the appointment of a guardian or other legal representative, or seek a protective order with respect to a client, when doing so is necessary in the client’s best interest.” MODEL RULES, supra note 9, Rule 1.14(b) (Discussion Draft 1980) (emphasis added). The proposed final draft replaced the last clause with “only when the lawyer reasonably believes that the client cannot adequately communicate or exercise judgment in the client-lawyer relationship.” MODEL RULES, supra note 9, Rule 1.14(b) (Proposed Final Draft 1981) (emphasis added). Thus, it limited the application of the mandatory language. The revised final draft replaced “shall” with “may.” MODEL RULES, supra note 9, Rule 1.14(b) (Revised Final Draft 1982). Interestingly, even when the language of Rule 1.14(b) had “shall,” the Comment stated that “[i]f the person has no guardian or legal representative, the lawyer often must act as de facto guardian.” MODEL RULES supra note 9, Rule 1.14(b) comment (Discussion Draft 1980, Proposed Final Draft 1981).

128. The lawyer’s discretion to seek a guardian or to take “other protective action” may be exercised “only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.” MODEL RULES, supra note 9, Rule 1.14(b) (emphasis added). Note that the term “interest” is used, raising the same problems caused by the use of that term in EC 7-7. See supra text accompanying notes 114-15.
approach to proxy decisionmaking. To the extent it permits ad hoc decisionmaking by the lawyer without either consent or court approval, the Rule reincorporates the tension that has received so much attention in the medical field,129 but it offers no meaningful assistance regarding how to resolve the tension in practice. In a technical but perhaps significant way, it also violates the law by authorizing action in the absence of direct or proxy consent.130 As noted below, this lawlessness is widespread in the professions and elsewhere. Some argue that it is entirely inevitable and even proper.131

The Comment to Rule 1.14 also raises a concern about the lawyer seeking appointment of a guardian by noting that “disclosure of the client’s disability can adversely affect the client’s interests,” for example, by leading to involuntary commitment proceedings.132 A related fact not mentioned by the Comment but implied in the example, is that disclosure contravenes the lawyer’s duty to

129. In the medical field the question of who will make decisions for incapacitated patients has been debated vigorously without any coherent or generally accepted resolution. See, e.g., 1 MAKING HEALTH CARE DECISIONS, supra note 3, at 182-88; Buchanan, Medical Paternalism or Legal Imperialism: Not the Only Alternatives for Handling Saikewicz-type Cases, 5 AM. J.L. & MED. 97, 105-06 (1979); Gauvey, Leviton, Shuger & Sykes, Informed and Substitute Consent to Health Care Procedures: A Proposal for State Legislation, 15 HARV. J. ON LEGIS. 431, 445 (1978) [hereinafter Proposal for State Legislation]; Meisel, supra note 3, at 476; Meisel & Kabnick, Informed Consent to Medical Treatment: An Analysis of Recent Legislation, 41 U. PITT. L. REV. 407, 461 (1980); Note, supra note 100, at 994. The themes that emerge from this debate form the basis for analyzing the lawyer’s role in making decisions for incapacitated clients in section IV of this Article. Given the similarity of the two professions, it is disquieting that this issue has received so little attention from scholars focusing on legal ethics. Although the life-and-death nature of medical choices certainly invites debate on the physician’s role, the absence of that element from most legal choices does not relieve lawyers of the same ethical dilemma.

130. The presumption of competence, see supra note 96 and accompanying text, can easily be construed to mean that all persons are legally competent to make decisions until the presumption has been overcome in a judicial proceeding. See, e.g., Rennie v. Klein, 653 F.2d 836, 846 (3d Cir. 1981), vacated and remanded, 458 U.S. 1119 (1982); Rogers v. Commissioner, 390 Mass. 489, 498, 458 N.E.2d 308, 314-15 (1983); cf. P. APPELBAUM, C. LIDZ & A. MEISEL, supra note 4, at 90 (“in theory,” a finding of incompetence requires adjudication). Any third party usurpation of authority without judicial approval or prior consent violates this principle. See Proposal for State Legislation, supra note 129, at 440-41. Yet such violations occur continually, sometimes without any acknowledgement of the legal impediment. See, e.g., 1 MAKING HEALTH CARE DECISIONS, supra note 3, at 185-87; Bedell & Delbanco, Choices About Cardiopulmonary Resuscitation in the Hospital: When Do Physicians Talk With Patients?, 310 NEW ENG. J. MED. 955, 956 (1984). When the legal bar is acknowledged, it is derided for its impracticality and seeming naivete. See, e.g., Proposal for State Legislation, supra note 129, at 440-41; Note, supra note 100, at 992-94.

131. See Proposal for State Legislation, supra note 100, at 440-41; see also infra text accompanying notes 229-30.

132. MODEL RULES, supra note 9, Rule 1.14 comment ¶ 5.
keep client confidences except in a few narrow instances. 133 The Comment’s only response to this, the heart of the dilemma faced by the lawyer representing an incompetent client without a guardian, is the following bromide: “The lawyer’s position in such cases is an unavoidably difficult one.” 134 The Comment is correct that the position is difficult; in fact, it is plainly far more difficult and wrought with internal contradictions than either the Rule or the Comment is willing to recognize. The Comment also is correct that the difficulty is unavoidable. It is in fact a classic moral dilemma—each option available to the lawyer has conflicting moral considerations. 135 The Rule should assist in resolving this dilemma, but it fails. The Rule seems to sacrifice confidentiality and loyalty, as well as the concomitant “adverse [e]ffect” 136 on the client’s interest, in favor of a principle of benign paternalism without explaining why or when the Rule is triggered. Section IV will subject these competing considerations to analysis and test Rule 1.14’s delegation of authority to the lawyer.

B. Suggestions From Courts and Commentators: Why the “Advocacy” vs. “Best Interest” Choice Fails

Much has been written concerning the lawyer’s relationship with the disabled or mentally impaired clients in the context of commitment or guardianship proceedings. 137 The question that

133. Id. Rule 1.6; Model Code, supra note 9, Canon 4. Seeking such help for a client inevitably breaches the duty of confidentiality. See Devine, The Ethics of Representing the Disabled Client: Does Model Rule 1.14 Adequately Resolve the Best Interests/Advocacy Dilemma, 49 Mo. L. Rev. 493, 500-02 (1984).

134. Model Rules, supra note 9, Rule 1.14 comment 15.

135. See T. Beauchamp & J. Childress, supra note 84, at 4 (moral dilemmas arise when one can appeal to moral considerations for taking each of two opposing courses of action).

136. Model Rules, supra note 9, Rule 1.14(b).

tends to arise in this context is a difficult personal one for the lawyer: Should the lawyer act as an "advocate" for her client, or should her actions be guided by the "best interests" of the proposed ward? The choice is a real one. Under the advocacy model, the lawyer does not make personal judgments about the wisdom of a full and vigorous defense but raises all reasonable arguments and employs all available tactics to challenge the proposed action. While this approach most closely adheres to the professional ethic of "zealous advocacy," it also leads to some disquieting results: the dangerous patient is permitted to remain free, or the desperately ill patient is denied needed treatment. In contrast, under the "best interests" model the lawyer defends aggressively only if it is in the ward's interest to avoid the proposed commitment, protective service, or the like. Proponents of this approach argue that it serves no purpose to employ skill, cunning, and strategy to keep badly needed help from a sick person.

Even though this choice may be difficult to make personally,

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138. See Mickenberg, supra note 137, at 632-33; Note, supra note 137, at 1562.
139. See Model Code, supra note 9, EC 7-9 ("a lawyer should always act in a manner consistent with the best interests of his client"); id. EC 7-12 (lawyer representing disabled client must "act with care to safeguard and advance the interests of his client"); People v. Bolden, 99 Cal. App. 3d 375, 160 Cal. Rptr. 268 (1979) (lawyer who believes that client is not acting in his own best interests may overrule client's instructions); Johnson, supra note 137, at 565-567. For a comparison of the two models, see Herman, supra note 117.
140. See In re Quesnell, 83 Wash. 2d 224, 236, 517 P.2d 568, 576 (1973); Frolik, supra note 98, at 633-37; Note, supra note 137, at 1561.
141. See Model Code, supra note 9, EC 7-1, DR 7-101. The 1983 Model Rules do not refer to "zeal" per se, but it is apparent that they impose the same duty of zealous advocacy. See, e.g., Model Rules, supra note 9, Rule 1.2(a) (lawyer must abide by client's decisions regarding objectives of the representation).
143. There are few actual proponents of the best interests model, although even those writers who reject it recognize its attractiveness, at least at some level. See Note, supra note 137, at 1552-53. Some commentators, however, have espoused this approach. See, e.g., Johnson, supra note 137, at 565-66; Stone, supra note 142, at 819; cf. Genden, supra note 87, at 588-89 (best interests approach advocated for children); Paulsen, Juvenile Courts and the Legacy of '67, 43 Ind. L.J. 327 (1968) (same).
144. See Stone, supra note 142, at 354; Traffert, Dying With Their Rights On, 130 Am. J. Psychiatry 104 (1973).
its resolution among courts and writers has been rather uniform. Most favor advocacy. The most significant reason is the belief that a lawyer using a more selective approach usurps the function of the judge or jury by deciding her client's fate.145 Judges and commentators also argue that it would be paternalistic for a lawyer to decide what is best for her client. Such paternalism, they argue, is unjustified.146

Might the advocacy model serve as a prescriptive (and normative) heuristic for dealing with the questionably competent client in all contexts? The model has been justified in several settings as that most consistent with principles of informed consent,147 and thus adherence to it might best serve all the competing concerns. The answer appears to be no. Analysis shows that this model is not necessarily fully congruent with informed consent. It may be justified in the context of appointed lawyers representing clients in liberty-threatening circumstances, but in ordinary civil contexts the model does not serve as well. First, it is apparent that the advocacy model reflects informed consent only if the client has chosen to

145. See In re Quesnell, 83 Wash. 2d 224, 517 P.2d 568, 574-76 (1973) (en banc); Frolik, supra note 98, at 634-35. In Quesnell the Washington Supreme Court vacated a civil commitment order and laid down guidelines for attorneys representing allegedly committable persons. The court held that such attorneys must act as advocates and not as disinterested guardians. The lawyer must “submit to the court all relevant defenses or legal claims his client may have.” Quesnell, 517 P.2d at 576 (quoting In re Estate of Manning, 85 Neb. 60, 122 N.W.2d 711, 713 (1969)). The court stated correctly that “in the absence of knowing consent of the person alleged to be mentally ill, a [lawyer] may not waive any fundamental right relevant to the . . . commitment proceeding.” Quesnell, 517 P.2d at 578. In Quesnell it was apparent that no such waiver had occurred.

Quesnell raises two additional issues. First, the case concerned an attorney serving as guardian ad litem, a role even less clear than the lawyer's. See Baron, Assuring "Detached But Passionate Investigation and Decision": The Role of Guardians ad Litem in Saikewicz-type Cases, 4 Am. J.L. & Med. 111 (1978) (discussing roles of both guardians ad litem and, by extension, lawyers). Quesnell, however, has been interpreted as if the court were addressing the lawyer's role. See, e.g., Devine, supra note 133, at 495-96. Second, the court did not address how, if at all, the lawyer's role is limited by instructions from the mentally ill client to waive rights or defenses. The decision implies that the lawyer would be bound by such a waiver only if it were a “knowing” waiver. Quesnell, 517 P.2d at 578. A court sitting in a commitment proceeding might inquire into the client's capacity to waive the right. Cf. Massachusetts Bar Ass'n, Comm. on Professional Ethics, Op. 80-4 (1980) (lawyer must remain as appointed counsel for mentally ill client even if client “fires” her; lawyer must also advocate against client's voluntary commitment if lawyer doubts voluntariness) [hereinafter Mass. Ethics Op. 80-4].

146. See, e.g., Andalman & Chambers, supra note 137, at 48 (“best interests” approach is “paternalistic attitude [that] reflects a fundamental misunderstanding of the lawyer's role in our system of law”).

