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INFORMED DECISIONMAKING IN AN OFFICE PRACTICE†

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Competent legal representation requires adequate communication between lawyer and client. Too often, persons are bound by words a client adopted but did not understand.¹ Fairness to clients, and to those affected by client decisions, requires that clients have an opportunity to make sensible choices about how to handle their affairs. Broader recognition of the doctrine of informed decisionmaking could encourage lawyers to communicate better with clients.²

This article develops a doctrine of informed decisionmaking appropriate for an office practice. It builds upon the medical informed consent³ doctrine and the work of

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¹ In an effort to fill apparent gaps in understanding, courts are tempted to attribute knowledge to the client. In one will construction case, a court was more blatant than most in merging the lawyer into the client: "The will was drafted by a member of the bar of many years' standing and experience, and it is fair to suppose that the *testator* . . . had in mind the interpretation of similar words and clauses in cases decided in this Commonwealth." *Proctor v. Lacy*, 263 Mass. 1, 8, 160 N.E. 441, 443 (1928) (emphasis added).

In another case, a court said that the client who read a document should have known better than to believe the lawyer-drafter's explanation. See *Berman v. Rubin*, 138 Ga. App. 849, 854-55, 227 S.E.2d 802, 806, (1976). The case involved a property settlement in the context of divorce. The client alleged that his attorney told him that increases in his earnings would trigger increases in support and alimony payments which would total only 15% of his increased earnings. Subsequent litigation determined that under the clear language of the agreement his children and former wife were entitled to a total of 60% of his earnings increases. When the client sued his lawyer for malpractice, the client again lost. Because the language was clear and the well-educated client read the document, that reading was an intervening cause which protected the lawyer from liability for his bad advice. *Id.* at 854-55, 227 S.E.2d at 806-07. It seems odd that because his advice was clearly wrong the lawyer escaped liability.

² Though this article proposes a broad view of lawyer duty, recognition of such a duty by most lawyers might well lower the incidence of malpractice claims. Cf. Waldman, *Lawyers Adopt New Strategies to Avoid Suits*, Wall St. J., Apr. 28, 1986, at 23, col. 3 (cautious firms are reviewing client relations in light of the connection between malpractice claims and a lawyer's failure to inform or obtain consent from a client).

³ Since the nineteenth century, the law has required doctors, in one way or another, to obtain the informed consent of their patients before performing procedures upon them. See Martyn,

others who have proposed extending informed consent requirements to lawyers, but who have viewed lawyers primarily as litigators.⁴ The office-practice focus of this article provides a vehicle for expanding and clarifying the doctrine in a number of ways. By offering examples in a variety of contexts, the article gives texture to the general requirement that lawyer-client discussions be appropriate to the circumstances. Because office planning often involves parties represented by other lawyers, the doctrine is shaped to take into account the presence of third parties. Further, because office planning often results in the production of documents, this article introduces reformation as a remedy for an informed decisionmaking breach in this context.⁵

Part I of this article will sketch briefly the history of the informed consent doctrine and identify policies which support its application to lawyers. Part II will develop and illustrate the scope of an informed decisionmaking doctrine for planners. Finally, Part III will discuss three principal remedies to an informed decisionmaking breach: professional discipline, malpractice actions, and reformation of documents.

I. THE INFORMED DECISIONMAKING DOCTRINE: ITS ROOTS AND RATIONALE

Both doctors and lawyers have been subject to the requirement that they obtain the "informed consent" of their patients or clients in some contexts. An explicit "informed consent" doctrine arose to protect patients from doctors who performed procedures without their patients' consent. Initially, courts treated the doctor's non-consensual touching as a battery.⁶ Later, the doctor's duty to obtain consent was expanded to require disclosure of the foreseeable consequences of the procedure, and a breach came to be treated as negligence.⁷ Now the doctrine is a well-recognized subcategory of medical malpractice law.⁸ The law has required similar disclosures of lawyers, although a lawyer's duty is not usually articulated in "informed consent" terms. For example, before a lawyer

Informed Consent in the Practice of Law, 48 GEO. WASH. L. REV. 307, 333-40 (1980); Plante, *An Analysis of "Informed Consent"*, 36 FORDHAM L. REV. 639, 651 (1968).

⁴ See Martyn, *supra* note 3, at 321-33; Peck, *A New Tort Liability for Lack of Informed Consent in Legal Matters*, 44 LA. L. REV. 1289, 1299-1302 (1984); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 73-77, 87-89, 100-10 (1979). *But see* Peck, *supra*, at 1303-04.

⁵ Cf. Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982) (discussing reformation to cure mistakes in wills and will substitutes).

⁶ See *Zoterell v. Repp*, 187 Mich. 319, 153 N.W. 692 (1915) (battery when doctor removed ovary while performing hernia surgery); *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905) (battery when doctor operated on left ear, which had serious problems, instead of right ear, for which patient gave permission); *Schloendorff v. Society of The N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914) (assault when doctor operated on tumor, where patient gave permission only to examine, and the result was the development of gangrene in the patient's arm).

⁷ See *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); *Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); *Harnish v. Children's Hosp. Medical Center*, 387 Mass. 152, 439 N.E.2d 240 (1982); *Perna v. Pirozzi*, 92 N.J. 446, 457 A.2d 431 (1983).

⁸ See, e.g., A. ROSOFF, *INFORMED CONSENT: A GUIDE FOR HEALTH CARE PROVIDERS* (1981); 2 PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *MAKING HEALTH CARE DECISIONS*. 317-410 app. (1982); Andrews, *Informed Consent Statutes and the Decisionmaking Process*, 5 J. LEGAL MED. 163 (1984); Katz, *Informed Consent — A Fairy Tale? Law's Vision*, 39 U. PITT. L. REV. 137 (1977); Riskin, *Informed Consent: Looking for the Action*, 1975 U. ILL. L.F. 580 (1975); Waltz & Scheuneman, *Informed Consent to Therapy*, 64 Nw. U.L. REV. 628 (1970).

may represent two persons with potentially conflicting interests, the lawyer must obtain client consent following appropriate disclosures.⁹ Similarly, a lawyer generally lacks the authority to accept a settlement offer without the client's consent.¹⁰ Although the medical informed consent doctrine is more well-developed, the law now requires of both lawyers and doctors a level of client/patient consent to protect clients' and patients' legal and medical interests.

In recent years, commentators have urged lawyers to involve their clients more fully in the decisions ostensibly made on the client's behalf.¹¹ Underlying most of these

⁹ There is no substantial agreement as to what appropriate disclosure would be, nor whether it alone would be enough. 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, 213 n.11 (1982).

¹⁰ See *Hayes v. Eagle-Picher Indus.*, 513 F.2d 892 (10th Cir. 1975); *Price v. McComish*, 22 Cal. App. 2d 92, 70 P.2d 978 (1937). A client may be estopped from denying the lawyer's authority if the client led others to rely on the lawyer's apparent authority. See *Arizona Title Ins. & Trust Co. v. Pace*, 8 Ariz. App. 269, 445 P.2d 471 (1968).

¹¹ See G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* 124-272 (1978); D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 147-55 (1977); M. SCHOENFIELD & B. SCHOENFIELD, *INTERVIEWING AND COUNSELING* (1981); T. SHAFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1976); A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976). Other professionals have been the subject of similar suggestions. See Note, *Design Professionals — Recognizing a Duty to Inform*, 30 HASTINGS L.J. 729 (1979) (urging adoption of an informed consent doctrine for architects and other design professionals). The call for an informed consent requirement can be seen as one attempt to allocate power properly in the lawyer-client relationship. It has a central role, however, because it mandates communication between the parties. See Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984) (advocating a "joint venture" model for allocating attorney-client authority); Spiegel, *supra* note 4, at 105; Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C.L. REV. 315 (1987).

Commentators have offered proposals of what the doctrine would require of lawyers. The most specific is a statute offered by Professor Martyn, who would create a new category of professional negligence. Martyn, *supra* note 3, at 346. Under Professor Martyn's analysis, a lawyer would be liable in malpractice if the client could prove three elements:

[t]hat the lawyer failed to disclose reasonably foreseeable choices of action in a manner permitting the client to make a knowledgeable evaluation of the legal consequences of the choices; that the undisclosed information, if disclosed, would reasonably, under all the surrounding circumstances, have changed the client's choice; and that damages have resulted from the failure to obtain informed consent.

Id. Professor Peck, who adds his own perspectives, has supported Professor Martyn's idea of creating a new tort. See Peck, *supra* note 4, at 1292 n.14.

Professor Maute prefers using the profession's disciplinary process. Compare Maute, *supra*, at 1050 n.2, with Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705 (1981). Professor Maute views informed consent requirements as one aspect of the Model Rules of Professional Conduct's allocation of decisionmaking authority. Maute, *supra*, at 1062-63. Rule 1.4 (v) of the model rules provides guidance along the lines of Professor Martyn's statute: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (v) (Final Draft 1983) [hereinafter MRPC]. The comment elaborates: "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." *Id.*, Rule 1.4 comment. Some parentalism remains under this approach, because it is the lawyer who is deciding what the client's "best interests" are.

Professor Spiegel would make decisions on a case-by-case basis, according to the particular interests involved, rather than create another "definitional categorization" of what is appropriate

discussions is the notion that, on moral grounds, a lawyer ought to respect each client's individuality.¹² Clients have the right to decide how to live their lives within the broad bounds set by society. To the extent that lawyers, consciously or unconsciously, preclude their clients from making informed decisions, that right is violated.¹³ Practical reasons also support increased client participation in decisionmaking. Better results (from the client's perspective) are likely when a client makes a fully-informed decision.¹⁴ Further, society in general, and the legal profession in particular, benefit from increased communication between lawyers and clients.¹⁵ In addition, placing greater emphasis upon the lawyer's role as educator of the client, rather than decisionmaker for the client, can meet lawyers' own interests in being more than mere instruments of their clients.¹⁶

Lawyers should structure a planning practice to allow clients to make informed decisions on the vast majority of questions.¹⁷ The problem facing lawyers is how to determine which topics to raise with clients. An informed decisionmaking doctrine which recognizes that different planning situations call for different levels of lawyer-client communication can achieve an appropriate level of disclosure while still being specific enough for lawyers to know their disclosure obligations.