147. See, e.g., In re Quesnell, 83 Wash. 2d 224, 517 P.2d 568 (1973) (en banc) (adversary approach is based on client consent); Frolik, supra note 98 (advocacy is following client's wishes); Note, supra note 137, at 1562.
litigate aggressively. If the client chooses another approach, does the model permit nonadvocacy? While most authorities sidestep the question, some expressly require advocacy even when the client, whose competence is the very subject of the proceedings, chooses nonadvocacy. For instance, one commentator has argued that the proper role for an attorney whose client instructs her not to resist a guardianship is “clear: defend the client from an unlawful guardian.” This suggestion supports the proposition that the

148. For example, in *Quesnell* the Washington Supreme Court assumed implied consent to full advocacy unless the client knowingly waives that approach. 517 P.2d at 578. The opinion presumably requires nonadvocacy if the client so demands, but full advocacy is the “default” option. If the client does or says nothing, the lawyer’s responsibility is to be an advocate. This makes some sense given that any other option would be more paternalistic because it would require the lawyer, rather than the court, to determine the client’s rights. See also note, supra note 137, at 1562 n.84 (lawyer must abide by client’s instructions, but if there are none, lawyer must serve as advocate).

149. See Frolik, supra note 98, at 636-37.

150. *Id.* Professor Frolik addresses the four possible scenarios of client choice in a guardianship proceeding: (1) a (seemingly) competent client instructs his lawyer to defend; (2) such a client instructs his lawyer not to defend; (3) a (seemingly) incompetent client instructs his lawyer to defend; and (4) such a client instructs his lawyer not to defend. *Id.* at 636. He concludes that in either instance of instructions to defend, the lawyer must follow the client’s wishes. In either case of instructions not to defend, Frolik concludes that defense is required nevertheless. Frolik observes that “[c]ounsel is not empowered either by training or law to decide that his client is incompetent or that society is best served by the appointment of a guardian.” *Id.* at 637. This explanation is ironic: unless the lawyer is deciding that the client is incompetent, what reason does she have for disregarding his instructions? If Frolik’s solution is justified, it is not because of the lawyer’s inability to decide competence, as he claims, but rather because of the independent role of appointed counsel in parens patriae proceedings. See Baron, *Professional Ethical Issues Confronting the Bench and Bar in “Mental Disability” Cases*, in GUARDIANSHIPS, CONSERVATORSHIPS, CIVIL COMMITMENT AND RIGHT OF INSTITUTIONALIZED PERSONS 73-82 (Mass. Cont. Legal Educ. 1982); Mass. Ethics Op. 80-4, supra note 145 (lawyer must remain as appointed counsel for mentally ill client even if client “fires” her; lawyer must also advocate against client’s voluntary commitment if lawyer doubts voluntariness).

This is the only reasonable justification for Frolik’s conclusion that the lawyer must defend even a competent client who instructs her not to defend. His argument that the client may obtain the same results through other means (e.g., a power of attorney), Frolik, supra note 98, at 636, is simply more paternalism. Why force a client to accept a less restrictive solution if he voluntarily and competently chooses a more restrictive one?

As noted above, Frolik differentiates between competent and incompetent clients. He does not explain, however, how these labels attach. Although he implies that they are the lawyer’s conclusions, that implication seems ruled out by his insistence that the process remain pure from lawyer judgment of competence. See *id.*

Another explanation that Frolik relies on is that “it would be unethical for counsel to cooperate in the appointment of a guardian for a competent person.” *Id.* at 636. This is insupportable. No standard of ethics requires an attorney to defend a claim that her client competently chooses not to defend, and there is no reason to believe that guardianship is any different from any other civil proceeding in this respect. Thus, the only possible justification for Frolik’s conclusion is the role-specific ethical mandate for appointed counsel to defend regardless of client choice.
advocacy approach is not an informed consent approach. The rationale for the advocacy model in fact rests less on informed consent considerations than on the need to assure that state imposed restrictions on liberty are accomplished only with all the protections of the adversary system.\(^{151}\) It is for this reason that the model seems less inappropriate when applied to appointed counsel, whose role may be situationally defined.\(^{152}\) To the extent that informed consent is a factor, the system presumes that competent clients would resist the petitioner; a choice not to resist is implicit evidence of incompetence.\(^{153}\)

In ordinary civil matters involving partially functioning clients, the advocacy model makes little sense. In such cases the choices are altered significantly because client choice can neither be so readily predicted nor its direction so readily presumed. The real difficulty in civil cases arises when the client chooses not to defend or assert his rights, and the consequence of this decision (or, not infrequently, mere nondecision) is considerable harm to the client. In such cases, “advocacy” does not equate with antipaternalism; in fact, it equates precisely with paternalism. If one wishes to advise attorneys in such cases to “oppose the opponent,” one may not do so in the guise of adhering to informed consent. Other justifications must be found or the advice must be changed.

The examples that introduced section II demonstrate this point. With Mr. H in the first example, the “best interests” and “advocacy” approaches collapse into uniformity, with the understanding that to be an advocate here is to defy the client’s express instructions. Advocacy might make “objective” sense, but the lawyer must somehow overcome the problem created by an absence of

\(^{151}\) See Baron, Botsford & Cole, supra note 137; Baron, supra note 150, at 80-82.

\(^{152}\) See Baron, supra note 150, at 76 (noting special role of appointed counsel); cf. In re Gault, 387 U.S. 1 (1967) (importance of adversary process to assure that both sides are heard).

\(^{153}\) It is more likely that the compliant object of commitment proceedings is not in fact consenting to commitment but simply does not understand the options. The theory is this: If the ward is incompetent, opposing commitment should cause no harm if the system is working (and the lawyer must assume that the system does work). If the ward is competent, the attorney’s advocacy will establish that fact and the involuntary commitment will not be ordered. Although this contradicts the client’s instructions, it may not be troubling (1) because voluntary commitment is often available, and (2) these circumstances are so rare as to be virtually nonexistent. A more realistic scenario would involve a competent client desiring involuntary commitment because of financial or emotional inability to request voluntary admission. Under these circumstances even appointed counsel could ethically agree to commitment.
consent. With Mr. M in the second example, the choice is even more difficult because it is unclear how one might most effectively "advocate," and the best way to further the clients "interests" is equally uncertain. The choice of either model leaves the hard questions unresolved.

The dilemma created by this kind of civil representation is thus much more complex and variegated than that facing appointed counsel. As we turn in the next section to consider the choices available in the civil context, no model will emerge. What can be accomplished is an elucidation of the considerations and ethical mandates that impinge on the representation, and an assessment of how each option might fare under those considerations and mandates.

IV. BEYOND INFORMED CONSENT: ASSESSMENT OF THE LAWYER'S CHOICES

The discussion up to this point has disclosed some real confusion emanating from the profession on this topic. If a theme does emerge, it is one of paternalism, and of shifting authority from client to lawyer when the lawyer believes such a shift is appropriate. The Code and the Rules permit various forms of intervention, while the case law on involuntary commitment encourages paternalistic advocacy. Notably, however, the profession seeks to adhere to the underlying ideology of informed consent while permitting exceptions to that doctrine. This is especially true in commitment-type cases that stress the client's right to decide.

This section will seek to make more explicit the tension between informed consent and paternalism within the professional directives. By identifying the concrete choices available to a lawyer facing client incapacity, this discussion will show that certain options fall at one end of the informed consent/paternalism axis while other options fit elsewhere. The discussion will also make explicit the value choices that are implicit in the various lawyer be-

154. Because all lawyering is consensual, any action taken on behalf of Mr. H must rest on authority obtained from some source. One might assume that the authority for appointed counsel to act in the absence of express consent from the client comes from the appointing court.

155. The difficulty of both examples is crystallized by the lack of any court to which the lawyer can turn. Compare the resolution of the lawyer's dilemma in the commitment setting: "The court, which may draw upon expert advice of its choice, is the only proper party to decide what is in the ill person's and the public's best interest. The judge, not the attorney, must make this decision." Andalman & Chambers, supra note 137, at 48.
The behaviors discussed, and will critique those value choices. Considering again the two examples that appeared earlier, we can develop a rather complete universe of choices available to a lawyer representing a client whose decisionmaking capacity shows signs of diminishing. The choices appear to be limited to the following:

1. Follow the client's wishes as if he were any other competent client.
2. Seek a guardian for him, either directly or by referral to another to accomplish that purpose.
3. Rely on next of kin as proxy decisionmaker, but without court approval of that designation.
4. Act as de facto guardian, which means the lawyer acts without actual authority.  
5. Deviate from the conventional interaction by seeking to persuade the client to permit the lawyer to do what the lawyer believes a more "realistic" client would choose to do.
6. Withdraw.

These options seemingly exhaust the universe of choices open to a lawyer, although concededly different possibilities exist within each option. The precise nature of each possibility affects the acceptability of the choice. The remainder of this Article will outline some of the considerations involved in any attempt to choose how to proceed with Mr. H or Mr. M. Once again, we will find that easy or right answers are scarce.

A. The Antipaternalism Option: Treat the Client as Competent

The first option to consider is nondiscrimination between competent and questionably competent clients. Under this option the lawyer adopts the same informed consent approach in each case, assuming conclusively that the client is capable of making an informed choice. To some, this option might be the most coherent because it fosters values that are important to prevailing notions of

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156. This description of option (4) assumes that without court approval or client consent the lawyer is not empowered by law to act on her own. It also assumes that state adoption of the Model Rules, supra note 9, Rule 1.14, would not create this otherwise nonexistent authority.

157. For example, the range of conduct that might constitute action without consent is quite broad, from speaking to the client's physician about the client's capabilities, to filing a lawsuit on his behalf, to getting his story on the front page of the local newspaper. The persuasion option also encompasses lesser and greater degrees of coercion. The propriety of the lawyer's conduct, therefore, may depend more on its degree within a category than on the category itself.
morality and professional responsibility. To test this, let us explore this approach in the context of Mr. H. The following considerations favor this option: First, Mr. H has a strong autonomy interest in making his own choices free from paternalism. Any option involving paternalism or intervention devalues that autonomy by substituting the decision of another for that of Mr. H. Because no other person can fully recreate or understand Mr. H’s values, that intervention runs the risk—perhaps a great risk—of being wrong. Further, more lawyer intervention in this setting has added unacceptable consequences. It encourages continued lawyer paternalism, which is a serious professional problem. It cannot be divorced from lawyer bias and conflict of interest (and thus a lawyer might intervene because of the substance or quality of the decision rather than because of a faulty decisionmaking process, the definition of incompetence). Often the intervention itself will result in breaches of loyalty and confidentiality, contrary to established principles of professional ethics.

One can present a coherent and principled argument, therefore, in favor of doing nothing, if that is the client’s choice, notwithstanding harmful consequences for the client. Although this argument has validity in many, perhaps most, instances of perceived client irrationality, one must recognize instances in which adopting such an approach would be ethically unacceptable. If one accepts the premise that some individuals suffer from forms of mental illness and incapacity that cause behavior inconsistent with their values (values that they held when competent and that they

159. See Simon, supra note 29, at 41 (lawyers never adequately understand client values); Spiegel, supra note 1, at 101; cf. Note, supra note 34, at 1546-47 (physicians do not know their patients’ values). Robert Veach has pointed out society’s tendency to “generalize expertise,” and to assume that a professional can be relied on for decisions beyond his training. This fallacy creates the incorrect impression that professionals will make more accurate decisions than their clients. R. Veach, Death, Dying and the Biological Revolution 112 (1976) (cited in S. Jordan, supra note 3, at 84-88); see also Veach, The Generalization of Expertise, 1 Hastings Rep. 29 (1973).
160. See authorities cited supra note 29. This is really a “slippery slope” argument, for it applies even if the present intervention would be justified.
161. See supra text accompanying note 96. The concerns about a professional’s inability to place her patient’s or client’s interests above her own have been expressed in philosophical terms (“man’s propensity to overreach a joint venturer”), in psychological terms (the ideology of help-giving is so strong that professionals feel obliged to help, see T. Szasz, supra note 75, at 187-88), and practical terms (experts must always rely in part on personal preference to fill gaps in information). See Note, supra note 34, at 1573-74 n.119.
162. See infra text accompanying notes 191-208.
continue to hold), one can accept the moral imperative to intervene to protect them from the consequences of their actions. Unless one believes that all forms of commitment, involuntary guardianship, protective services, or comparable intervention are unacceptable because of their infringement on liberty and autonomy, one can accept the notion—or at least the theory—of benevolent intervention. Indeed, the refusal to intervene in extreme cases of distraught self-destructive behavior (the most obvious example is a depressed individual’s suicide attempt) is arguably morally wrong.