II. AN INFORMED DECISIONMAKING DOCTRINE

An informed decisionmaking doctrine should distinguish between two broad categories of situations: those which involve conflicts of interest and those which do not. Traditional doctrine recognizes the importance of lawyers' disclosure of conflicts of interest; conflicts of interest may interfere with a lawyer's loyalty to the client, which is

informed consent. Spiegel, *supra* note 4, at 123. He views the doctrine as appropriate both as a new tort and as part of lawyer discipline. *Id.* at 140. Spiegel also favors "increased attention to these issues in legal education . . ." *Id.*

¹² See Martyn, *supra* note 3, at 311-13; Maute, *supra* note 11, at 1070-72; Spiegel, *supra* note 4, at 73-77; Strauss, *supra* note 11, at 336-38.

¹³ Under what circumstances a lawyer *ultimately* should make any decision for the client is a different question. Even if the client chooses to have the lawyer decide, the decision about who decides needs to be an informed one. See generally D. BINDER & S. PRICE, *supra* note 11, at 147-55, 197-200. In some cases it will make sense for clients to delegate decisionmaking authority to lawyers. See *infra* note 91 (discussing blanket delegation regarding routine questions). In some situations, however, a lawyer may have a moral or professional duty to counsel against particular client decisions or withdraw from the lawyer-client relationship. See generally MRPC Rule 1.16; Maute, *supra* note 11, at 1061, 1064-66, 1110; Spiegel, *supra* note 4, 117-20, 126-33.

¹⁴ See Martyn, *supra* note 3, at 314-16, 340-43; Spiegel, *supra* note 4, at 104-10; Strauss, *supra* note 11, at 338-39. Research on the effect of requiring doctors to obtain informed consent supports the view that better results follow when lawyers obtain informed consent. See Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 293 (1985); cf. Strauss, *supra* note 11, at 326-31 (discussing how a parentalistic approach gets in the way of achieving the best results).

¹⁵ Involving clients in decisionmaking should broaden lawyers' perspectives on public policy questions. Further, it should increase the level of self-scrutiny within the profession. See Martyn, *supra* note 3, at 318-21.

¹⁶ See Spiegel, *supra* note 4, at 113-23.

¹⁷ For discussions of decisionmaking in the non-litigation context, see generally Brown & Brown, *What Counsels the Counselor? The Code of Professional Responsibility's Ethical Considerations — A Preventive Law Analysis*, 10 VAL. U.L. REV. 453, 458-62 (1976); Maute, *supra* note 11, at 1085-86; Spiegel, *supra* note 4, at 125-26.

an essential element of the lawyer-client relationship.¹⁸ Because such conflicts threaten the integrity of the lawyer-client relationship, courts should hold lawyers to high standards of disclosure and presume harm when there has been inadequate disclosure of the conflicts.¹⁹ A lower, but still comprehensive, informed decisionmaking standard should apply to decisions made when conflicts of interest are not involved. In both situations, clients and lawyers should discuss all topics relevant to the individual client.²⁰ The sections which follow give guidance to lawyers about the scope of the doctrine by filling in details and offering examples, drawn mostly from estate planning, of how lawyers should talk with clients.²¹

¹⁸ See generally MRPC 1.7 (Conflict of Interest: General Rule). The literature on conflict of interest is extensive. See, e.g., C. WOLFRAM, *MODERN LEGAL ETHICS* 312-494 (1986); Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807 (1977); Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981); Moore, *supra* note 9; Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 727-32 (1977); Note, *Unified Sewerage Agency v. Jelco, Inc.: The Client's Right of Consent to Potential Conflicts of Interest*, 11 CAP. U.L. REV. 625 (1982); *Developments in the Law — Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981). A convenient bibliography appears in T. MORGAN & R. ROTUNDA, *PROFESSIONAL RESPONSIBILITY* 118-21 (1984).

¹⁹ See *infra* notes 22-41 and accompanying text.

²⁰ See *infra* notes 42-47 and accompanying text.

²¹ Courts should recognize a carefully limited exception to the doctrine when a client seeks advice in an emergency, as, for example, when a client desires a deathbed will. Admittedly, it may not be possible to engage in the same level of interchange that a lawyer would achieve with a healthy client in an office setting. As long as the client meets the test for testamentary capacity, however, the lawyer involved should not face malpractice liability or disciplinary sanctions for not having engaged in full disclosure. The emergency exception might also apply to a lawyer who receives a project right before a filing deadline. Of course, if the lawyer has time to reflect on the work, the law should require informed decisionmaking. *Cf.* *Saif Ali v. Sydney Mitchell & Co.*, [1978] 3 W.L.R. 849, 861 (opinion of Lord Diplock) (court allowed suit in negligence where there was opportunity for reflection by counsel). The notion of an emergency exception is consistent with cases allocating to the lawyer decisionmaking authority over procedural and tactical issues in the litigation context. One explanation for such lawyer control is the presence of time constraints on fully informing the client. *Cf.* *Gordon v. Gordon*, 270 Wis. 332, 347, 71 N.W.2d 386, 394 (1955) (new trial not warranted where trial lawyer "exercised judgment with respect to conducting the inquiry as to the husband's income . . ."); *Duffy v. Griffith Co.*, 206 Cal. App. 2d 780, 787, 24 Cal. Rptr. 161, 165 (1962) ("At the trial [the attorney] must have and exercise discretion to make such tactical decisions as the exigencies of the combat may dictate.").

Some cases free the lawyer from a duty to consult in situations where time constraints are not pressing. Those cases reflect the parentalistic "lawyer knows best" philosophy rejected in this article. See, e.g., *Duffy*, 206 Cal. App. 2d 780, 24 Cal. Rptr. 161 (lawyer can withdraw client's defense without consulting client); *cf.* *Stricklan v. Koella*, 546 S.W.2d 810, 812 (Tenn. Ct. App. 1977) (lawyer not liable for failure to transcribe and file depositions or for failure to move for change of venue, as the client requested). See also *infra* note 28 for a discussion of the professional standard. One case recognizes a client role, but still defines the role too narrowly. *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980) (attorney has duty to investigate potential witnesses identified by client, but decision on whether to call them at trial is attorney's).

The presence of third parties (courts and other litigants) may also affect the way courts view control issues. Maute, *supra* note 11, at 1091 ("Effective operation of the adversary system requires that courts and litigants be able to rely and act upon the decisions made by a lawyer during litigation."). However, the need for other parties to be able to rely on a particular representation ought not to insulate the lawyer from liability to the client for failure to consult. The question is one of finding an appropriate remedy. While a new trial might be inappropriate, lawyer liability should still attach. *Cf. infra* text accompanying note 183 (noting that the presence of third parties may preclude reformation of documents upon which they relied). For further discussions of lawyer

A. *Conflicts of Interest: Assuring that the Individual Client Actually Understands*

Despite the presence of conflicts of interest, the law has allowed lawyers²² to represent clients as long as the client consented after being properly informed of the conflict.²³ A lawyer violates the informed decisionmaking doctrine, however, if he or she acts before the client has understood the relevant implications of any conflicts of interest.²⁴ Because a breach in such a situation threatens the integrity of the lawyer-client relationship, courts should consider the failure to engage in informed decisionmaking itself a harm²⁵ and, accordingly, require high levels of disclosure and client understanding.

Courts and commentators have debated what levels of disclosure and understanding the law should require in informed consent situations. They have developed three approaches for measuring the adequacy of disclosure.²⁶ A "professional" standard would

control over litigation, see Maute, *supra* note 11, at 1086-95; Spiegel, *supra* note 4, at 123-26; Strauss, *supra* note 11, at 318-24.

Some states have adopted the emergency exception for medical informed consent situations. See, e.g., KY. REV. STAT. ANN. §§ 304.40-320(3) (Michie/Bobbs-Merrill 1981); WASH. REV. CODE ANN. § 7.700.050(4) (Supp. 1983-84). See generally Andrews, *supra* note 8, at 206-08 (discussing courts and legislatures that have adopted this exception).

²² There are some exceptions, where the the law views the conflict as too fundamental to allow, even with consent. See, e.g., MRPC 1.8(c) (lawyer shall not prepare an instrument giving the lawyer or a close relative a substantial gift from a client, unless client is related to donee); (d) (lawyer shall not enter into an agreement giving the lawyer the literary or media rights for information relating to the representations); (e) ("A lawyer shall not [in general] provide financial assistance to a client in connection with pending or contemplated litigation"); (j) ("A lawyer shall not [in general] acquire a proprietary interest in the cause of action . . .")

²³ See authorities cited *supra* note 18. Estate planners should consult Professor Johnston's extensive article: Johnston, *An Ethical Analysis of Common Estate Planning Practices — Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57 (1984). See also Levin, *Legal Ramifications of Unethical Estate Planning Practices*, 124 TR. & EST. 47 (Oct. 1985). For a discussion of conflict of interest questions in the context of proposing an informed consent doctrine for lawyers, see Spiegel, *supra* note 4, at 87-99, 107-08.

²⁴ Courts should consider conflict-of-interest consent cases as informed decisionmaking cases for two reasons. First, the long history of such consent cases can serve as a base of precedent from which informed decisionmaking can grow into other areas. Second, the traditional doctrine can benefit from the broader perspective of informed decisionmaking generally. Of course, medical informed consent cases will also be useful. Courts may be more willing, however, to impose broader duties on lawyers, as opposed to doctors, if plaintiffs present other lawyer-consent cases as part of the developing doctrine of informed decisionmaking.

²⁵ Commentators on medical informed consent have considered the appropriateness of treating the failure to obtain informed consent as a harm itself. See, e.g., J. KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* 79 (1984); Katz, *supra* note 8, at 164-74; Riskin, *supra* note 8, at 603.

In the absence of actual damages, nominal damages would be appropriate in any malpractice action as nominal damages are traditionally awarded for dignitary harm in other contexts. See, e.g., W. PROSSER AND R. KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* § 13, at 75 (5th ed. 1984) [hereinafter *PROSSER AND KEETON*] (nominal damages for trespass); *id.* § 9, at 40 (nominal damages for battery); J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS*, § 14-2 (2d ed. 1977) (nominal damages for contract breach). Courts should consider a claim involving nominal damages as personal to an injured client and unable to be asserted by third parties. See *infra* notes 146-59 and accompanying text.

Plaintiffs should be able to recover attorneys' fees incurred in any malpractice action as part of the damage award. See *infra* notes 138-40 and accompanying text.

²⁶ For an excellent short summary of the approaches taken toward physicians, see Andrews, *supra* note 8, at 175-80.

ask whether, in the judgment of a competent professional, a particular disclosure was adequate under the circumstances. A "reasonable client" standard would ask whether the disclosure would enable a reasonable person in the position of the client to make an informed decision. An "individual client" standard would ask whether the disclosure was adequate for the particular client in question. Apart from the level of disclosure required, the doctrine ought to require client understanding as opposed to mere lawyer disclosure. The individual client standard best fits the purposes of the informed decisionmaking doctrine because it focuses on the client's particular circumstances.

Because the informed decisionmaking doctrine has developed in response to professional reluctance to communicate with the persons they serve,²⁷ the "professional" standard is inappropriate.²⁸ Such an approach still lets the professionals guard themselves.

²⁷ See *id.* at 171-75.

²⁸ Though under attack, the professional standard is the prevailing rule in medical malpractice. See *id.* at 176. It is based on the parentalistic notion that the professional knows what is best for the client. See, e.g., *Emmett v. Eastern Dispensary and Cas. Hosp.*, 396 F.2d 931, 935 (D.C. Cir. 1967) ("physician's duty [is] to reveal to the patient that which in his best interests it is important that he should know"); *Roberts v. Wood*, 206 F. Supp. 579, 583 (S.D. Ala. 1962) (doctors may tailor pre-operative warnings because the risk is "of a technical nature beyond the patient's understanding" and fear caused by full disclosure may have a detrimental effect); *Zurich Gen. Accident and Liab. Ins. Co. v. Kinsler*, 12 Cal. 2d 98, 81 P.2d 913, 917 (1938) (attorney, because of superior skill and knowledge so has the authority to act as he or she sees fit, even against the client's wishes); *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 154 Cal. App. 2d 560, 578, 317 P.2d 170, 181 (1957) ("[I]n discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed consent."); *Duffy*, 206 Cal. App. 2d at 787, 24 Cal. Rptr. at 165 (1962) ("The trial attorney is in full charge of his client's cause or defense . . . His is the legal knowledge and skill that must be consulted in that connection, not the views of a layman.") Along these same lines, Professor Freedman quotes Judge Clement Haynsworth: "the lawyer must never forget that he is the master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and legally right . . . [T]he lawyer must serve the client's legal needs as the lawyer sees them, not as the client sees them." Freedman, *A Lawyer Doesn't Always Know Best*, 7 HUM. RTS. 28, 29 (May 1978).

Several legal consequences flow from the focus on the professional, instead of the client. Courts often require expert testimony to establish whether a professional acted reasonably. See *Stallcup v. Coscarart*, 79 Ariz. 42, 282 P.2d 791 (1955); *Aiken v. Clary*, 396 S.W.2d 668, 674 (Mo. 1965). Courts may define reasonableness either under the "locality rule," which holds professionals to the standard of care prevalent in their communities, or according to a national standard. Compare *Robbins v. Footer*, 553 F.2d 123 (D.C. Cir. 1977), *Kronke v. Danielson*, 499 P.2d 156, 108 Ariz. 400 (1972) and Note, *Medical Malpractice-Expert Testimony*, 60 Nw. U.L. REV. 834 (1966) (favoring a national standard for doctors) with *May v. Moore*, 424 So. 2d 596, 601 (Ala. 1982) (adopting a locality standard for doctors), *Poulin v. Zartman*, 542 P.2d 251, 269 (Alaska 1975) (same), and *King & Coe, The Wisdom of the Strict Locality Rule*, 3 BALT. L. REV. 221 (1973) (favoring the locality rule for doctors). As to lawyers, compare *Woodruff*, 593 F.2d 43 (adopting a national standard for lawyers), *Cook Flanagan & Best v. Clausing*, 73 Wash. 2d 393, 438 P.2d 865 (1968) (same) and Note, *The Illinois Legal Malpractice Tort: Basic Tenets And Recent Trends*, 1980 U. ILL. L.F. 427 (favoring a statewide or a national standard) with *Ramp v. St. Paul Fire and Marine Ins. Co.*, 263 La. 774, 269 So. 2d 239 (1972) (adopting a locality standard for lawyers), *Viccinelli v. Causey*, 401 So. 2d 1243 (La. Ct. App. 1981) (same), Comment, *New Developments in Legal Malpractice*, 26 AM. U.L. REV. 408 (1977) (favoring the locality rule) and Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771 (1968) (same).

Further, if the professional is a specialist, a higher standard of care might apply. See *Robbins*, 553 F.2d at 129 (doctor specializing in obstetrics and gynecology held to duty of care equal to all doctors in that particular field), *Gittens v. Christian*, 600 F. Supp. 146, 146 (D. St. Croix, 1985) (doctor certified as a family medicine specialist held to a higher standard of care than general

Rather, an informed decisionmaking doctrine ought to ask what a *client* would want to know.

If courts adopt the client perspective, the question remains whether the law should judge the adequacy of information objectively by what a hypothetical "reasonable client" should want to know, or subjectively by what the individual client in question would have wanted to know.²⁹ Often it will matter little whether a court applies an objective or a subjective test.³⁰ After all, most clients are reasonable people. The difference between

practitioner), *Wright v. Williams*, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975) (maritime law specialist held to a standard of care exercised by other maritime specialists), *Trimboli v. Kinkel*, 226 N.Y. 147, 123 N.E. 205 (1919) (attorney who was negligent in a title conveyance held to a standard of care exercised by all other conveyancers). *But see* *Olson v. North*, 276 Ill. App. 457 (1934) (attorney claimed specialty in criminal defense but still only held to standard of care exercised by ordinary attorney). *Cf.* *Estate of Beach*, 15 Cal. 3d 623, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (corporate trustee held to a higher standard than non-expert); *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979) (failure of a general practitioner lawyer to refer to a specialist can be basis of a malpractice claim).

The possibility that specialists may face a higher standard poses a dilemma for the generalist in a less-populated area: either decline to take on the client's problem (and possibly effectively deny the client legal services) or risk exposure to a higher standard of competence. *See* *Johnston, Legal Malpractice in Estate Planning — Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629, 685-90 (1982). The informed decisionmaking doctrine, however, may provide a solution. If the client fully understands the risks of having the local lawyer work on the problem, the lawyer should not be held to the higher standard.

²⁹ In the medical malpractice area, some courts, following the now-classic *Canterbury*, 464 F.2d 722, have judged the physician's conduct by what a reasonable patient would consider material. *See In re Swine Flu Immunization Prods. Liab. Litig.*, *Bean v. United States*, 533 F. Supp. 567 (D. Colo. 1980); *Hitchcock v. United States*, 665 F.2d 354, 361 (D.C. Cir. 1981); *Henderson v. Milobsky*, 595 F.2d 654, 656 (D.C. Cir. 1978). The objective standard serves to protect professionals, because as a practical matter the question of adequacy arises after the fact when the patient knows consequences about which he or she had been uninformed. *See Canterbury*, 464 F.2d at 791 (protecting doctors from "the patient's hindsight and bitterness").

Courts also give other reasons for following an objective standard. Courts have acted, consistent with the parentalistic model, to protect patients from a "wrong" decision (that is, one the patient, but not a reasonable person, might have made). *See Hitchcock*, 665 F.2d at 361, *Henderson*, 595 F.2d at 656, *In re Swine Flu Immunization Prods. Liab. Litig.*, *Bean*, 533 F. Supp. at 575-76; Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking*, 1979 WIS. L. REV. 413, 428. The use of an objective standard is said to avoid placing the physician in the position of a mind reader. *See Waltz & Scheuneman*, *supra* note 8, at 639. Further, under an objective standard, professionals may be less likely to shower patients or clients with useless information. *Cf. TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976) (discussing the risks of a low standard for "materiality" in the context of disclosures required by securities law).

Some courts have rejected *Canterbury* and adopted a subjective test. *See Scott v. Bradford*, 606 P.2d 554 (Okla. 1979). *See also McPherson v. Ellis*, 305 N.C. 266, 287 S.E.2d 892 (1982) (adopting a subjective standard). *But see* N.C. GEN. STAT. § 90-21.13(a)(3) (1975) (mandating an objective standard).

³⁰ *See* *Martyn*, *supra* note 3, at 348-49. Further, the "objective" and "subjective" labels, despite their common use after *Canterbury*, may cloud the issue. Professor Katz believes the *Canterbury* court "should have considered more the patients' plight and required physicians to learn new skills: [such as] how to inquire openly about their patients' individual informational needs and patients' concerns, doubts, and misconceptions about treatment — its risks, benefits, and alternatives." J. KATZ, *supra* note 25, at 78. Of course, such an approach leads one in the same general direction as the "subjective" standard. The focus, however, is more on the process of mutual information-sharing than on the mental state of two participants. *Cf. id.* at 79, 84. Because the labels are in common use, they are retained here.

the two tests is important, however. A "reasonable client" approach encourages the mindset that clients fit into categories and that lawyers should treat like clients alike. It depersonalizes the counseling and fails to recognize that similar clients are not the same. Only by focusing on an individual client can lawyers adequately serve the rare client who wants information which a reasonable person in that client's position would not want.³¹ This approach effectively requires the professional to inquire about the client's personal needs.