All this may be patently obvious, but it deserves explication because intervention sacrifices the dearly held values of freedom and autonomy. That does not fully answer our inquiry, however, for one can believe fundamentally that protective services are justified but disagree that lawyers ought to be permitted to make competence determinations, even tentative ones. The rationale

163. See Luban, supra note 29, at 493. Luban’s thesis holds that paternalism may be justified only if its object is acting contrary to values that he continues to hold. This formula avoids intervention on the grounds that the individual is not furthering his interests. This type of intervention has also been referred to as “soft paternalism.” J. CHILDRESS, supra note 4, at 18.

164. Because paternalism always violates the rights of its object, see Gert & Culver, Paternalistic Behavior, 6 PHIL. & PUB. AFF. 45, 52-53 (1976), it can be justified only if based on moral imperatives that override the object’s rights to autonomy and liberty. The proponent of paternalism always bears the burden of proving justification, but paternalism is generally viewed as morally acceptable to prevent harm. Dworkin, supra note 71, at 125-26; see also Wikler, Paternalism and the Mildly Retarded, 8 PHIL. & PUB. AFF. 377, 378 (1979).

165. Even the most aggressive critics of the abuse of guardianship and commitment proceedings appear to concede that benevolent intervention is appropriate in certain cases. See, e.g., Mitchell, supra note 74, at 1435; Morse, supra note 75, at 653-54.


167. The staunchest opponents of paternalism concede that it is appropriate when the person has not carefully chosen the harm to befall him, particularly if the choice is irreversible. See Dworkin, supra note 71, at 118-19, 122-23 (J.S. Mill’s absolutist position against interference to protect the decisionmaker himself does not apply to those who “lack some of the emotional and cognitive capacities required in order to make fully rational decisions”).

168. Of course, intervention might be better viewed as protecting freedom and autonomy because it seeks to preserve options that are not being sacrificed consciously but that will be lost without intervention. This reasoning was applied by John Stuart Mill even to those who choose to give up future freedom and autonomy. For instance, Mill did not extend his radical antipaternalism to contracts for perpetual involuntary servitude. “The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom.” J.S. MILL, ON LIBERTY 104 (1947 ed.), quoted in Dworkin, supra note 71, at 118.

169. The author knows of no published source that expressly makes this argument, but it is a critical one. At least two separate issues are important here. First, may the lawyer begin to look for other decisionmaking methods if she seriously questions competence and
for such a position rests not only on the lawyer's role of confidante and ally, but also on the very real danger of overreaching by lawyers. To permit lawyer intervention in specific cases, it may be argued, will create serious long-term harm for clients generally, because lawyers who are permitted limited paternalism are apt to misread the limits, even when acting in the utmost good faith. Given this risk, it is better to accept occasional harm to individuals (such as the loss of Mr. H's home) as the cost of protecting the autonomy interests of clients generally.\textsuperscript{170}

This Article rejects that argument, although as noted above, the calculus for evaluating the choices is not very precise. The above argument favors as a superior moral choice benefits to clientdom generally over the protection of Mr. H. The benefits of decreased paternalism (which is actually no more than a mere prediction of decreased paternalism),\textsuperscript{171} however, are speculative and hypothetical. The danger to Mr. H is real and unavoidable.\textsuperscript{172} The value of prohibiting lawyer intervention in cases of imminent harm to individual clients because of predictions about possible future overreaching is illusive. Choosing Mr. H's concrete concerns over the ephemeral concerns of clientdom generally is an equal, if not superior, moral choice. Indeed, perhaps the predicted overreaching can be dealt with by more effective limits on the nature of intervention.

This Article will proceed, therefore, on the assumption that

capacity? This question is relatively easily answered in the affirmative because that resolution espouses limited paternalism. Second, may the lawyer herself actively restrain her client's choices? This Article discourages that kind of license because the risk of unrestrained lawyer paternalism is so great.

170. This approach might be seen as a form of rule utilitarianism: "What would happen if everyone were to do that in such cases?" Frankena, \textit{Ethics}, in \textit{The Legal Profession: Responsibility and Regulation} 119 (G. Hazard \& D. Rhode eds. 1985). It differs from the usual teleological justification because it does not argue that adhering to such a ban would most often lead to correct utilitarian results. Rather, it argues that the absence of a ban will invite discretion that is empirically likely to be abused by lawyers who do not observe the limits imposed by ethical standards.

171. The benefits of decreased paternalism are not very much in dispute. \textit{See} authorities cited \textit{supra} note 29. The prediction that lawyers will overreach if limited intervention is permitted, on the other hand, rests on much more speculative ground.

172. It is a common criticism of rule utilitarianism that adherence to a rule in the face of actual imminent harm is very difficult to justify. \textit{See} T. \textsc{Beauchamp} \& J. \textsc{Childress}, \textit{supra} note 84, at 26-28. A rule favoring protection of clients in general over protection of individual clients rests on even weaker ground because there is no empirical data supporting its hypothesis that lawyers will overreach sufficiently often and seriously enough to justify permitting client injury. \textit{Cf.} A. \textsc{Goldman}, \textit{The Moral Foundations of Professional Ethics} 110-11, 133-37 (1980) (assertion that confidentiality rules increase client disclosure and trust is not verifiable and probably not accurate).
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intervention—some limited intervention, at least—into the lives of self-destructive incompetents is an ethically principled course of action.\textsuperscript{173} In our example of Mr. H, some intervention is appropriate. His decisionmaking process is apparently impaired, for his reluctance to sue is articulated as the result of satanic and other apparently psychotic delusions and not an appreciation of the facts of the situation. Under these facts he would quite likely be found incompetent (at least with regard to this series of decisions) by an enlightened court.\textsuperscript{174} He will suffer serious harm without intervention, for he will be rendered homeless; his health may well suffer; and his sole asset will be lost.\textsuperscript{175}

It is not necessarily immoral to act on paternalistic impulses in justified cases,\textsuperscript{176} even though permission to intervene at the lawyer's discretion might lead ineluctably to increased, unjustified paternalism among lawyers generally. This fear, however, was only one of two reasons offered in opposition to lawyer intervention. The second reason was that alluded to originally,\textsuperscript{177} that the lawyer's role prohibits intervention, because intervention equates with loss of rights and the lawyer's duty of loyalty precludes advocating for or instigating the loss of a client's rights.

This Article also rejects that argument. The simplistic rationale for rejecting it is that the immediacy of client injury overrides the ethical imperatives accompanying the lawyer's role. But in fact the rationale is more complex than that, and the following discussion of the various modes of intervention will address the role ten-


\textsuperscript{174} The qualification that the court be "enlightened" is necessary given the evidence that often courts hearing guardianship cases are not. See Mitchell, supra note 74, at 1415-19.

\textsuperscript{175} The example of Mr. H encompasses threats to both his health and his economic interests. It therefore avoids the difficult issue of which type of interest standing alone warrants paternalism. Obviously no bright lines can be drawn, but one can assume that health might generally be accorded greater weight than money for two reasons. First, it may be argued that health is more important than money for preserving future autonomy. See Dworkin, supra note 71, at 118-21. Second, loss of health is apt to be irreversible, hence more readily justifying intervention.

\textsuperscript{176} Although the questions of who determines what paternalism is justified and how that determination is made will never be resolved adequately, the remainder of the Article tries to address those issues.

\textsuperscript{177} See supra text accompanying notes 100-01.
sions more fully. At this point, however, there is one important consideration: if the lawyer correctly determines (1) that the client’s competence has failed, (2) that the client has chosen a course of conduct contrary to his values, and (3) that in fact he would choose differently if he were competent, then the lawyer’s decision to try to achieve what the client actually values is not disloyal behavior.\[178\] It may be disloyal vis-à-vis the client’s present wants,\[179\] but not vis-à-vis the client’s enduring values. So when the lawyer correctly perceives incompetence, some intervention is appropriate. Misperception is the real problem, the “slippery slope” issue addressed above.

Another reason for attorney-client interaction that transcends ordinary informed consent is raised by the example involving Mr. M, who refuses to make a choice. While it is true that refusal to choose is itself a choice,\[180\] it is very difficult to argue convincingly that by refusing to choose Mr. M is actually choosing not to litigate. Although that conclusion may be correct in some cases,\[181\] it would be entirely incorrect in other circumstances.\[182\] If nonchoice is probably the result of impaired reasoning ability (an extreme example is a comatose individual),\[183\] reliance on fictional informed consent is dishonest and unjustifiable. With Mr. M, then, the lawyer should explore whether nonchoice is actually a choice or merely the absence of choice.

Thus, intervention or deviance from informed consent\[184\] is not barred ex ante. Even a concession that lawyers need not always treat their clients as competent does not resolve all of the tension, for the lawyer’s role makes conventional approaches troublesome.

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178. See Luban, supra note 29, at 491.
179. Id.
181. The mere fact that Mr. M’s nonchoice appears objectively unwise does not necessarily mean that it is an incompetent decision. See Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978); Annas & Densberger, supra note 86, at 570-71.
182. This is self-evident, as long as one acknowledges the reality of incompetence. Mr. M’s inability to make a reasoned choice or to articulate a basis for his choosing the default (nonchoice) option is certainly evidence of a lack of competence. See Appelbaum & Roth, supra note 72, at 1467.
184. Characterizing substituted judgment decisionmaking as deviation from informed consent is probably incorrect. Its purpose is to be as faithful as our methods will allow to the choices that the client would make were he competent. See Annas, Reconciling Quinlan and Saikewicz: Decision Making for the Terminally Ill Incompetent, 4 Am. J.L. & Med. 367, 373-75 (1979).
The types of intervention that are justifiable must be identified. The next sections address that issue.

B. The Guardianship Conundrum

The example involving Mr. H illustrates the dilemma posed by guardianship. It might be said that what Mr. H needs in the guise of protective services is someone to make decisions for him, a proxy who will arrange Mr. H's affairs as he would were he competent to do so. For reasons of accountability, uniformity, and protection of contracting third parties, the law has developed the guardianship proceeding as the exclusive method of establishing proxy decisionmakers. By limiting substitute decisionmaking to one court-appointed proxy, the law avoids multiple intervention by different actors with differing agendas, minimizes abuse and conflicts of interest, and puts third parties on notice that nonappointed agents generally have no authority to bind the ward. If Mr. H had relatives or friends with the means to bring a petition, the court would likely appoint a guardian, who would probably authorize the lawsuit to save Mr. H's house.

Model Rule 1.14 suggests that Mr. H's lawyer could seek a guardian for him. Such a suggestion, however, raises several concerns and implicates unavoidable and significant breaches of other professional ethical standards. Consider Mr. H's situation. Mr. H's attorney, seeking to avoid the harsh consequences of doing nothing but fearful of acting without consent, might investigate the possibility of a guardianship. If she decides to pursue that option, she must file a petition alleging incompetence and seeking appointment of a guardian by the probate court. The substance of this act and its procedural ramifications demonstrate the untenable situation that such a decision creates for a lawyer. Appointment of a guardian is generally recognized as a drastic and virtually complete deprivation of civil rights. If a guardian were appointed for Mr. H, he would lose his right to make legally binding decisions, to vote, to own property, to choose his place and manner of living, to make medical decisions, and so on. Short of imprisonment or commitment, appointment of a guardian is the most serious restriction

185. See Note, supra note 100, at 1014; Regan, supra note 123, at 607-09.
186. For a history of the guardianship process, see Frolik, supra note 98, at 600-25.
188. MODEL RULES, supra note 9, Rule 1.14(b).
189. See Mitchell, supra note 74, at 1433-47; Comment, supra note 74.
of a person’s liberty. The paternalistic and benign purposes of guardianship do not blunt its harsh consequences. A lawyer’s decision to impose guardianship on a client without his consent or understanding is particularly difficult to justify given the lawyer’s obligations of loyalty and zeal.