In a conflict of interest context, the individual client standard and requirement of client understanding are especially attractive because the conflict particularly threatens the client's autonomy. Lawyers should probe carefully to be sure that their disclosures meet the needs of the client before them.³² Further, the law should measure the client's "consent" by whether the client actually understood the disclosures.³³ The notion of

³¹ See *Scott* where the court noted, "[t]o the extent the plaintiff . . . would have declined the proposed treatment, and a reasonable person in similar circumstances would have consented, a patient's right of self-determination is *irrevocably lost*. The basic right to know and decide is the reason for the full-disclosure rule." *Scott*, 606 P.2d at 559. See also Comment, *Informed Consent: From Disclosure to Patient Participation in Medical Decisionmaking*, 76 Nw. U.L. Rev. 172, 199 (1981) [hereinafter Comment, *Informed Consent*]. Cf. Chused, *Faretta and the Personal Defense: The Role of A Represented Defendant in Trial Tactics*, 65 CALIF. L. REV. 636, 655 (1977) (stating that "courts find some areas in which a [criminal] defendant's desires, even if irrational, are so important that they supercede the benefits of counsel").

Courts should not, however, interpret focus on the individual client in a way which would make the proof problem more difficult for claimants. If the claimant cannot establish that the particular client in question wanted particular information, but can prove that a reasonable client would have, the claimant would have established a violation. Rather, the point of the individual client standard is that a professional will not be protected by *only* disclosing what a reasonable client would want.

³² Meeting such an obligation will not be easy. The lawyer should engage the client in a conversation which gives the client opportunities to reveal gaps in understanding. Cf. J. KATZ, *supra* note 25, at 78 ("Physicians should not try to 'second-guess' patients or 'sense' how they will react. Instead, they need to explore what questions require further explanation"). Then the lawyer can attempt to fill the gaps. See generally D. BINDER & S. PRICE, *supra* note 11.

One might ask how much clients, especially unsophisticated ones, will be able to understand. Sophisticated understanding, however, is not the goal. Rather, the client need only understand enough of the basics to be able to make an informed choice. Good lawyers have learned how to communicate with each other; with some change in emphasis, they ought to be able to apply those skills toward communicating with clients. See Strauss, *supra* note 11, at 341-49. Cf. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *MAKING HEALTH CARE DECISIONS*, vol. two: Appendices, 12-13 (medical patients can understand medical information if explained simply).

³³ The question of lack of understanding has not received much attention by courts because most of the cases involve the failure to disclose any information. See, e.g., *Spector v. Mermelstein*, 361 F. Supp. 30 (S.D.N.Y. 1972) (attorney failed to advise client of known facts which would have caused client not to loan money to corporation owning a gambling casino); *Republic Oil Corp. v. Danziger*, 400 N.E.2d 1315 (Mass. App. Ct. 1980) (attorney negligent in failing to disclose to client the existing perfected security interest in heating and cooling equipment on the property the client was purchasing); *In re Finn*, 54 A.D.2d 503, 389 N.Y.S.2d 393 (1976) (attorney disbarred for, among other things, failure to disclose to client beneficiary the purchase of real property with trust funds).

Some courts, however, have indicated they will ask whether the individual understood the information disclosed. See *Olfe v. Gordon*, 93 Wis. 2d 173, 187-88, 286 N.W.2d 573, 580 (1980) (court relied upon plaintiff's perception of the responses to her questions and the fact that plaintiff did not understand the contents of the instruments involved in purchase and mortgage of property); *Bang v. Charles T. Miller Hosp.*, 251 Minn. 427, 88 N.W.2d 186 (1958) (In a medical malpractice

mutual information sharing is central to an informed decisionmaking doctrine; mutuality can be achieved only by requiring that the particular client in question understands the choices to be made and their consequences.

Conflicts in planning circumstances are likely to be one of two types: the lawyer may be representing clients who themselves have conflicting interests or the lawyer may have personal conflicts with the client. In either of these cases, the conflicts might be so strong as to bar the lawyer from acting.³⁴ In most cases, however, an adequately informed client is able to consent to the representation despite the conflict. A rule barring clients' opportunity to consent would preclude clients from obtaining the representation they choose.

Multiple representation in an estate planning context³⁵ will usually involve a lawyer representing a family whose members have conflicting interests. A common estate plan would give a surviving parent lifetime income interest in a trust and perhaps a power to invade the corpus. After the death of this parent, the children would have a right either to income or to distribution of their shares of the fund.

In such a situation, disputes may ultimately arise on a variety of questions. Before accepting the representation, the lawyer's obligation is to educate all potential clients about the nature of these potential disputes. For example, a life tenant and a remainderman may disagree about whether the trustee should allocate particular receipts or expenditures to principal or to income.³⁶ Also, the parent's exercise of the power to invade the corpus would reduce the shares of the children. If the invasion power is subject to any limitation,³⁷ questions might arise as to whether the parent's exercise was within the parent's power under the document. Furthermore, if the lawyer also represents the trustee (who could be a family member), a whole range of potential trustee-beneficiary conflicts arises.³⁸ In order to comply with the informed decisionmaking

case, the jury was to decide if the defendant doctor was guilty of assault and battery based upon, among other things, the perception by the plaintiff of the discussions between plaintiff and defendant.)

³⁴ See generally MRPC 1.8(c), (d), (e), (j). Professor Johnston has proposed that some common practices be prohibited. See Johnston, *supra* note 23, at 84-86 (will named drafting attorney as beneficiary), 112-14 (will named drafting attorney as attorney for the estate), 133 (attorney "safe-keeping" of will). From the perspective of the informed decisionmaking doctrine, the important point is that if courts allow such practices to continue at all, they should allow them only after fully informed decisions by the clients.

³⁵ In other planning contexts, lawyers will often be representing entities, like corporations, and at the same time representing individuals, like corporate officers, whose interests may conflict with each other or those of the entity. See generally G. C. HAZARD, JR., & W. W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 231-68 (1985) (discussing entity clients, with specific reference to the ABA's Model Rules).

Representation of both buyer and seller in the sale of real estate is among the most common multi-party conflict situations planners face outside of estate planning. See, e.g., *In re Lanza*, 65 N.J. 347, 322 A.2d 445 (1974); *In re Kamp*, 40 N.J. 588, 194 A.2d 236 (1963). Another common conflict is the representation of both parties to a divorce. See e.g., *Klemm v. Superior Court of Fresno County*, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977).

³⁶ See, e.g., *In re Catherwood's Trust*, 405 Pa. 61, 173 A.2d 86 (1961) (included disputes about how to treat stock dividends).

³⁷ The trust may limit powers because the creator of the trust was unwilling to grant unlimited power to the surviving spouse. Tax considerations often play a decisive role; powers restricted by an "ascertainable standard" will not bring the property subject to the power into the gross estate of the donee of the power. See I.R.C. 2041 (b)(1)(A) (1982).

³⁸ The trustee might disagree with some beneficiaries about either of the issues noted in the

doctrine in this situation, the lawyer should be sure all parties understand that such potential conflicts exist and that they understand enough of the substantive law to be able to evaluate how important the conflicts are to them.³⁹ Only then can the client make an informed decision about whether to hire the lawyer and how much to rely upon the lawyer's advice.

In the very nature of an estate planning practice, conflicts also will arise directly between the lawyer and the client.⁴⁰ Because the lawyer who serves as planner usually expects to be hired as lawyer for the estate of the client, and because common practice often ties legal fees into the size of the estate, lawyers have an interest in maximizing the size of the probate estate. Clients, on the other hand, may prefer to save on probate costs (and their attendant legal fees) by employing inexpensive probate-avoidance devices, especially joint tenancies. When explaining the advantages and disadvantages of various planning devices, a lawyer should be sure the client understands the lawyer's personal stake in the option being discussed.⁴¹

text: principal/income allocation and scope of invasion powers. Virtually any interpretation problem could involve the trustee. In particular, trustees and beneficiaries would be likely to disagree over interpretations which directly affect them, such as the scope of the trustee powers, the appropriateness of fees, or the accuracy of accountings. For a discussion of ethical problems faced by lawyers in the context of trust terminations, see Dobris, *Ethical Problems for Lawyers upon Trust Terminations: Conflicts of Interest*, 38 U. MIAMI L. REV. 1 (1983).

³⁹ See MRPC Rule 1.7(b)(2) ("When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved").

Another example is that of a husband and wife who seek estate plans. In most states, lawyers should inform both spouses of their right (and their spouse's right) to reject will provisions on their behalf and instead elect to take a statutory share. See generally T. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 33 (2d ed. 1953). Further, in many places lawyers should inform clients that spousal claims can often be reduced to next to nothing, usually by using an inter vivos trust to "empty" the estate so that little is left against which to elect. See *Johnson v. La Grange St. Bank*, 73 Ill. 2d 342, 383 N.E.2d 185 (1978). But see *Sullivan v. Burkin*, 390 Mass. 864, 460 N.E.2d 572 (1984) (prospectively ruling that an inter vivos trust over which the deceased spouse had a general power of appointment created by the deceased spouse during the marriage is part of the estate against which the surviving spouse can elect). For comprehensive discussion of the approach of the Uniform Probate Code to spousal disinheritance, see Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981 (1977).

A discussion of the potential conflicts in this context is unlikely to be long, because most persons have no interest in disinheriting their spouses. See Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681, 715 (1966) ("The married testator on the whole shows little inclination to avenge himself at death for the slights and frictions of marital bliss"); Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 316-17 (1975) ("There was virtually no indication that spouses of either sex used dispositive instruments to deprive the surviving spouse of any of the property the couple had accumulated during marriage."). Of course, one reason those studies might not have found disinheritance common could be that the clients did not know it was possible.

⁴⁰ One common conflict outside of estate planning involves the lawyer who represents a client buying or selling a business in which the lawyer has an interest. See, e.g., *People v. Razatos*, 636 P.2d 666 (Colo. 1981).

⁴¹ A similar conflict arises when the family of a decedent asks whether probate of an estate is necessary. If creditors will be paid and there are no problems clearing title to property, probate (and the attendant legal fees) may not be required.

Professor Johnston's perceptive article discusses a series of other common practices by estate planners which raise conflict of interest issues: naming the lawyer/drafter as beneficiary, as attorney for the estate, or as trustee or executor; "safekeeping" the will, in the hope that new business will

This discussion has not sought to list all of the circumstances in which planners would breach an informed decisionmaking doctrine if they failed to disclose conflicts. Rather, by highlighting a few familiar practices in one area of law, the section has sought to identify the types of situations which always call for fully-informed client decisions. As the law already recognizes, lawyers have a duty to disclose conflicts of interest. Such a duty is consistent with the theory of informed decisionmaking. When facts bear upon the heart of the lawyer-client relationship, lawyers should disclose those facts and clients should understand their importance.

B. When No Conflicts of Interests Are Present: Assuring that the Individual Client Has the Relevant Information

One tendency of lawyers is to view many relevant issues as "too trivial"⁴² to require client consultation. Some "trivial" issues do affect clients and their successors, however, and adequate representation requires discussion of issues relevant to the individual client.⁴³ The standard "relevant to the individual client" is a broad one. Like the disclosure standard in conflict of interest cases, the standard in non-conflict cases should be the subjective, individual client approach. Any more restrictive standard would undermine the principal purpose of the representation — to effectuate the client's particular (even peculiar) intention.⁴⁴ Lawyers ill-serve their clients when they effectively make decisions for clients by not providing a client enough information upon which to base an informed decision. Whether the result of planning is embodied in a set of corporate documents or in a trust and pour-over will, when only one party is involved, the focus of the process should be on producing a plan which meets the desires of the particular client. If other parties will become involved, as when a contract is contemplated, the

accompany its retrieval. A more subtle conflict exists when the drafting lawyer recommends the naming of a corporate fiduciary when the lawyer knows of the fiduciary's policy to hire the drafting lawyer as lawyer for the estate. Another conflict is present when lawyers fail to offer "self-proved" clauses as part of their will executions. Such clauses can greatly simplify the admission of the will to probate in jurisdictions which have adopted the Uniform Probate Code section 2-504. See Johnston, *supra* note 23, at 115-24, 133-40.

⁴² Cf. *infra* note 84 (questioning whether the non-tax consequences of various provisions inserted to achieve tax savings are too trivial to raise).

⁴³ Expert testimony, from other lawyers, would be appropriate to establish what options would be available to a client in particular circumstances. Lay testimony should address the question of whether any particular client would have chosen a particular option. See generally *supra* notes 30-33 (discussing a subjective test of client understanding).

⁴⁴ See *supra* notes 26-31 and accompanying text. Further, courts' decisions reflect emphasis upon individuality when they purport to interpret documents by judging their meaning not by what a reasonable person would have meant, but by what the individuals involved in the transaction meant. See *In re Smith's Will*, 254 N.Y. 283, 290, 172 N.E. 499, 501, (1930) ("[t]he question is whether . . . [extrinsic evidence] indicate[s] that the literal meaning of the language employed is not in accord with the meaning which the testatrix intended to give it . . ."); *In re Estate of Houston*, 414 Pa. 579, 585, 201 A.2d 592, 595 (1964) ("[w]e first place ourselves in the armchair of the testator and remember that the intention of the testator is the polestar in the construction of every will."); *But see Birchcrest Bldg. Co. v. Plaskove*, 369 Mich. 631, 637, 120 N.W.2d 819, 823 (1963) ("the law presumes that the parties understand the import of the contract and had the intention manifested by its terms").

Sometimes a court will state, for example, that it is following the intention of a testator, when it is really foisting a technical meaning upon him or her. See, e.g., *Proctor v. Lacy*, 263 Mass. 1, 8, 160 N.E. 441, 443 (1928) (quoted *supra* note 1).

ultimate goal should be to produce a plan meeting the desires of all participants. Some give and take may be required, but the lawyers for each party initially should focus upon the particular needs of their clients.⁴⁵ In order for documents to reflect what clients really intend, lawyers should be sure their clients understand⁴⁶ the factors which the client would find relevant to a decision. Further, the use of a "relevant" standard requires at least a preliminary inquiry into a wide range of issues.⁴⁷ A client's response to such general discussions will determine how much additional information the lawyer should introduce.

The relevance standard does provide, however, a limit on disclosures. Clients will need only general descriptions of some topics, but more detailed information on others. Three typical estate planning problem areas — discussions of non-tax consequences of planning decisions, discussions of options available to clients, and use of boilerplate — illustrate how lawyers and clients should communicate.

Tax savings will often be an important goal of estate planning clients.⁴⁸ Before a client can make an informed decision about whether or how much to focus on tax

⁴⁵ Cf. Llewellyn, *The Modern Approach to Counselling and Advocacy — Especially in Commercial Transactions*, 46 COLUM. L. REV. 167, 185 (1946) (noting the importance to a commercial lawyer of knowing the client's business). Of course, in order adequately to represent the client, the lawyer needs to look beyond the individual situation to the needs of the society at large. See Llewellyn, *The Crafts of Law Re-Valued*, 15 ROCKY MTN. L. REV. 1, 6-7 (1942).

⁴⁶ As a threshold matter, a client must have mental capacity; an "incompetent" person cannot make intelligent choices. The appropriate test for measuring the adequacy of a client's mental capacity to understand a lawyer's explanation ought to be the same as the test appropriate for the document being produced. For example, if the client is about to sign a partnership agreement, the test would be that for contracts. See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* §§ 8-10 (2d ed. 1977). Mental capacity to contract exists unless a party "does not understand the nature and consequences of his act at the time of the transaction." *Id.* Furthermore, a contract is voidable if the party "by reason of mental illness or defect . . . is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of this condition." *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 18C (1982)). See also RESTATEMENT (SECOND) OF CONTRACTS § 15 (1982). If the lawyer has prepared a will, the lower testamentary capacity standard would apply. See T. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 51 (2d ed. 1953) (To have testamentary capacity, a person must understand the nature and extent of his or her property, the objects of his or her bounty, and the disposition of his or her property. In addition, a person must be capable of appreciating the relationship of these elements and forming an orderly desire for the disposition of his or her property.).

Though often a contract in form, an unfunded revocable inter vivos trust is primarily a will substitute; a court should measure a client's ability to understand a lawyer's explanation of the trust by the testamentary standard. See R.W. Effland, *Trusts and Estate Planning*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 128 (1976). Because an irrevocable inter vivos trust, usually executed primarily for tax reasons, has binding lifetime consequences, perhaps a court should judge its validity (and the ability of the client to understand an explanation of it) by the contract standard. Cf. *id.* (stressing the coincidence of revocability of revocable trusts and wills). A funded, revocable inter vivos trust stands between an irrevocable inter vivos trust (more like a contract) and an unfunded, recoverable inter vivos trust (more like a will). The contract competency standard is more appropriate if a revocable, inter vivos trust is funded by more than a token amount, because the trust involves an ongoing relationship between the settlor (who can revoke) and the trustee.

⁴⁷ Doctors must provide "material" information to their patients. See *Canterbury*, 464 F.2d at 787-88; *Scott*, 606 P.2d at 558. Authorities on medical informed consent, however, disagree on the appropriate scope of "material." See *Canterbury*, 464 F.2d at 787 n.84-788 n.89. The text uses the term "relevant" in order to indicate a broad range of topics and avoid identification with the narrower definitions of "material."

⁴⁸ Tax savings for the client may often become the lawyer's primary goal. Cf. Peck, *supra* note

savings, however, the lawyer must explain the restrictions tax laws impose on freedom of disposition. Thus, there is a close tie between traditional notions of competence and the informed decisionmaking doctrine. Only by knowing the substance of the law can a lawyer recognize when a particular topic could be relevant to the client. The focus of informed decisionmaking, as a branch of competence generally, is not so much on the accuracy of the lawyer's advice as on the adequacy of lawyer-client communication about the problem.

The situation which arose in *Estate of Mittleman v. Commissioner* illustrates the type of discussion lawyers and clients should have.⁴⁹ The question in *Mittleman* was whether a gift in trust to a decedent's widow qualified for the federal estate tax marital deduction. To qualify for the deduction, the trust had to give the spouse *all* of the income from her share in at least annual payments.⁵⁰ The trust stated as a purpose "[t]o provide for the proper support, maintenance, welfare and comfort" of the widow.⁵¹ Because other trust provisions referred to the corpus, the court treated this provision as a direction to the trustee regarding income.⁵² The Commissioner argued that the trust did not give Mittleman's widow all of the trust income, but the Court of Appeals disagreed. It looked to other language in the trust, noted the small size of the corpus, and concluded that Mittleman expected that all of the income would be needed for his wife's support.⁵³ More important for our purposes, the court also relied on the testimony of the lawyer who drafted the document. The lawyer said that Mittleman wanted to qualify for the marital deduction.⁵⁴ The court stated "where a testator intends to create a trust qualifying for the marital deduction, ambiguities in his will should, if possible, be resolved in favor of success in that endeavor."⁵⁵ Because the trust, as interpreted, gave all of the income at least annually to the widow, the court allowed a marital deduction.

The problem with the case from the perspective of informed decisionmaking is that, despite the lawyer's testimony that Mittleman wanted to qualify for the marital deduction, Mittleman seems never to have formed any specific intention to *qualify for the deduction by expressly giving his wife a greater income right than the right to receive support*.⁵⁶ It appears

4, at 1303 ("I believe that . . . persons . . . receive advice based upon an unstated assumption of the lawyers that the major concern of the client is to avoid or minimize taxes."). One reason for this tendency may be that for many clients, that is their primary goal; consequently, a lawyer treats any particular client like the others. Another reason for this tendency may be that if tax savings are the goal, the lawyer has available a set of familiar techniques. If other goals emerge, they are likely to be more individualized, such as caring for a disabled parent, and thus require treading on unfamiliar ground. One technique for avoiding over-emphasis on taxes is to ask the client to give details on desired outcomes. Once it is established where the client wants to go, the lawyer can raise the issue of tax consequences. Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1088-89 (1979).

⁴⁹ 522 F.2d 132 (D.C. Cir. 1975). For an enlightening discussion of *Mittleman*, see Langbein & Waggoner, *supra* note 5, at 552-54, 584-85. See also *infra* notes 170-74 and accompanying text.

⁵⁰ 522 F.2d at 135 (citing 26 C.F.R. Sec. 20.2056(b)-5 (1975)).

⁵¹ *Mittleman*, 522 F.2d at 133 n.1.

⁵² *Id.* at 138.

⁵³ *Id.* at 138-40.

⁵⁴ *Id.* at 140 n.55.