The procedural posture accentuates the awkwardness of the lawyer’s position. Because of the deprivation of rights and liberties, a prospective ward is often entitled to counsel for purposes of opposing the petition. Thus, a lawyer who is the petitioner is “suing” her own client, who must have other counsel to oppose the petition. All this is just an interlude of sorts, after which the lawyer probably intends to continue representing her client in the matter that caused her to seek a guardian in the first place. Meanwhile, for evidence to support her petition, the lawyer will presumably rely on communications she received from her client in the course of her earlier representation. Such communications, however, are entirely confidential, and may have been made after assurances that they would be maintained in confidence. Thus, viewed from its harshest perspective, the process looks like this: the client hires the lawyer to serve as his loyal agent and confidante; the lawyer promises him that those expectations are warranted and will be fulfilled; the lawyer then uses her client’s confi-

190. Because guardianship proceedings may impose substantial restrictions on a ward’s liberty, several jurisdictions provide for the ward’s right to be represented by counsel. See Devine, supra note 133, at 499-500; Frolik, supra note 98, at 629-37. See, e.g., ILL. ANN. STAT. ch. 110 1/2 § 11a-11b (Smith-Hurd 1986); N.M. STAT. ANN. § 45-5-303(B) (1978); UNIFORM PROBATE CODE § 5-303(b) (1983); AMERICAN BAR ASS’N COMM’N ON THE MENTALLY DISABLED, MODEL STATUTE 136 (1979).

191. MODEL CODE, supra note 9, Canon 4, DR 4-101(A), (B) (lawyer shall not knowingly reveal information protected by attorney-client privilege or other information gained in professional relationship that client has requested be held inviolate or the disclosure of which would be embarrassing or detrimental to client); MODEL RULES, supra note 9, Rule 1.6 (lawyer shall not reveal information relating to representation of client without client consent or unless impliedly authorized). Under either standard client communications indicating incompetence are privileged and confidential. Under the Model Code, the revelation of the client’s mental disability is prohibited because it is both embarrassing and detrimental to the client. Under the Model Rules, the matter is confidential because there is neither express nor implied consent. See Devine, supra note 133, at 500-02.

dences to bring a court proceeding that will deprive him of all his
rights, and will require him to obtain another lawyer to defend
against it; and all the while the lawyer plans to resume represent-
ing him once this distraction is over. This representation is obvi-
ously chock full of direct ethical violations.\textsuperscript{193}

The serious professional responsibility concerns that inevita-
bly arise in this scenario, however, do not necessarily mandate
banning this approach. The consequences of not intervening, and
the harm to the client, may well warrant overriding the usual ethi-
cal considerations.\textsuperscript{194} Before considering the question of balancing
ethical rules against the client's interest in protection from harm,
we should consider an alternative. Rather than instituting a guar-
dianship proceeding herself, Mr. H's lawyer could suggest that some
third party file the petition. Although such a referral resolves some
of the ethical problems, it creates some new difficulties of its own.

The advantages of the referral approach are obvious. It avoids
the most serious conflicts of interest that arise when the lawyer is
the petitioner. The lawyer does not have to oppose her own client
in court, nor use his confidences directly against him. The side-
switching problems are minimized, or at least hidden from view.\textsuperscript{195}
The lawyer may remain her client's confidante and advocate, loyal
and zealous to the extent that her personal beliefs do not color her
representation.\textsuperscript{196}

It does not follow, however, that this approach avoids loyalty
and zeal problems. The problems do not necessarily require rejec-
tion of the referral approach but are indeed issues to be con-

\textsuperscript{193} See Devine, supra note 133, at 499-500.
\textsuperscript{194} This assumes that one considers intervention unethical even though the Model
Rule 1.14 permits such behavior. Balancing conflicting ethical principles, of course, is not
new in the field of professional responsibility. The classic example is balancing the lawyer's
duty of zealous advocacy with her obligation to the judicial system. See, e.g., Curtis, The
Ethics of Advocacy, 4 STAN. L. REV. 3 (1951); Hazard, How Far May a Lawyer Go in Assist-
ing a Client in Legally Wrongful Conduct?, 35 U. MIAMI L. REV. 669 (1981); Schwartz, supra
note 10; Simon, supra note 29; see also A. GOLDMAN, supra note 172, at 111-12 (what is
morally correct depends on balancing competing moral concerns).

\textsuperscript{195} How well hidden the lawyer's side-switching is depends a lot on how secretive the
lawyer remains vis-à-vis her client regarding the referral.

\textsuperscript{196} The lawyer's personal disagreement with the client's position is not ipso facto an
obstacle to continuing the representation. The Model Code advises lawyers to maintain the
representation notwithstanding the repugnance of the subject matter or the lawyer's belief
regarding the merits of the action. MODEL CODE, supra note 9, EC 2-29. Of course, if the
lawyer's personal beliefs interfere with her ability to provide adequate counsel, she should
not continue to represent the client. Id. DR 2-110(c), (d) (permissive withdrawal when cli-
ent's conduct "renders it unreasonably difficult for the lawyer to carry out [her] employ-
fronted. For example, one might argue that the referral is not disloyal because there is no "harm" in merely referring the issue of guardianship to a fair tribunal, provided the client has able representation. 197 This argument fails for two reasons, one conceptual and one empirical. The conceptual objection disagrees with the assumption that a client is not entitled to avoid referral to a tribunal. It is incorrect to assume that the duties of loyalty, zeal, and confidentiality only restrain the lawyer from harming her client directly. Even if the lawyer's actions are not a priori harmful, they may be unacceptable. The lawyer's ethical duties promote client choice and the question of "harm" is one of individual client perception, not one of objective measure. A lawyer, for example, may not send her client on an involuntary but expense-paid vacation to Barbados, not because it would be harmful, but simply because he might wish to spend his time in other ways.

In addition, the guardianship process is harmful in a more objective sense, even if the determination is fair, neutral, and correct. 198 An accusation of incompetence and mental illness can hardly be beneficial or even neutral. It is little solace that one has the opportunity to defend against the accusation because the accusation itself causes irreparable harm.

The empirical objection to the argument that a lawyer who uses the referral approach is not really responsible for causing the guardianship is simply that guardianship petitions tend to be granted. 199 From the judge's perspective this result is almost understandable because the safer and wiser course, except in clearly inappropriate proceedings, is to appoint a guardian. 200 Because the ward may continue to live in his home, see his friends and relatives, and otherwise lead an ostensibly "normal" life, guardianship appears to be a minor inconvenience. Denial of the petition, on the

197. The lawyer's argument that the referral is not itself harmful is as follows: It is wrong for me to deprive my client of rights or benefits. What I am doing, however, is nothing of the sort. I am calling attention to the possibility that my client may require, and may benefit from, intervention. I will assure by all means available that no inappropriate intervention occurs. I will see to it that someone argues vigorously against intervention. If no intervention occurs, my client has not been harmed. If, despite all advocacy, intervention is permitted, my client is not harmed, for he has no right to avoid justified, benign, and legally appropriate assistance. This argument, however, does not solve the lawyer's loyalty dilemma.

198. The evidence suggests that most guardianship proceedings are not very fair or neutral. See Frolik, supra note 98; Mitchell, supra note 74, at 1415-19; Comment, supra note 74.

199. Mitchell, supra note 74, at 1425.

200. Id. at 1419.
other hand, creates the specter of unpaid bills, lack of food and heat, and eviction or foreclosure. Thus, referral actually creates the guardianship. To pretend that it merely deflects the decision to others is less than honest.

Moreover, the referral approach creates two additional problems. First, the referring lawyer will probably represent her client in the guardianship proceeding, vigorously opposing the petition. Although it is a central tenet of professional ethics that a lawyer may argue for a position with which she personally disagrees, and in fact such "fungibility" of roles is in many ways fundamental to professional role ethics, the incongruity and dishonesty of the lawyer's position in such a proceeding is more than a little disconcerting. Dishonesty is also at the heart of the second problem raised by a referral. If a guardian seems necessary, but the client strongly opposes such an imposition, the referral works best when the client does not know about it. The referral must be secret if the lawyer hopes to continue representing her client. If the referral approach is justified, professionally sanctioned dishonesty must be accepted or, alternatively, client rapport and trust must

201. See In re Quesnell, 83 Wash. 2d 224, 517 P.2d 568 (1973) (en banc); Mass. Ethics Op. 80-4, supra note 145; Devine, supra note 133, at 495.

202. See Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1159 (1958) (ABA/AALS Joint Conference Report). The "fungibility" notion arises directly from the profession's demand that lawyers be zealous, see supra note 10, and from the profession's concomitant absolution of zealous lawyers from legal or moral responsibility for the positions taken or the character of their clients. The term "fungibility" is intended to communicate that in any given case a lawyer could have represented either party, and it is happenstance that determines which client the lawyer in fact finds herself representing. C. WOLFRAM, supra note 66, at 578-82.

203. Even if one fully accepts lawyer neutrality and fungibility, the suggestion that a lawyer could defend a client in a proceeding essentially instigated by the lawyer strains credibility. It is one thing to assert that lawyers may defend the guilty or represent clients with whose claims they disagree; it is another thing entirely to contend the lawyer may pursue one result secretly (by referral) and yet publicly defend the client against that result. The inherent hypocrisy of the advocate's role would reach new heights if this were allowed. See Luban, supra note 73; see also Postema, Moral Responsibility in Professional Ethics, 55 N.Y.U. L. Rev. 63, 73-83 (1980) (discussing advocate's role and responsibility); Simon, supra note 29, at 76-77 (noting cognitive dissonance of advocate's role).

204. It seems likely that the attorney who has represented the client in the past would continue to do so after a guardian is appointed. If the client is poor, the chances of this occurring are obviously enhanced, for alternative counsel are simply not available. But see Devine, supra note 133, at 508 (once lawyer has decided to seek protective services, "the relationship with the client must terminate," because lawyer's personal or professional interests adversely affect representation).

205. One might argue that if guardianship referral is made by the lawyer, effective representation can be preserved only if the client is unaware of the lawyer's involvement. Some dishonesty to the client would therefore be necessary and, perhaps, justified. See S.
be sacrificed to the principle of honesty within the relationship. These are not easy choices.

Two other concerns arise from a lawyer's decision to pursue guardianship, whether directly or by referral. First, the attorney-client relationship is almost certain to deteriorate. Trust and confidentiality have always been professional ideals, and any action that fosters mistrust and antagonism, as pursuing guardianship likely will, should be discouraged. This consideration is not peculiar to lawyers, of course. Family members or friends who feel

BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 131-35 (1983). Such an argument tracks the "therapeutic privilege" sometimes asserted in medicine. The substance of that privilege is that doctors may lie about or withhold information regarding the patient's medical condition if, in the doctor's judgment, disclosure would be harmful to the patient. See Smith, Therapeutic Privilege to Withhold Specific Diagnosis from Patient Sick With Serious or Fatal Illness, 19 TENN. L. REV. 349 (1946); Capron, supra note 35, at 387-92, 405. The therapeutic privilege has been the subject of considerable criticism. See, e.g., Comment, Informed Consent: The Illusion of Patient Choice, 23 EMORY L.J. 503, 514-16 (1974); Goldstein, For Harold Lasswell: Some Reflection on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain, 84 YALE L.J. 683, 692 (1975).

It is not at all clear that such dishonesty would be justified in the case of a guardianship referral. It should be noted, however, that the Comment to Model Rule 1.4 contains a provision implying a similar "therapeutic privilege" for lawyers. See Model Rules, supra note 9, Rule 1.4 Comment ¶ 4 (lawyer may delay transmission of information when client would be likely to react imprudently). This provision is consistent in spirit with the liberal authority granted attorneys by Model Rule 1.14. See supra notes 119-36 and accompanying text.

206. Rejecting dishonesty is likely to result in client dissatisfaction when the lawyer refers her client for protective services proceedings. To determine whether such dissatisfaction is too great a price to pay for honesty, consider the utilitarian bases for the profession's usual emphasis on fostering client trust. The primary purpose is complete disclosure to the lawyer who must know everything the client knows to provide effective representation. See M. FREEDMAN, supra note 11, at 4-5 (quoting A.B.A. STANDARDS RELATING TO THE DEFENSE FUNCTION 147 (1971)); Landsman, Confidentiality and the Lawyer-Client Relationship, 1980 UTAH L. REV. 765, 783-86. But see A. Goldman, supra note 172, at 133-37 (full disclosure need not receive so much attention); S. BOK, supra note 205, at 122 (such a purpose for trustworthiness is "potentially treacherous").

Any impairment of the lawyer's effectiveness as a result of this breach in the relationship must be dealt with. If other counsel are available, the lawyer might choose to withdraw, see Model Code, supra note 9, DR 2-110(c)(1), (2), unless the client retains the lawyer notwithstanding the distrust that may have arisen, see id. DR 5-105(c) (lawyer may represent client notwithstanding impaired professional judgment if client consents and it is obvious that lawyer can represent client adequately); Model Rules, supra note 9, Rule 1.7(b)(1), (2) (similar rules).

207. This assumes that the profession rejects concealing the lawyer's role in the proceedings from clients. Any other choice seems quite unworkable.

208. All guardianships, except those for profoundly impaired persons who do not understand the proceedings or for consenting wards (assuming that the concept is not an oxymoron, see infra note 213) are likely to interfere to some degree with the relationship between the ward and the guardian or the petitioner. The fact that this applies to the attorney-client relationships as well should not serve as the basis for prohibiting lawyers from pursuing guardianship in appropriate cases.
compelled to institute guardianship proceedings generally recognize the substantial challenge to the relationship that such a choice entails.

The second concern is that guardianship is both a serious public stigma and a status that is often abused. In comparison to the other options theoretically available to the attorney it is by far the most intrusive. Furthermore, guardianship is relatively permanent and intractable. If the lawyer needs the authority to handle one rather isolated, concrete matter, resort to guardianship might be overkill. Finally, a guardianship proceeding could lead to referral for commitment, a far more drastic result than the lawyer intended.

Any pursuit by the lawyer of guardianship, whether direct or indirect, creates serious loyalty, zeal, and confidentiality problems. Should the profession prohibit such action given these problems? At least one state ethics committee has hinted that such a prohibition is warranted. In a 1980 Ethics Opinion, the Committee on Professional Ethics of the Massachusetts Bar Association concluded that the lawyer's duties of loyalty and confidentiality forbid pursuing guardianship, or even recommending it to a third party. This opinion arose in the civil commitment context and

209. See In re Guardianship of Reyes, 731 P.2d 130, 131 (Ariz. App. 1986) (stigma and deprivation of liberty); see also authorities cited supra note 189.

210. See Frolik, supra note 98, at 649-59. For a client who otherwise is in control of his life and functioning adequately either in the community or in an institutional setting, petitioning for a guardian to enable the lawyer to carry out the representation seems harmful and unnecessary. For the potential use of a guardian ad litem, see infra note 219.

211. The possibility of referral for commitment is raised in the commentary to the Model Rules. See Model Rules, supra note 9, Rule 1.14 comment ¶ 5.


213. The factual background of Opinion 80-4 is as follows: A court-appointed attorney for a patient in an involuntary commitment proceeding was told by the client that she no longer wanted the lawyer to represent her, stating: "Who says you're my lawyer anyway? I want to get my own lawyer. You're trying to commit me." The lawyer believed that appointment of a guardian would permit him to continue to represent the person notwithstanding her objection. Id.

The Massachusetts Bar Association Committee on Professional Responsibility concluded (1) that the attorney cannot withdraw under such circumstances because of the court's appointment, and (2) that it would be inappropriate for the lawyer to suggest to the court or a third person that a guardian be appointed, because "such a suggestion would reflect the attorney's conclusions as to the client's competence, conclusions which almost invariably would be based on confidential statements made by the client to the lawyer." Id. The Committee, however, did not rule out the possibility of a lawyer making such a referral. Clearly, an attorney cannot suggest the appointment of a guardian where the client appears to be competent and has expressed opposition to appointment of a guardian. There may be cases in which a client cannot lucidly express his desires to his attorney and in which it is so clear that appointment of a guardian is the only means by which
consequently might be limited to its facts.\textsuperscript{214} It is nevertheless contrary both to Model Rule 1.14(b) that authorizes such a pursuit and to several other bar association ethics opinions that permit it as well.\textsuperscript{215}

A more appropriate resolution of this issue would borrow the Massachusetts Ethics Committee's concerns about lawyers pursuing guardianship and would limit substantially the discretion the ABA gives to lawyers. The resulting rule would bar lawyers from pursuing guardianship unless serious harm is imminent, interven-

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\textsuperscript{214} In the context of Opinion 80-4, given the lawyer's court appointment to protect against societal infringement of the client's rights, the Committee's advice is certainly understandable. Considering that the client might be disabled but not committable, it would serve no purpose at all for the lawyer to drop the defense based on what might well be incompetent instruction from the client if the result would be an unfair and inappropriate commitment. See Baron, \textit{supra} note 150.

\textsuperscript{215} The ABA/BNA \textit{Lawyers Manual on Professional Conduct} reports several state bar association ethics committee opinions apparently concluding that a lawyer's institution of guardianship proceedings against her client is not necessarily inappropriate. \textit{2 Lawyers Manual on Professional Conduct} 801:4303 (ABA/BNA 1981) (Md. Op. 80-46: lawyer may seek to secure waiver of attorney-client privilege through appointment of a guardian if lawyer is convinced that doing so is in client's best interests); \textit{id.} at 801:4858 (Mich. Op. CI-682: lawyer may file petition for determination of client competence only if lawyer reasonably believes client is unable to act in own best interests, but revealing evidence of client's incompetence is still barred by confidentiality duty); \textit{id.} at 801:4889 (Mich. Op. CI-1055: lawyer has choice of making decisions on behalf of client or seeking appointment of legal representative); \textit{id.} at 801:8824 (Va. Op. 570: lawyer has discretion to petition for guardianship and to withhold information from client, but must disclose to client that she possesses information that she cannot reveal); \textit{id.} at 801:8010 (Va. Op. 463: lawyer is urged to seek appointment of guardian); \textit{id.} at 801:6322-23 (N.Y.C. Op. 81-32: lawyer herself should not seek appointment of a guardian but should cooperate with others, preferably family, to accomplish guardianship; lawyer must seek to preserve confidences); \textit{id.} at 801:6343 (N.Y.C. Op. 83-1: lawyer may seek the appointment of a representative).
tion is necessary, no other ameliorative development is foreseeable, and nonlawyers would be justified in seeking guardianship. This proposed standard is more exacting than Model Rule 1.14, which allows lawyers to pursue guardianship so long as "the lawyer reasonably believes that the client cannot adequately act in the client's own interests." A more exacting standard would have two almost contrary consequences. First, from a practical perspective, this standard might better reflect actual practice because the time, expense, and complexity of the process mean that resort to guardianship proceedings tends to be rare. From a conceptual or intellectual perspective, however, the more exacting standard causes problems rather than solving them. For a lawyer who adheres to the formalities of proxy consent, guardianship is the only lawful method of overriding a client's choice. It is the only safe and proven way to establish lawful substitute authority. If the avenue is closed, the lawyer who represents an impaired client must explore the other possible options.

216. Lawyer pursuit of guardianship should be discouraged if family members or other support networks can intervene to resolve competence or authority questions. If such alternative relief is foreseeable, the lawyer should refrain from pursuing a guardianship proceeding herself. Of course, the ethical difficulties addressed in this section do not arise at all if third parties independently see the need for protective services and act on their own.

217. Model Rules, supra note 9, Rule 1.14(b).

218. The author knows of no studies supporting this conclusion. By analogy, however, the cost and complexity of guardianship make resort to that procedure very rare in the medical field. See, e.g., 1 Making Health Care Decisions, supra note 3, at 185-86; Solnick, supra note 3, at 25-26; Note, supra note 100, at 1014.

219. The discussion in the text applies not only to formal guardianship but also to the use of a guardian ad litem. "A 'guardian ad litem' is one appointed by a court, in which particular litigation is pending, to represent a ward or an unborn person in that particular litigation." Model Probate Code § 196(b) (1946). The term guardian ad litem ("GAL") has two meanings. Some courts refer to an attorney appointed to represent a particular point of view in litigation as a GAL. See, e.g., In re Quesnell, 83 Wash. 2d 224, 517 P.2d 568 (1974); Baron, supra note 145, at 122-24. This GAL role is really no different from that of appointed counsel used to balance out the adversary system. In other instances, however, a GAL is appointed to serve as a surrogate client, to make decisions for an incompetent client. See, e.g., Mass. Gen. L. ch. 201, § 34 (1985) (providing for appointment of GAL or "next friend" for mentally retarded or disabled person). This procedure is much more like formal guardianship in terms of the proxy decisionmaking role that it fills.

Seeking appointment of a GAL raises the same ethical concerns as does seeking appointment of a formal guardian. In litigation, the court will not be aware of the mental disability of the litigant unless attention is drawn to that fact. If disclosure of that disability is made by the opposing party, and a GAL is appointed before the disabled litigant has obtained counsel, no ethical concern arises, for the client's incompetence has been established before the attorney-client relationship begins. See supra note 19. If, on the other hand, the disabled client's lawyer wishes the court to appoint a GAL to assist in decision-making, the confidentiality and loyalty issues discussed in the context of formal guardian-
C. Reliance on “Natural Guardians” for Proxy Consent

In medical literature frequent attention is given to the role of next-of-kin or close friends in making decisions for incapacitated patients.\(^{220}\) Often reliance on this group, referred to on occasion as “natural guardians,”\(^ {221}\) is recommended as a practical solution to an intractable problem.\(^ {222}\) Given the prominence of this practice in medicine, the legal profession ought to give careful consideration to its use when consent is needed and no authorized representative exists. Although this practice is troublesome and replete with unresolved questions, both legal and ethical, it does offer a method of proxy consent that can work effectively.

This Article cannot begin to explore fully the role of close family members in making critical decisions for impaired individuals.\(^ {223}\) What it can address, however, are some of the benefits and

\(\text{ship arise. See supra text accompanying notes 188-93. Although the limited authority of a GAL makes the intrusiveness less severe than in the case of formal guardianship, disclosing the client’s mental illness to the court cannot be reconciled with the lawyer's professional loyalties unless there is substantial justification for such a breach of duty.}

This issue arises repeatedly in the criminal context. Pleading lack of competence to stand trial is often an attractive strategy for a criminal defense attorney, but if the client chooses not to raise it the lawyer’s options are limited. If the client chooses not to raise the defense but the attorney believes in good faith that the refusal is not competent, the lawyer faces the same dilemma that this Article addresses. There is an argument, however, that a criminal defense attorney has greater discretion to reveal the client’s incompetence because of the constitutional interests at stake and because of her predefined role in the proceedings. There is substantial case law supporting this argument. See, e.g., Johnson v. Duckworth, 793 F.2d 898, 902 (7th Cir.), cert. denied, 107 S. Ct. 416 (1986); Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir.), petition for cert. filed, Oct. 27, 1986; McDonald v. Hutto, 414 F. Supp. 532, 535-36 (E.D. Ark. 1976); People v. Hill, 67 Cal. 2d 105, 429 P.2d 586, 592, 60 Cal. Rptr. 234, 240 (1967), cert. denied, 389 U.S. 1009 (1967); People v. Bolden, 99 Cal. App. 3d 375, 379, 160 Cal. Rptr. 268, 270 (1979); State v. Aumann, 265 N.W.2d 316, 318 (Iowa Ct. App.), aff’d, 268 N.W.2d 228 (1978). See generally Bennett, supra note 16.


221. See 1 MAKING HEALTH CARE DECISIONS, supra note 3, at 182.

222. Id. at 182-85; see Relman, supra note 220, at 234-37; Solnick, supra note 3, at 20-24; see also S. JORDAN, supra note 3, at 109-21 (proxy decisions for incompetents should be made by the “primary moral community” of that person, which is most often the family).