⁵⁵ *Id.* at 140. Professors Langbein and Waggoner point out that the will had no ambiguity and that the court was really rewriting the will to cure the lawyer's mistake. Langbein & Waggoner, *supra* note 5, at 554. For a discussion of the appropriateness of using reformation as a remedy in informed decisionmaking cases, see *infra* notes 160-85 and accompanying text.

⁵⁶ There seems to be little question that Mittleman would have given all the income to his wife,

that the lawyer did not know the tax code well enough to have asked whether the client wanted to save taxes at the "cost" of giving his wife the total trust income, instead of only support. The informed decisionmaking doctrine would not require every client to confront the tradeoff between maximizing tax savings and pursuing other goals. When the client expresses a desire for particular tax savings, however, the costs, in terms of other possible client goals, become relevant to the discussion.

The availability of an "unlimited" marital deduction also poses tradeoff questions which may be relevant to a particular client. If a decedent gives all of her property to her surviving spouse, the decedent's estate will escape all estate tax.⁵⁷ At the death of the survivor, however, any unconsumed property would be included in the survivor's gross estate.⁵⁸ A decedent who chose to give some property to others, say to her children, might suffer taxes in her estate, but might lower the amount of tax in the survivor's estate.⁵⁹ Much of the literature on how best to decide whether to take maximum advantage of the marital deduction focuses upon such questions as the relative wealth of the spouses and the survivor's life expectancy.⁶⁰ Lawyers often view the issue in dollar terms: will the value of tax deferral — escaping estate taxes in the decedent's estate — exceed the cost of taxation in a higher bracket when taxation comes later? Often understated or ignored,⁶¹ however, is an additional question: are there non-tax reasons why the client might prefer not to give everything to the spouse? For example, the children might have greater need for the funds than the spouse. Once a client expresses interest in using the marital deduction, both tax and non-tax considerations become relevant. It would be a breach of the informed decisionmaking doctrine for the lawyer not to engage in discussions on those topics.

Powers of appointment pose a similar problem. Someone given a power to direct that trust property be paid to himself will be said to have a general power of appointment unless an "ascertainable standard" defined in the tax code limits the power.⁶² Property over which a decedent had an unlimited general power of appointment is included in the decedent's gross estate.⁶³ Yet before a lawyer automatically limits someone's power to an ascertainable standard, the lawyer and client should discuss whether the client would prefer the tax savings a limited power would bring or the flexibility of an unlimited power. The effect of an informed decisionmaking doctrine on a tax planning practice would be to focus more attention on discussing both tax and non-tax questions with

had he confronted the question. See *Mittleman*, 552 F.2d at 138-39. The question of what a fully informed client would have done often will be critical in informed decisionmaking cases. See *infra* notes 116-33 and notes 161-74 and accompanying text.

⁵⁷ See I.R.C. § 2056(a) (1982).

⁵⁸ See *id.* at § 2033.

⁵⁹ To the extent that a decedent gives others non-charitable gifts which total less than the amount sheltered by the available unified credit, those gifts would pass tax free. Tax would be assessed only after the taxpayer fully used the unified credit. See *id.* §§ 2010, 2055.

⁶⁰ See, e.g., J. PRICE, CONTEMPORARY ESTATE PLANNING 263-70 (1983); Backman & Frank, *Five Factors to Consider in Determining How Much of the Unlimited Marital Deduction to Use*, 9 EST. PLAN. 194 (1982); Smith, *Unlimited Marital Deduction Increases Planning Flexibility and Triggers Redrafting*, 8 EST. PLAN. 336 (1981).

⁶¹ But see Smith, *supra* note 60, at 337-39.

⁶² I.R.C. § 2041(b)(1)(A) (1982).

⁶³ *Id.* at § 2041(2). Powers created on or before October 21, 1942, are subject to different rules. *Id.* at § 2041(1).

clients.⁶⁴ Lawyers following such a doctrine would be less able to assume that their clients would prefer a particular approach.

A similar set of problems arises regarding discussions of planning options available for clients. Because the choices are virtually unlimited, no lawyer could be expected to explain them all (let alone imagine them all). Some options are important enough, however, that lawyers have a duty to mention them as part of giving competent advice. The informed decisionmaking doctrine would enhance current doctrine by focusing attention on the need to discuss some options in greater depth.

For example, if a trust is appropriate for a particular client, a further question which the lawyer and client commonly should discuss is whether the trust should be testamentary or inter vivos. Most good lawyers would note the relative merits of each in general terms.⁶⁵ Other questions may arise, however, depending upon the client. If the client is naming beneficiaries likely to reside in another state, the lawyer should note the relative ease of moving an inter vivos, as opposed to a testamentary, trust.⁶⁶ If an unmarried client is involved in a sexual relationship, an inter vivos trust might be an attractive alternative to a will.⁶⁷ The lawyer would likely not need to discuss either of these points in full with many clients. An informed decisionmaking doctrine, however, should emphasize the duty of the lawyer to learn enough about each client to know

⁶⁴ Charitable gifts pose similar problems. For example, a properly structured charitable testamentary gift will be deductible from the donor's gross estate. *Id.* at § 2055. If the will was executed, however, too close in time to the testator's death, or if the gift is too large, such charitable gifts will be invalid in some states. For an example of a plan frustrated by such an approach, see *Crosby v. Alton Ochsner Medical Found.*, 276 So. 2d 661 (Miss. 1973). See generally Report of the Committee on Succession, *Restrictions on Charitable Testamentary Gifts*, 5 REAL PROP., PROB. & TR. J. 290 (1970). Because such restrictions usually apply only to testamentary gifts, however, a client can avoid them by using an inter vivos trust. Of course, other considerations may affect the choice of an inter vivos trust. See *infra* notes 65-67 and accompanying text.

If the charitable gifts would be of non-cash property, other questions could arise. For example, a gift of art work might or might not carry with it a right to reproduce the item, as when museums offer to sell prints of their paintings. See generally Berkowitz & Leaffer, *Copyright & the Art Museum*, 8 COLUM. J.L. & ARTS 249, 286-99 (1984) (discussing exclusive rights under copyright law in the context of works of art). The client should decide whether the gift should include other uses of the art work.

⁶⁵ Testamentary trusts tend to be easier to change while the testator is alive, but may be less flexible later (primarily because court supervision is often required). Inter vivos trusts are somewhat more cumbersome to establish or amend (because of the need to involve the trustee at that time), but may be more flexible than a testamentary trust after the settlor has died. Inter vivos trusts are not subject to probate and its attendant costs. See generally J. DUKEMINIER & S. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 516-17 (3d ed. 1984); J. PRICE, *CONTEMPORARY ESTATE PLANNING* § 10.10-10.11 (1983); T. SHAFFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 197-212 (2d ed. 1979).

⁶⁶ Because a testamentary trust is subject to court supervision, any move would require court approval. That complication can be eliminated if an inter vivos trust is used. For example, one circumstance which might be overlooked unless the lawyer asks the right questions involves minor children. If the contemplated personal guardian for the children resides in another state and the children will be moving to live with the guardian, the settlor may want to allow the guardian to remove one trustee and name as successor someone (or some institution) more convenient to the guardian.

⁶⁷ See generally Kramer, *Estate Planning for the Stable and Not-So-Stable Marriage and Nonmarital Cohabitation*, 39 N.Y.U. INST. ON FED. TAX'N § 56.07 (1981); Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981); Wolk, *Federal Tax Consequences of Wealth Transfers Between Unmarried Cohabitants*, 27 UCLA L. REV. 1240 (1980).

whether such issues could be relevant and the duty to assure that the client understood the consequences of the choices made.

Another example of planning options involves choices available for the disposition of property. Most clients probably begin by thinking they should treat each of their children equally. Not only should lawyers not automatically assume that the client will prefer equal treatment, but lawyers should also challenge such assumptions by the client. The lawyer should point out that no two children are the same and that the law does not require that they be treated the same. Questioning by the lawyer should seek to uncover whether the differences between the children are substantial enough to call for consideration of different dispositions. In most cases the client probably will elect equal division of property, but the decision will not have been fully informed unless some discussion of the question has taken place.⁶⁸

Lawyers and clients also should explore differences among beneficiaries in the context of powers to invade a trust corpus. Trusts commonly give trustees the power to spend the corpus for the "health, education and comfort" of a beneficiary. The lawyer should ask whether some more specific powers would be appropriate. Is one child likely to need funds to start her own business? Is another likely to need a down-payment for a house? Is a third likely to abuse grants for education? Only by inquiring about the family, and suggesting various ideas, can the lawyer be sure the client fully appreciates the flexibility available. One object of such an open-ended discussion would be to elicit a client question like, "Could I do this?" The answer likely will be "yes," and the idea likely never would have arisen if the lawyer had not stimulated the client's thinking.⁶⁹

By encouraging more complete discussions between lawyers and clients, the informed decisionmaking doctrine could greatly enhance the chances that clients really have formed the specific intention to mean what a document says. In particular, one of the most troublesome problems regarding the interpretation of documents is the courts' tendency to pretend that testators (or others) actually understood the legal meaning of the words used.⁷⁰ Clearly, not all clients will fully understand all of their documents. Just as clearly, clients could understand more if lawyers made a greater effort to explain in more detail.⁷¹

⁶⁸ A similar problem may arise for a client who is informed that a trustee may be given the discretion to "sprinkle" income among beneficiaries. While the trustee would have the power to act, he or she would probably want to consult the beneficiaries regarding their needs and preferences. If the settlor left both children and grandchildren (children of predeceased children), the trustee may have trouble deciding how to weigh the reasonable claims of all. For a discussion of options which a lawyer ought to raise with a client considering sprinkle provisions, see Halbach, *Issues About Issue: Some Recurrent Class Gift Problems*, 48 Mo. L. Rev. 333, 355-57 (1983).

Lawyers also ought to consider out-of-the-ordinary dispositions when designing a special power of appointment. A trust often gives surviving spouses power to appoint the remainder of a trust "among our children" or, more flexibly, "among our descendants." A client, if told it is possible, might also want to include the spouses of descendants as possible takers. If a child has predeceased his or her surviving parent, leaving a spouse and minor children, perhaps a gift to the spouse, instead of to the minor children, would be sensible. Some clients would know that under no circumstances would they want such a distribution. Others might want to preserve the option. Only by engaging in a fully-informed discussion can clients decide.