223. The role of family members in decisionmaking raises two separate issues. First, what role do family members actually play in client decisionmaking, and how should their influence be accounted for in the counseling process? Cf. R. BURT, supra note 4 (all choices are functions of interactions with other people); T. SHAFFER, supra note 31, at 172-73 (transference created by family influences—in both the biological and ancient, archetypal senses). Second, of greater concern to this Article, may family members serve as proxy decisionmakers for incompetents, and if so, how? The medical profession has begun to debate this issue, focusing, however, on the process more than on the substantive value of family member proxies. See, e.g., Baron, supra note 145; Baron, Medical Paternalism and the Rule
pitfalls of professional reliance on natural guardians. The manifest benefits fall into three categories. First, reliance on family members imposes side constraints on lawyer overreaching.\(^{224}\) It is preferable to unilateral lawyer usurpation of authority because it requires the lawyer to articulate the considerations involved in the decision, just as she would with a competent client.\(^{225}\) Second, it is likely to provide a more accurate gauge of substituted judgment.\(^{226}\) If lawyer paternalism is justified only in "wants over values" cases because its purpose is loyalty to client values,\(^{227}\) who better to assess those values than one who has known and perhaps lived with the client for years? Third, use of family members as proxies accomplishes what the guardianship process accomplishes but without the time, expense, permanence, stigma, or ethical conflicts.\(^{228}\)

These benefits explain why the family frequently serves as a proxy decisionmaker in the medical field. But the medical profession addresses the serious pitfalls of such reliance far less often and less adroitly. The most important pitfall is that in many jurisdictions the family has absolutely no lawful authority to give consent.\(^ {229}\) Professional justification of reliance on such questionable authority is extremely curious. Moreover, those states whose statutes or common law permit family consent offer no guidance on how to resolve conflicting family sentiment or how to prioritize among family members.\(^ {230}\) If a single family member will consent

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224. Cf. Spiegel, supra note 1, at 113-20 (informed consent limits lawyer's tendency to serve her own, rather than client's interests); see also Gauvey, Leviton, Shuger & Sykes, supra note 129, at 433-34 (reasons that physicians should not act on their own).

225. Spiegel, supra note 1, at 104.

226. See 1 MAKING HEALTH CARE DECISIONS, supra note 3, at 183.

227. See Luban, supra note 29, at 474.

228. The cumbersome nature of resorting to the courts is inevitably raised as a justification for relying on family members in the medical context. See 1 MAKING HEALTH CARE DECISIONS, supra note 3, at 185-87 (resort to the courts is counterproductive in ordinary cases); Solnick, supra note 3, at 24-26. But see Baron, Rule of Law, supra note 223. Doctors are not alone in finding reliance on judicial guardianship unwise; patient advocates see much abuse in the process and thus do not favor it. See, e.g., Frolik, supra note 98, at 654-55; Mitchell, supra note 74; Comment, supra note 100, at 993-94 (21 states have neither statute nor common law permitting family consent).

229. See 3 MAKING HEALTH CARE DECISIONS, supra note 3, at 206-45; Gauvey, Leviton, Shuger & Sykes, supra note 129, at 449; Solnick, supra note 3, at 19-24; Note, supra note 100, at 993-94 (21 states have neither statute nor common law permitting family consent).

230. Solnick, supra note 3, at 21. Dr. Solnick points out as an appropriate example the Mississippi statute, Miss. CODE ANN. § 41-41-3 (1984), which, despite being the most comprehensive statute of this type, authorizes such arrangements as any parent consenting for an adult child "of unsound mind," or a spouse consenting for a spouse of unsound mind. Id.
to what the lawyer wants, and the lawyer is not required to consider any other input, informed consent is lost. No effort will be made to work through the real risk of differing interests among family members and the incompetent client.231

If lawyers are to use family members as proxy decisionmakers, two requirements must be met. First, it must be lawful in the jurisdiction. Second, lawyers must act in good faith when exercising their discretion in seeking consent from the family. Considering that the profession has already given lawyers the authority to make substituted decisions (apparently presuming good faith), the use of the family as a buffer to lawyer interests can only be an improvement. Reliance on natural guardians, however, cannot be an option unless the profession develops guidelines regarding who may serve and how conflicts of interest will be recognized and dealt with.

D. De Facto Guardianship

The Model Rules advise that lawyers may act as de facto guardians for incompetent clients.232 The Model Code also implies that de facto guardianship is an option.233 The American Bar Association apparently believes that such usurpation of client consent is justifiable and lawful. Some courts have also expressed a similar opinion.234 The simplicity, efficiency, and relative unintrusiveness of this approach make it attractive, but the practical and conceptual difficulties it creates make the approach unwise.

The Model Rules do not define “de facto” guardianship, but logically it means that the attorney makes decisions for her client, much as a guardian would. Presumably the lawyer would be bound

Because the statute apparently leaves the determination of competence to the discretion of the family member as advised by a physician, a relative could easily overrule a competent but unusual medical choice. It is likely that such an “outcome” test is used rather frequently to measure competence under this kind of statute.

231. Solnick, supra note 3, at 22-24; Gauvey, Leviton, Shuger & Sykes, supra note 129, at 434 (potential for conflict of interests between family members and patient).

232. MODEL RULES, supra note 9, Rule 1.14.

233. MODEL CODE, supra note 9, EC 7-12.

234. See, e.g., People v. Hill, 67 Cal. 2d 105, 429 P.2d 586, 592, 60 Cal. Rptr. 234, cert. denied, 389 U.S. 1009 (1967); People v. Bolden, 99 Cal. App. 3d 375, 160 Cal. Rptr. 268 (1979); State v. Aumann, 265 N.W.2d 36, 318-19 (Iowa Ct. App.), aff'd, 268 N.W.2d 228 (Iowa 1978). In re A.G., 448 So. 2d 183, 186 (La. App. 1984). Notably, each of these cases involved criminal or quasi-criminal proceedings where loss of liberty was an issue, which may account for the courts' willingness to delegate to counsel the role of opposing the state's position. See supra text accompanying notes 152-53.
The advantages of this approach are not only apparent, they are also similar to some of those offered by reliance on natural guardians. The most obvious benefit of permitting this conduct is that it provides an inexpensive, simple, and nonpublic remedy for the problem of client incompetence. In Mr. H’s situation, for example, if his lawyer simply decides to file suit on his behalf rather than to seek a guardian for him, she can avoid the following serious complications: the cost, time, and effort of a guardianship proceeding; the public charge of mental illness against her client; the substantial, almost inevitable, risk that, instead of the limited guardianship sought, the court will appoint a plenary guardian or refer Mr. H for commitment; and the professional responsibility quandaries that are unavoidable when a lawyer pursues guardianship for her client.

In addition, the lawyer has a persuasive argument that she in fact will watch over her client’s rights and interests as well as any other third party appointed by the court. Because guardians are only ordinary people trying to make reasonable decisions for their wards, there is no inherent reason to believe that the attorney will not do as good a job as anyone else. There is nothing magical about

235. Guardians are held to fiduciary accountability in managing their ward’s estate. See, e.g., RESTATEMENT (SECOND) OF TRUSTS, § 2, comment (b) (1959); Florida Bar v. Van Deventer, 368 So. 2d 48 (Fla. 1979); Fuehring v. Union Trust of Indianapolis, 73 N.E.2d 754, 757 (Ind. 1945); Hoveson v. Hoveson, 216 Minn. 237, 12 N.W.2d 497, 500 (1943).

236. The term “propriety” refers to the process that the guardian uses to reach proxy decisions. Most courts require “substituted judgment” decisionmaking, i.e., the decisions the ward would have made were he competent. See Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 750, 370 N.E.2d 417, 430 (1977) (court’s goal is to determine with as much accuracy as possible the wants and needs of the incompetent individual); Eichner v. Dillon, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980); Frolik, supra note 98, at 618-25; see also Buchanan, The Limits of Proxy Decisionmaking for Incompetents, 29 UCLA L. REV. 386, 401-03 (1981) (substituted judgment standard is useless when patient has never expressed a preference). Other courts have held that guardians must adopt the more objective “best interests” approach to decisionmaking. See, e.g., In re Storar, 52 N.Y.2d 363, 426 N.E.2d 64, 438 N.Y.S.2d 266, cert. denied, 454 U.S. 858 (1981); In re Pesceksi, 67 Wis. 2d 4, 7, 226 N.W.2d 180, 181 (1975) (court refused to allow ward to serve as kidney donor because surgery was not in ward’s best interests); see also Frolik, supra note 98, at 611-18.

237. See supra text accompanying notes 188-211.

238. Frolik, supra note 98, at 654-55 (courts generally appoint full guardians even when limited guardians would be more appropriate). For an analysis of Utah’s guardianship statute, see Comment, A Critique and Revision of the Utah Guardianship Statute for Incapacitated Persons, 1986 UTAH L. REV. 629.

239. See supra text accompanying notes 188-211.
court appointment that turns ordinary good faith decisions into "correct" decisions. Moreover, another justification for de facto guardianship is the recognition that it is a common practice. There is some wisdom in establishing ethical guidelines that do not contradict the exigencies of practical lawyering.240

All these justifications are valid, and their persuasiveness makes it difficult to argue for a contrary rule. This efficient and sometimes effective scheme does, however, have fundamental problems that warrant denying lawyers this kind of authority. An initial objection is that other professionals, most notably doctors, may not act as de facto guardians.241 This may not appear self-evident initially, for doctors are known to treat incompetent patients without proxy consent.242 But in fact physicians may not justifiably treat patients without either formal court authorization or informal consent from next-of-kin,243 except in emergencies. This principle has been stressed in a continuing series of judicial opinions prohibiting involuntary administration of antipsychotic medication to mentally ill patients who have been committed.244 Ac-

240. See Frankel, supra note 103, at 876-78.
241. See Baron, Rule of Law, supra note 223.
242. See Meisel, supra note 3, at 473-76; Relman, supra note 220, at 237 (complaining that Saikewicz will cause doctors to continue their purportedly unauthorized decisionmaking "in the closet").
243. A brief explanation of the state of the law in the confusing area of medical treatment for incompetent patients is called for because the judicial decisions and literature on this intensely debated issue are apparently inconsistent. Courts generally recognize a patient's right to be free from all nonconsensual treatment. See Shultz, supra note 35 (discussion of such cases). Incompetence does not deprive a patient of this right. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); Baron, Rule of Law, supra note 223; Plotkin, Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment, 72 Nw. U.L. Rev. 461 (1977). These two principles are universal. Adding the presumption of competence to this formula, see supra note 96, one might conclude that physicians have no right to treat incompetent patients without lawful, perhaps even court-ordered, proxy consent.

This conclusion, however, is not consistently adopted by the courts. In certain circumstances court approval is required, such as when a decision to terminate or refuse life-prolonging treatment is involved, Saikewicz, 370 N.E.2d at 433; Brophy v. New England Sinai Hosp., 398 Mass. 417, 497 N.E.2d 626 (1986), or when antipsychotic medication is administered. In less critical cases reliance on the good faith of physicians is sometimes permitted, although it is always assumed that the physician obtained some consent. See, e.g., In re Long Island Jewish-Hillside Medical Center, 73 Misc. 2d 395, 342 N.Y.S.2d 356, 358 (N.Y. Sup. Ct. 1973); Collins v. Davis, 44 Misc. 2d 622, 254 N.Y.S.2d 666, 667 (N.Y. Sup. Ct. 1964). Except for the medical profession's own prescriptive literature, see, e.g., Inglefinger, Arrogance, 303 New Eng. J. Med. 1597 (1980); Marzuk, The Right Kind of Paternalism, 310 New Eng. J. Med. 1474 (1985); Relman, supra note 220, no authority has sanctioned unilateral decisionmaking by physicians without some lawful proxy consent.

244. See Bee v. Greaves, 744 F.2d 1387, 1395 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985); Rennie v. Klein, 720 F.2d 266, 269-70 (3d Cir. 1983); Mackey v. Procunier, 477
cording to these cases, treatment may not be given to nonconsenting, incompetent patients unless a guardian is appointed and court approval is obtained for the treatment plan. In such cases psychiatrists, like lawyers, can claim that physician decisionmaking is more efficient, is as likely to be correct, is less stigmatizing to the patient, and comports with the reality of medical practice. The courts have expressly or implicitly rejected those claims. The autonomy interests of the patient and the physician's potential conflict of interest require resort to guardianship.

The Model Rules grant to lawyers authority that psychiatrists are denied—the right to make decisions for the client/patient when the professional sees fit to do so. Even if an objection based on this incongruity across professions seems somewhat superficial (consistency across professions is not necessarily a hallowed virtue), it identifies yet another instance of apparent lawyer self-protection through self-regulation. Furthermore, the objection is valid on


246. Id. at 1364.
247. Id. at 1362-63, 1367.
248. Id.
249. In at least one respect the question posed in Rogers-type cases is distinguishable from the question of lawyer-client authority allocation. In Rogers the federal district court was particularly concerned with the serious, debilitating, and generally irreversible side-effects of the antipsychotic medication known as tardive dyskinesia. Prolonged use of the medication causes severe facial muscle twitches and distortion. Rogers, 478 F. Supp. at 1360. The nature of this risk caused the court to require substituted judgment for the incompetent patient's desires. Only if the patient himself would be willing to assume the risk could it be imposed on him. Id. at 1361-64. The magnitude of the risk caused the court to order additionally that the decision could not be made solely by a guardian but had to be reviewed and approved by a court. Id. at 1362-64.

Lawyers' decisions generally are less likely to have such life-altering side-effects, and thus one might say that the reasoning of Rogers is inapposite. But that argument is not faithful to the decision. Rogers emphasized the importance of autonomy and self-determination in general, not just in exceptionally serious cases. In fact the opinion appears to stand for the proposition that all substantial decisions must be made through a guardianship or other lawful process, and in exceptional cases the court will review the decision to assure that the guardian makes the best decision possible. See also In re Spring, 380 Mass. 629, 642, 405 N.E.2d 115 (1980); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 757, 370 N.E.2d 417 (1977). But see supra note 243.

250. The legal profession's self-regulation has not been without its critics, who point out the self-protectionist effect of many of the bar's ethical standards. See, e.g., Abel, Why
far more substantial grounds. It is not merely for consistency that lawyers should be held to the same standards as physicians; it is because these restrictions reflect important values and principles and lawyers should be bound by them as well.

Before exploring the other objections to this option, let us first distinguish between broad and narrow views of de facto authority, for it is really the broad version that is most objectionable. The broad view would allocate to lawyers full authority to make major legal decisions, e.g., to institute litigation, to settle litigation, or to disclose significant and harmful confidences. The narrow view would not allocate such critical authority but would permit lawyers to decide matters that are more "means" than "objectives," even though they normally invite client participation, e.g., whether to demand a jury or whom to name as defendants.

Although this narrow version of de facto authority may cause lawyer-influenced rather than client-influenced results, which may mean "wrong" results, the very real need to develop workable means of representing incompetent clients requires the conclusion that, on balance, such behavior should not be deemed unacceptable.

The broader version of de facto guardianship that the Model Rules contemplate raises more serious problems that are harder to justify even after balancing the practical needs of working lawyers. Although there is a preliminary concern about the lack of any substantive source of authority to bind the client vis-a-vis third par-


251. The distinction between ends and means is relied on by the Model Rules. See Model Rules, supra note 9, Rule 1.2(a) & comment ¶ 1.

252. Acceptance of the narrow version of de facto authority results from balancing the interests involved and understanding practical lawyering. Although the distinction between ends and means is often illusory, see Strauss, supra note 1, at 324-26, some real differences exist between decisions about critical junctures in the course of representation and decisions about the way to further objectives that the client has chosen. Ordinary informed consent principles require attorney-client collaboration on decisions about means as well as on decisions about ends. Id. at 333-35. With impaired clients, however, it is difficult to justify the intrusiveness and public revelation that accompany the pursuit of proxy consent for decisions that are less crucial. In such cases the lawyer may make means decisions in accordance with her client's prior expressed objectives.
ties, the primary concern is the absence of accountability and restraint. The purpose of informed consent is to protect client autonomy, particularly against misperception of client values and conflicts of interest. The good faith of lawyers cannot be relied on to protect competent clients from these possibilities. Thus, efficiency cannot justify reliance on lawyer good faith to protect incompetent clients unless no other choices exist. The broad view of de facto authority, therefore, sacrifices the client's substantial autonomy interests without imposing side constraints on lawyer bias and conflict of interest.

The guardianship process, the family-as-proxy method, and the client consent option each, to a greater or lesser degree, impose such side constraints. Even if a lawyer who pursues guardianship always gets it, and even if an appointed guardian is apt to follow the lawyer's lead, the process of obtaining proxy consent and the process of articulating decisionmaking criteria will serve to restrain lawyer conflicts of interest. Such side constraints and accountability are important not merely because of conflicts of interest but

253. See Devine, supra note 133, at 513-14 (lawyer loses all authority to act when client becomes disabled).

254. One of the significant purposes underlying informed consent is to establish both procedural and substantive rights that counteract lawyer bias and self-interest. Cf. Spiegel, supra note 1, at 76-77 (discussing conflicts of interest). Not only does the lawyer seldom appreciate her client's values fully but her position is fraught with potential conflicts of interest. For example, the vast majority of legal disputes are resolved by negotiated settlement. See G. Williams, Legal Negotiation and Settlement (1983); Menkel-Meadow, supra note 116, at 768 & n.53. The terms of a settlement as well as the decision not to litigate are choices made formally by the lawyer. The impact of such decisions on the lawyer's income, schedule, prestige, and stress is usually substantial; in fact, it is precisely for this reason that informed consent regarding such major decisions is critical.

255. See Luban, supra note 29, at 465.

256. Lawyers seeking guardianship are overwhelmingly likely to succeed not only because guardianship petitions tend to be granted generally, see Horstman, Protective Services for the Elderly: The Limits of Pares Patiae, 40 Mo. L. Rev. 215, 235-36 (1975); Mitchell, Involuntary Guardianship for Incompetents: A Strategy for Legal Services Advocates, 12 Clearinghouse Rev. 451, 454 (1978), but also because the lawyer's support for the guardianship, if known to the judge, would carry immeasurable weight.

257. A guardian is likely to follow the lawyer's advice for two reasons. First, client-centeredness is less likely when the "client" is a proxy even if the attorney believes in the doctrine and acts in good faith. Because both the attorney and the proxy are each bound by the hypothetical substituted judgment of the incompetent and not by any existing subjective feelings, their decisionmaking is apt to be rather mechanical, tending toward an objective or "reasonable person" approach. See Buchanan, supra note 236, at 402-03. In such a process the lawyer's perceptions and analysis are likely to play a significant role. Second, the guardian, having no personal stake in the outcome of the case, is more likely to delegate decisionmaking, expressly or implicitly, to the lawyer.

258. See Spiegel, supra note 1, at 118-23.
also because of the tendency, especially of lawyers,259 to be paternalistic in dealing with less "capable" persons.260 De facto guardianship thus creates difficulty not only because it fails to provide any substantive authority for the lawyer's agency or any constraint on conflicts of interest, but also because it encourages lawyer paternalism.

It must be conceded that denying attorneys the authority to act as de facto guardians makes their life more difficult. But that is not necessarily bad. Considering that guardianship should remain a seldom used option, both because of the ethical and practical problems associated with it, denial of the de facto guardian alternative will force lawyers to make genuine efforts to discern the reasons for their clients' choices,261 and to involve family members if the difficulties persist. Each of these is a potentially welcome development, for they are both more likely to lead to client-based decisions than would repeated lawyer usurpation of decisionmaking authority. In addition, denying such authority does not mean that lawyers will not intervene in this manner when warranted by sufficiently critical circumstances. A lawyer will probably act, notwithstanding a general rule denying de facto authority, if her client would otherwise suffer irreparable harm. She will take the risk if she believes she is justified. If the lawyer is in fact justified, she will likely suffer no discipline for this civil disobedience. Thus, the profession's refusal to permit intervention ex ante will cause lawyers to act as de facto guardians only in the most compelling circumstances.262

The concept of genuinely exploring the reasons for client choices leads us to the last of the options to be assessed. The following section considers how a lawyer employing the dyadic dialogue might achieve more client-centered results, and how that process might also lead to manipulation and coercion.

260. See Wikler, supra note 164, at 378-79; see also supra note 71.
261. See J. Katz, supra note 56, at 163 (the concept of "fraternal correction"); T. Shaffer, supra note 31, at 254-69 (various forms of "interventions" with which to confront clients).
262. This suggestion is based on Robert Burt's work on physician and court intervention on behalf of the medically ill. See R. Burt, supra note 4, at 135-43.
E. The Dialogue: Persuasion, Manipulation, and "Fraternal Correction"

We now turn to Binder and Price's suggestion\(^{263}\) that a lawyer whose client makes an extremely detrimental choice may attempt to persuade the client to choose a more beneficial option. As pointed out above\(^{264}\), a lawyer should ordinarily refrain from expressing an opinion regarding the relative merit of any choice available to the client. To guide the client's decision by doing so is inconsistent with the policy of informed consent because clients are unlikely to resist lawyer influence, which results in lawyer-centered rather than client-centered decisions. Although perhaps not exactly a breach of ethics\(^{265}\), such a practice is tactically inappropriate.

To recommend this normally inappropriate practice for questionably competent clients seems a bit incongruous at first glance. If a lawyer's influence is too strong for healthy, competent clients, it appears senseless to argue that more confused clients can better withstand it. This proposition, however, should not be so easily dismissed. There are several reasons why persuasion should not be ruled out as an option for lawyers whose clients make ill-considered and harmful decisions.

Persuasion may take several forms, and its ethical propriety might turn on the form used. Thus, it is important to define the forms of persuasion that must be addressed in this discussion. For this purpose there are four modes of persuasion, covering the continuum from subtlety to coercion. At the subtle end is nonverbal behavior that either intentionally or unintentionally communicates the lawyer's desires or preferences.\(^{266}\) Next to nonverbal behavior are "is statements,"\(^{267}\) statements of fact that lead to inevitable

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\(^{263}\) D. Binder & S. Price, supra note 1, at 203-10.

\(^{264}\) See supra notes 53-61 and accompanying text.

\(^{265}\) No professional responsibility standards currently in operation, ethics committee opinions, or judicial opinions have ever held expressly or implicitly that persuasion of clients is ethically improper. But given the general ethical requirement of informed consent and the fact that persuasion is a poor method of implementing informed consent, the use of persuasion raises serious ethical questions. Cf. Wasserstrom, supra note 29, at 19 (professional interaction is often manipulative and paternalistic). But see Jones v. Barnes, 473 U.S. 745, 761 (1983) (Brennan, J., dissenting) (suggesting propriety of persuading client to follow lawyer's advice).


\(^{267}\) The "is-ought" dichotomy is from Zimmerman, The Is-Ought Barrier: An Unnecessary Dualism, 71 Mind 53 (1962), discussed in J. Smart, Ethics, Persuasion & Truth
conclusions. Further along the continuum are “ought statements,”268 suggesting or commanding certain choices. Finally, at the coercive end of the spectrum are outright threats, imposed not by inevitable facts but by the lawyer using perhaps all the other three forms of persuasion.269 Each of these methods might be employed by lawyers to prod clients into acting as lawyers believe they should.270

These forms of persuasion must be assessed not in the general context of competent clients271 but in the limited context of questionably rational clients. Some preliminary assumptions are necessary. First, as a broad generalization, persuasion itself and the above methods of persuasion, except for threats, are not ethically troublesome.272 Lawyers are supposed to persuade others.273 Second, assume, at least arguendo, that persuading clients is troublesome.274 In light of these two assumptions then, we must determine

45-63 (1984). Zimmerman's article seeks to demonstrate the uselessness of moral language or "ought" statements (e.g., "You ought to do X.") because they add nothing to the "is" statements, statements of fact or empirical prediction (e.g., "If you do X you will be rewarded.") on which they rest.

268. Id.

269. A "threat" should be distinguished from a prediction. If the lawyer points out that a particular strategy will bring an unfavorable result, he has not threatened that outcome, but merely revealed it. If, on the other hand, the lawyer promises to reduce an unfavorable outcome if the client refuses to adopt a recommended strategy, then her action is aptly termed a threat. See, e.g., Westen, "Freedom" and "Coercion": Virtue Words and Vice Words, 1985 DUKE L.J. 541, 571-89.

270. For a discussion of methods of manipulation and coercion that might enter into the attorney-client dyad, see Ellmann, Lawyers & Clients, 34 UCLA L. Rev. (1987).


272. Persuasion is not morally opprobrious. "To point out persuasion is not to condemn it; the practical problem is not to avoid all persuasion, but to decide which to avoid and which to accept." C. Stevenson, Ethics and Language, quoted in Johannesen, Perspectives on Ethics in Persuasion, in Persuasion: Reception and Responsibility (C. Larson ed. 1973).