⁶⁹ For a discussion of such brainstorming in a negotiation context, see Gifford, *The Synthesis of Legal Counseling and Negotiating Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. Rev. No. 3 (1987).

⁷⁰ See Proctor, 263 Mass. at 8, 160 N.E. at 443 (quoted *supra* note 1).

⁷¹ See Langbein & Waggoner, *supra* note 5, at 585. Noting that tax problems can arise from the

The question of how much a lawyer should discuss under the relevance standard is particularly troublesome when the potential topics involve "boilerplate," that is, language which tends to appear repeatedly in different documents of the same type. Once in a lawyer's forms, boilerplate seems to take on a life of its own. The meanings of many terms are obscure, but because the words (if not their meanings) are so familiar to the lawyer, they often go unexplained to the client. Surely the cost of legal advice would rise dramatically if every client had to understand the implications of every word in every document. Lawyers ill-serve their clients, however, by broadly defining what explanations are too trivial to raise with a client. The result is worse than an inadequately-informed decision; it is adoption of language without a decision. A standard of "relevance" can set the bounds of appropriate discussions. Lawyers should always consider relevant the meanings of terms used in the document. The doctrine of informed decisionmaking would not require discussions of other possible word choices unless the client's situation indicated the particular relevance of extended discussion. Clients should know, however, what the words mean, and the doctrine should require lawyers to evaluate when clients might want to know more.

For clarity and efficiency, estate planners often insert boilerplate definitions in wills and trust agreements. A particular definition can affect who qualify as beneficiaries or what their rights are. For example, a will might define "descendants" to mean "lawful descendants, whether natural or adopted." Such a definition would disinherit all children of unmarried parents. Perhaps the client would not want to disinherit his or her son's children resulting from a living-together relationship.⁷² The lawyer should raise the question. Further, such a definition might well allow the son to include his lover as a beneficiary by adopting her.⁷³ Perhaps the client would prefer to recognize an adoption only if it occurred while the adoptee was a minor.⁷⁴ The client is unlikely to identify the problem without advice from the lawyer.

Complete discussion of other definitions, even ones which affect distributions, may be beyond the scope of an informed decisionmaking duty. They may deal with possibilities so remote as not to warrant elaboration. For example, many clients will want their estates distributed "per stirpes," more easily understood if called "by right of representation." Lawyers should explain to clients the difference between that approach and a "per capita" distribution.⁷⁵ If a client adopts a "representation" approach, another problem arises. In cases involving survivors two and three generations below the testator, courts have disagreed on the meaning of "right of representation."⁷⁶ Lawyers can solve

insertion of boilerplate, the authors add: "[s]uch provisions are so trivial that their inclusion would seldom even be brought to the testator's attention by his lawyer; they are not, in other words, the product of the testator's particularized instruction to the lawyer." See also Schwartz, *Whose Wealth Is It Anyway? Impediments to the Realization of an Owner's Plan of Disposition*, 25 ARIZ. L. REV. 671, 672-73 (1983) (calling for empirical research as to whether clients understand their estate plans). Cf. Connecticut Jr. Republic v. Sharon Hosp., 188 Conn. 1, 11, 448 A.2d 190, 195 (1982) ("How often is it, that the words used by the scrivener convey a different estate from what the testator designed!").

⁷² See Halbach, *supra* note 68, at 343-50.

⁷³ See OHIO REV. CODE ANN. § 3107.15(A)(2) (1982) (adoption creates parent-child relationship "for all purposes, including . . . applicability of . . . documents . . .").

⁷⁴ See Halbach, *supra* note 68, at 335-43, 347-50.

⁷⁵ See *infra* note 146 for an example of different shares under per capita and per stirpes distribution.

⁷⁶ One construction is to divide the estate into as many shares as there were children of the testator. See *Lombardi v. Blois*, 230 Cal. App. 2d 191, 40 Cal. Rptr. 899 (1964). Another possibility

this problem, however, by drafting a definition of right of representation.⁷⁷ Especially if a trust is designed to last for a long time, it should contain a definition as a way of avoiding litigation; the lawyer should explain the definition and tell the client that the definition represents one possible approach. A lawyer should not have a further duty, however, to explain other alternatives. If the proposed definition does not seem appropriate to the client and the lawyer has informed the client that alternatives are available, the client should have the burden of carrying the discussion further.

In addition to explaining the definitions they propose, lawyers should avoid the temptation not to discuss other common provisions. For example, many clients will want to protect their trust beneficiaries from themselves by inserting into the trust "spendthrift" clauses of various types. The basic purpose of such a clause is to protect the beneficiary's share from creditors.⁷⁸ Even lawyers who bother to mention the clause may limit their explanation to saying, "It's there to protect against creditors." Lawyers should also tell clients that the price of such protection may be to prohibit beneficiaries from transferring their shares to more needy beneficiaries⁷⁹ or terminating the trust early.⁸⁰

Other implications of spendthrift clauses would be relevant only to particular clients. For example, such clauses may not protect a beneficiary's share from claims for child support or alimony.⁸¹ As a general rule, it would not seem necessary to raise such an exception with a client. If any of the client's beneficiaries were divorced and making such payments, however, the lawyer and client should discuss the point. Another example involves state claims for a disabled beneficiary's support; a court might or might not allow such claims against the trust.⁸² In most cases, that risk would not be worth noting. If the client had a disabled beneficiary, however, or expressed concerns regarding future disability, informed decisionmaking would require a good deal of additional discussion.⁸³

is to divide the estate at the first generation level which left survivors. See *Balch v. Stone*, 149 Mass. 39, 20 N.E. 322 (1889).

⁷⁷ See e.g., UNIFORM PROBATE CODE § 2-106 (1982), which reads

If representation is called for . . . the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

For another approach, see Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 Nw. U.L. Rev. 626 (1971).

⁷⁸ See generally 2 A. SCOTT, *THE LAW OF TRUSTS* §§ 151-58 (1967).

⁷⁹ In one case, spendthrift provisions almost prohibited the testator's sons from using their interests to benefit their aged mother. The sons had to go to the expense of getting a court order allowing invasion of the principal. See *In re Wolcott*, 95 N.H. 23, 56 A.2d 641 (1948). If all of the beneficiaries had not agreed on that approach, the mother might have been left without a remedy. See *In re Van Deusen's Estate*, 30 Cal. 2d 285, 182 P.2d 565 (1947).

⁸⁰ Of course, prohibition of early termination may be exactly what the testator would prefer, if given the information. See, e.g., *Heritage Bank — North, N.A. v. Hunterdon Medical Center*, 164 N.J. Super. 33, 395 A.2d 552 (1978) (early termination denied where lawyer inserted spendthrift clause in response to client concerns that beneficiary would dissipate her estate).

⁸¹ Compare *Shelley v. Shelley*, 223 Or. 328, 354 P.2d 282 (1960) with *In re Campbell's Trusts*, 258 N.W.2d 856 (Minn. 1977).

⁸² Compare *Dep't of Mental Health v. First Nat'l Bank of Chicago*, 104 Ill. App. 3d 461, 432 N.E.2d 1086 (1982) (allowing the state claim) with *In re Gross*, 52 N.Y.2d 1006, 420 N.E.2d 91 (1981) (protecting the trust).

⁸³ See Massey, *Protecting the Mentally Incompetent Child's Trust Interest from State Reimbursement Claims*, 58 DEN. L.J. 557 (1981).

The lawyer's duty under an informed decisionmaking doctrine would be to learn enough about the client to be able to draw appropriate boundaries for their discussions.⁸⁴

In sum, a lawyer representing a client should discuss whatever is relevant to that client. Under a relevance standard, a lawyer bears a heavy burden of at least initially raising topics with the client. If a lawyer identifies particular client needs, informed decisionmaking may require further discussions. In order to aid their clients' understanding, and at the same time protect themselves against claims that clients acted without advice, many lawyers will want to develop methods of preserving evidence of their disclosures and their clients' comprehension.⁸⁵

⁸⁴ A few additional examples support the point. A forfeiture-type spendthrift provision attached to a surviving spouse's income interest would disqualify the trust for the marital deduction, because the spouse could not be sure of getting all the income. See I.R.C. § 2056(b) (1982), as amended in 1984. Langbein and Waggoner have labeled such provisions "trivial" and have noted "their inclusion would seldom even be brought to the testator's attention by his lawyer . . ." See Langbein & Waggoner, *supra* note 5, at 585. Whether the lawyer and client ought to discuss these provisions depends upon the client. A client for whom tax savings is a major goal presumably would not want to forego the savings for the particular form of spendthrift protection. On the other hand, if the client expresses concern for the spending habits of the spouse, the parties should discuss the question of how the trust might restrain those habits and what the tax consequences might be.

The same authors raise another example which they suggest is too trivial for discussion: the omission from a charitable remainder annuity trust or unitrust of . . . a power in the trustee to name a qualified charitable organization as the remainderman if the charity designated in the trust instrument is no longer a qualified charitable organization at the time that the remainder is to become possessory disqualifies the remainder interest for the charitable deduction.

Id. (citation omitted). One can imagine a testator who would be unwilling to give such a power to the trustee if the testator were particularly wedded to the charity. Rather than not raise the issue, the lawyer ought to mention the restriction and thereby shift the burden to the client to object.

Perhaps the least often reviewed of boilerplate provisions are those involving trustee powers. Even here, preliminary explanations are warranted, and they may reveal a need for more detailed discussions. Most forms will provide wide-ranging investment powers for the trustee. Before a client signs such a document, however, the client ought to have an opportunity to say, "I want to preclude my trustee from investing in X." Documents often give trustees the power to retain property, "however acquired." If the client contemplates a corporate trustee, the client should be aware that a court may read a power to retain property as waiver of any objection to the trustee holding its own stock. See *In re Will of Heidenreich*, 85 Misc. 2d 135, 378 N.Y.S.2d 982 (N.Y. Surrogate's Ct. 1976).