273. Much of law training is directed to developing the skill of persuasion. See, e.g., R. Keeton, Trial Tactics and Methods, passim (2d ed. 1973); K. Hecland, Trial and Practice Skills in a Nutshell, passim (1978); G. Bellow & B. Moulton, supra note 42, at 855-956.

274. For an argument that persuading clients is unethical, see supra text accompanying notes 53-64. The limits on attorney solicitation of clients stem from concern about advo-
whether lawyers may justifiably use persuasion with clients who are exhibiting "wants over values" behavior.

This Article's thesis is that such persuasion is justified. Lawyers ought to be permitted greater latitude to use persuasive dialogue with a confused client than with a more coherent client.\textsuperscript{275} This is not an easy conclusion to draw. In fact, it may be the result of believing that less neutrality is needed in all lawyer-client interaction.\textsuperscript{276} However, given the difficulty in accepting the converse—that neutrality should be maintained even in the face of irrational decisions—it seems to be necessary.

Actively challenging a client's decision may be justified on several grounds. The first, and no doubt the weakest justification is that it is perverse to resort to such intrusive intervention as guardianship without first having attempted to elicit client consent, particularly if the client is capable of functioning and articulating.\textsuperscript{277} A second consideration is that the reasons for not doing this with competent clients do not apply to incompetent clients because paternalism has been accepted as a reasonable response to the client's incapacity to make reasoned decisions. Each of the alternatives discussed above involves paternalism. Thus, if the only objection to persuasion is paternalism, it is the least objectionable of all the available options.

Another important reason for permitting, perhaps even encouraging, persuasion if a client appears to be acting self-destructively is that persuasion can help both the lawyer and the client to explore the reasons for the client's choice. The type of persuasion that can achieve such a result is a dialogue that employs "is" statements to test the client's logic. Professor Jay Katz compares this

275. This Article's thesis is not that confused clients ought to receive relatively greater lawyer involvement as a rule. Rather, only if we posit that nonimpaired clients receive neutral treatment will the recommended involvement with less impaired clients be greater.

276. The discussion of the use of persuasion, particularly that which is grounded in Jay Katz's and Robert Burt's notions of mutually interdependent decisionmaking, see infra notes 278-80, might well apply to ordinary attorney-client interactions. See authorities cited supra note 271.

277. All of the suggestions found in this section perforce apply only to functioning clients. In cases involving severely impaired and noncommunicative clients, seeking to obtain consent is obviously not an alternative.
method to Thomas Aquinas’ concept of “fraternal correction”278 because it captures the same spirit of mutual, interactive decision-making. This is more helpful than viewing “client choice” or “lawyer choice” as isolated parts of a dialectic process.279 For example, the lawyer says “I cannot follow your instructions unless I fully understand them, so I need you to explain all your reasons, even unconscious reasons,280 for your decision.” Actively exploring the client’s reasons may have two beneficial effects: the client may learn that his decision is inconsistent with his values; or the lawyer may learn that the client has arrived at an apparently “insane” decision by means of a rational process. If, on the other hand, the lawyer is convinced that the client is not using a rational decision-making process, the lawyer’s efforts at persuasion will have tested the client’s competence more fully.281 At the very least, this should be attempted before abandoning the client for resort to a proxy.

There are formidable conceptual objections, however, to the “fraternal correction” form of persuasion. The first recalls the initial objection to non-neutrality: that clients will be influenced by lawyers. If this is correct, this form of persuasion is no different in result from the de facto guardian alternative that has been rejected. This objection is no doubt partially true, and therefore adds to the difficulty of assessing the available options. There are significant differences, however, between persuasion and de facto guardianship. The most critical distinction is that persuasion rests on

278. J. Katz, supra note 56, at 163 (quoting T. Aquinas, II Summa Theologica, Q. 33, 1333-41 (Benziger trans. 1947)).
279. Id. See R. Burt, supra note 4, passim.
280. The lawyer might even be encouraged to seek a mental health professional’s assistance in understanding the reasons for her client’s actions. See Model Rules, supra note 9, Rule 1.14, comment ¶ 5 (lawyer may seek guidance from appropriate diagnostian). This suggestion raises additional ethical issues.
281. One risk of testing the client’s competence by challenging his decisions is that this process tends to equate competence with the ability to verbalize thoughts and impressions. It is therefore biased against the less verbally skilled. See Stanley, supra note 67, at 61.
client choice, and openly recognizes the client as the ultimate decisionmaker; de facto guardianship clearly does not. To the extent that persuasion does not become coercion, the distinction is a valid one. Persuasion protects client autonomy far better than either formal or de facto guardianship. Furthermore, its continuing requirement of client consent provides the side constraints that de facto guardianship lacks. Persuasion is therefore preferable, in terms of client autonomy, to the alternatives.

The second objection questions the logic of disparate treatment for competent and questionably competent clients. There are two responses to this objection. First, as explained above, paternalism is justified with incompetent clients, even though it is not justified with competent clients. For instance, if Mr. H explained that he was willing to risk losing his house because he hated litigation, his lawyer would not be justified in trying to persuade him that his value system was wrong. The second response to this objection is the untested empirical observation that clients whose reasoning processes are such that intervention is justified are less likely to respond to lawyer influence by changing their decisions. If this is true, the risk of a lawyer imposing her values on an incompetent client is less than it would be in normal attorney-client interactions.

The final objection to persuasion by "fraternal correction" is that the use of such persuasion is tautological. This type of persuasion is similar to that employed by doctors but rejected by courts:

282. Of course, persuasion may be used to overcome the free choice of the audience. See Johannesen, supra note 272, at 216. Such overbearance is not sanctioned by this Article's recommendations. Some semblance of voluntariness must accompany any change in attitude accomplished by legitimate persuasion.

283. In fact, some argue that persuasion is a necessary element in supporting autonomy. "To argue with a person and seek to persuade him or her is to respect the person's autonomy." Thompson, supra note 55, at 111 n.84.


285. See Luban, supra note 29, at 489.

286. The conclusion that incompetent clients are less likely to be influenced by their lawyers is based on the author's observations during several years of representing failing elderly clients and mentally ill younger clients. This conclusion also has some logical appeal, if only because those clients who are considered "difficult" are those who do not respond as expected to a given set of data. This does not rule out the possibility, however, of less competent clients who are susceptible to lawyer influence. To the extent that a client will change his mind merely because his lawyer requests it, his consent is not informed and cannot serve as the basis for his attorney's actions.
if the client persists in an irrational choice, he will be treated as incompetent; but if his lawyer can persuade him to agree to a more rational course, then his consent will be treated as valid. This is a difficult objection to answer. One response is that persuasion simply cannot be used with clients who cannot comprehend the dialogue and who, therefore, cannot give consent. The distinction between persuasion and coercion is critical; with such severely impaired clients, the lawyer must seek another form of intervention because persuasion would amount to coercion. With less profoundly impaired clients, however, the process of persuasion can be a test of competence, as explained above. If the client's response to the lawyer's arguments is continued reliance on delusions, with no appreciation of the actual facts and circumstances, then the lawyer can appropriately determine that competence is in question. Thus, the process is not necessarily as tautological as it appears at first. Indeed, one competence testing study points out that the "valence" of the decision, i.e., whether the person is refusing or accepting treatment, may be a legitimate factor in determining competence. Ultimately, the level of tautology will turn on the quality of the lawyer-client interaction. The lawyer must decide in the end whether she has simply wheedled an involuntary "yes" from her client. Although reliance on lawyer good faith is not sufficient in these cases, good faith must nevertheless be required.

Even if "fraternal correction" is justified, does permissible persuasion include telling the client what he should do? If persuasive "is" statements ("You will lose your home if you do not ask a judge for help, and you have always told me that you do not want to lose your house") are appropriate, but persuasive threats ("You will agree to file a lawsuit or I will have you placed in a nursing home") are not.

287. See supra note 92.
288. Advocating the use of persuasion assumes a certain level of functioning and ability to process persuasion. Absent that, persuasion becomes coercive manipulation.
289. See authorities cited supra note 95.
290. Roth, Meisel & Lidz, supra note 88, at 282-83. The authors report that when the risk/benefit ratio of an action is favorable but the patient refuses to consent, a test employing a higher threshold of competency may be applied.
291. See supra text accompanying notes 255-64.
292. Any guidance on an issue such as the one addressed by this Article must recognize that lawyers seek in good faith to consider ex ante how economic, social, and psychological pressure might impair their future good faith. This initial good faith is an essential element of the approach advocated in this Article, an approach that rejects sole reliance on good faith. And finally, although a breach of duty may lead to suit for damages, see Maute, supra note 1, at 1087-89, attorney conduct is regulated largely by the honor system.
home") are not, then the question is whether "ought" statements ("You really should file that lawsuit") are more like "is" statements or threats. J.C.C. Smart has pointed out that although "ought" statements may be used to save time by summarizing innumerable "is" statements, most often they are used to avoid logic and persuade by power, authority, or coercion. If this is true, then using "ought" statements after logical arguments have failed must be rejected as a form of coercion. If it succeeds after logic has failed, it is only because of the lawyer's influence. That kind of manipulation, although efficient, is unjustified.

In the end, persuasion might not work. If the client lacks decisionmaking capacity, it should not work. In such cases, an attorney must fall back on other options and determine whether the circumstances warrant imposing a guardian, relying on the family, or simply accepting the client's wishes.

V. CAVEATS, APOLOGIES, AND A CONCLUSION

This is all very risky business. Any acceptance of lawyer intervention, any authorization for deviating from strict informed consent and presumed competence, potentially opens "the floodgates" for more lawyer control and less client autonomy. A lot of line-drawing is called for and history shows that professionals tend to draw lines in ways that benefit themselves. The benefits offered by prophylactic rules are notable: if lawyers are forbidden from questioning client competence they can have little temptation to intervene inappropriately. Permitting lawyer discretion cannot avoid the consequence of encouraging more paternalism.

With all this firmly in mind, some intervention must be reluctantly advocated or accepted. The profession cannot refuse to assist those who are incapable of helping themselves in the name of protecting the integrity of the lawyer-client relationship. Lawyers

293. See Ellmann, supra, note 270.
294. J. Smart, supra note 267, at 54.
295. Id. at 62-63.
296. See Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 Tex. L. Rev. 689 (1981); authorities cited supra note 250.
297. The encouragement of paternalism is truly a significant consideration. The great difficulty in developing procedures to guide lawyers in their dealings with disabled clients is that lawyers, like other professionals, tend to be paternalistic. Thus, procedures that allow some paternalism may produce greater intervention than anticipated. See Wasserstrom, supra note 29; Condlin, The Moral Failure of Clinical Legal Education, in The Good Lawyer 317, 329 (D. Luban ed. 1983) ("the internalization of predominantly persuasion-mode habits can cause a person to interpret most social relationships in persuasion-mode terms").
and the ethical rules that govern them, however, must acknowledge and counteract their natural attraction to dominance and manipulation. The trick is to assist clients while restraining lawyers. It is not an easy balance to strike.

This Article is an attempt—perhaps an initial and tentative attempt—to adjust that balance. By suggesting that pursuing guardianship is legitimate in extreme cases, that reliance on family may be appropriate, that noncoercive persuasion is justified in less extreme cases, and that unilateral usurpation of client autonomy is never appropriate except in emergencies, this Article offers some concrete standards for guiding lawyer behavior. Much more discussion, however, is necessary. These issues are too important to ignore.

298. When an earlier draft of this Article was presented at the UCLA/Warwick International Clinical Conference in October 1986, some participants questioned whether restraining lawyers actually was "the trick." They believe that the current crop of law students, for example, is notably unwilling to intervene actively in client affairs. If it were true that lawyers needed encouragement rather than discouragement in their interventionism, the conclusions drawn in this Article would be different. This author's belief is that lawyer domination of client decisionmaking is the rule, not the exception. Professional domination of client and patient is a consistent theme in studies of professional behavior. Notwithstanding the evidence of instrumentalist attitudes in cases of moral disagreement with client goals, the real problem is still the prevalence of lawyer-oriented, rather than client-oriented, lawyering.