Another common provision is a "severability clause," which says that if any particular provision fails, the rest of the document is still to stand. Most testators would prefer such an approach. For some, however, the plan might "hang together" so closely that the testator would view disruption of any part as worse than total invalidity. The client should have a chance to make that choice. *Cf.* J. GRAY, *THE RULE AGAINST PERPETUITIES* § 872 (4th ed. 1942), in which Gray criticizes *Ederly v. Barker*, 66 N.H. 434, 31 A. 900 (1891), which reformed a document that otherwise would have violated the rule. Professor Gray notes that the court may have given property to persons the testator never meant to benefit. Perhaps the testator would have preferred invalidity to the court's choice of validity of benefits to an expanded class.

Of course, if the lawyer fails to engage in the discussions recommended here, reformation of the document might be an appropriate remedy. See *infra* text accompanying notes 160-85.

⁸⁵ Even lawyers who ultimately clear themselves of charges of inadequate disclosure would have been better off if they had preserved some evidence. See, e.g., *In re Shear*, 72 N.J. 474, 371 A.2d 282, (1977) (attorney reprimanded for failure to obtain client's consent to changes in contract; changes never confirmed in writing); *In re Conduct of Bevans*, 298 Or. 583, 695 P.2d 41 (1985) (evidence that attorney made insufficient disclosure of conflict of interest did not meet "clear and convincing" standard). *Cf.* *Heritage Bank — North, N.A. v. Hunterdon Medical Center*, 164 N.J.

C. Preserving Evidence of Disclosure and Understanding

A variety of methods are available for recording what information was discussed with a particular client and whether the client understood it. Lawyers certainly are accustomed to writing memos "for the file" to explain their actions and self-serving letters to each other and to clients.⁸⁶ While such documentation might be useful in an informed decisionmaking context, a method which actively involves the client is likely to be more credible. One approach would be to borrow from doctors, who have had extensive, if uneven, experience with informed consent forms.⁸⁷ An alternative to having clients sign prepared forms would be to ask them to write out or dictate statements in their own words.⁸⁸ Lawyers might make audio or video tapes of the client conferences unless they would interfere with the lawyer's effort to establish rapport with the client.⁸⁹ In any event, the lawyer ought to select the method most suitable to the particular circumstances.

Which approach, or combination of approaches is appropriate will depend primarily upon three factors: the sophistication of the client, the nature of the lawyer-client relationship,⁹⁰ and the legal problems being resolved. The needs of both the lawyer, for protection, and the client, for information, are relevant. A lawyer serving a sophisticated, long-term client with a relatively straightforward problem might do well with a simple prepared form.⁹¹ On the other hand, a videotape of conversations might be appropriate

Super. 33, 395 A.2d 552 (1978) (court concluded that client intended to include spendthrift clause, even though lawyer could not recall either reading or explaining the clause to the client).

⁸⁶ See Avery, "Is it Safe to Be An Estate Planner?", 16 L. OFF. ECON. & MGMT. 240, 243 (1975); Johnston, *supra* note 28, at 675 n.185 (noting the common practice of sending "closing letters" to clients after a will has been drafted). From the perspective of fostering an informed decisionmaking process, however, the closing letter comes too late unless it accurately reflects what the lawyer and client discussed during the planning stages.

⁸⁷ See Andrews, *supra* note 8, at 180-82; Miller & Willner, *The Two Part Consent Form: A Suggestion For Promoting Free and Informed Consent*, 290 NEW ENG. J. MED. 964 (1974); Morrow, *How Readable Are Subject Consent Forms?*, 244 J. A.M.A. 56 (1980).

⁸⁸ See Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 91-93 (1958).

⁸⁹ See Beyer, *Video Requiem: Thy Will Be Done*, 124 Tr. & Est. 24 (July, 1985); Beyer, *Videotaping the Will Execution Ceremony — Preventing Frustration of the Testator's Final Wishes*, 15 ST. MARY'S L.J. 1 (1983); Buckley & Buckley, *Videotaping Wills: A New Frontier in Estate Planning*, 11 OHIO N.U.L. REV. 271 (1984); Nash, *A Videowill: Safe & Sure*, 70 A.B.A. J. 87 (Oct. 1984). In one recent case, audio tapes made of a will execution ceremony were crucial to the court's rejecting an undue influence challenge. *Green v. Jones*, 254 Ga. 35, 326 S.E.2d 448 (1985). If tapes are not admissible into evidence in local courts, they will not offer as much protection to the lawyer. See American Bar Association, *Videotape Evidence in the Courts — 1985*, 26 S. TEX. L.J. 453 (1985). See also FED. R. EVID. 1001(2).

⁹⁰ Because client understanding is particularly important in conflict of interest situations, complete documentation of the lawyer's disclosures and clients' consent should be the norm.

⁹¹ In the context of an ongoing lawyer-client relationship, it ought to be possible for the lawyer and client to engage in a dialogue which would consider the consequences of a variety of routine matters. Once the client had been able to make informed decisions on the appropriate approaches to take, the doctrine proposed here would not require further consultations unless something out of the ordinary arose. In order to protect both the lawyer and the client, any form should carefully define the scope of the lawyer's authority to act without further consultation.

Waivers provide another approach to avoiding the repetitiveness which would characterize continuing disclosures in an ongoing relationship. See Martyn, *supra* note 3, at 351. In order to make a knowing waiver, however, the lawyer would have had to inform the client of the consequences of the waiver. A theory of broad disclosures to cover routine matters thus seems more straightforward than a theory allowing waivers.

with an unsophisticated client in need of a will. If the video equipment proved intimidating to the client, a lawyer might use an audio tape. Lawyers might devise forms to cover "routine" matters,⁹² but should treat forms with special care. Their use might encourage the natural tendency to classify clients and their needs without conducting a real dialogue with each client. Further, forms lack flexibility, while a planning practice necessarily requires consideration of a variety of options in a variety of combinations. Also, the use of forms tends to exacerbate language problems.⁹³ One luxury of a planning practice is that time is usually available before a decision is needed. Lawyers should use this time to facilitate client comprehension; clients should be able to "sleep on it" before making decisions.⁹⁴ Finally, lawyers should structure the disclosure process to allow, indeed force, continuing interchange between lawyer and client.

If the lawyer has preserved reliable evidence of disclosure and client comprehension, this evidence ought to establish a presumption that the lawyer has given the client an opportunity to make an informed decision.⁹⁵ In order to recover in a later malpractice action, courts would then require plaintiffs to challenge the authenticity of the evidence. Similarly, if a client brought an ethics complaint against the attorney, the evidence would carry a presumption of proper conduct. Finally, if a lawyer sought reformation of documents, this evidence would be persuasive evidence of what the client intended.

The informed decisionmaking doctrine developed here builds upon the solid base of disclosure requirements applicable in conflict of interest situations. The doctrine further recognizes that unless clients and lawyers discuss topics relevant to each individual client, lawyers will continue to make decisions properly belonging to clients. Accordingly, remedies should be available to persons harmed when lawyers breach the duty to engage in informed decisionmaking.

⁹² If lawyers use paralegals for handling "routine" matters, they also should be involved in the information-giving process. Lawyers may be held liable for the mistakes of their employees. See generally Wade, *Tort Liability of Paralegals and Lawyers Who Utilize Their Services*, 24 VAND. L. REV. 1133 (1971).

⁹³ Whatever method of disclosure and preservation of evidence the lawyer adopts, the language used should facilitate, rather than impede, communication. Attention to some basic guidelines can pay significant dividends in terms of client understanding. First, discussions ought to be in the native tongue of the client. In addition, lawyers should use short sentences and avoid technical language. See D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 399-436 (1963); R.C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 31-35, 49-57 (2d ed. 1985). See also, Andrews, *supra* note 8, at 182-86.

Furthermore, lawyers ought to give broad definition to what are "technical" terms. "Per stirpes" seems to call out for explanation, but a client might be equally uninformed about what the innocent-sounding phrase "power of appointment" means. Because lawyers frequently use technical language with each other, they often find it difficult to distinguish between what is familiar language to them and what is likely to be familiar to the client. See also *supra* text following note 71 (discussing the use of boilerplate language). If the lawyer can quantify risks, they ought to be stated in percentage terms, rather than merely categorized as "significant" or "negligible." The lawyer must take care to present neutral explanations. See Andrews, *supra* note 8, at 182-83. See generally D. BINDER & S. PRICE, *supra* note 11, at 156-91; Andrews, *supra* note 8, at 184-204; Comment, *Informed Consent*, *supra* note 31, at 192-95.

⁹⁴ See Andrews, *supra* note 8, at 199 n.192.

⁹⁵ Martyn's model statute would allow a signed writing which meets specific requirements regarding content. The written consent form would establish a presumption in favor of the lawyer, but be subject to challenge in a number of specified circumstances. See Martyn, *supra* note 3, at 346-47. Because the best method of preserving evidence of lawyer disclosure and client understanding might be authentic audio or video tapes, these ought to carry similar weight.

III. REMEDIES

Two categories of remedies ought to be available if a lawyer fails to engage in informed decisionmaking. In some cases the law should direct sanctions at the lawyer; they might take the form either of professional disciplinary actions for professional ethics violations or of successful malpractice actions. A second approach would focus on reforming documents prepared in the absence of adequate information.

A. Actions Against Lawyers

1. Ethics Violations

The new emphasis on the client in the Model Rules of Professional Conduct from the American Bar Association provides one vehicle both for alerting lawyers to the need for meaningful communication with clients and for disciplining lawyers who fail to comply with the appropriate standard.⁹⁶ The rules take significant steps toward establishing an informed decisionmaking doctrine. In particular, for the first time in the evolution of lawyer's professional standards, a professional regulation expressly requires lawyer-client communication. The vehicle is Rule 1.4, which in part (b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁹⁷ The standard proposed in this article, requiring lawyers to discuss topics relevant to each individual client, should be viewed as the way "to permit the client to make informed decisions."⁹⁸ Like this article,

⁹⁶ MRPC (Final Draft 1983). Professional organizations may become involved in encouraging informed decisionmaking in other ways. A peer review system could encourage it. See The American Law Institute-American Bar Association Committee on Continuing Professional Education, A Model Peer Review System 17-18 (Discussion Draft, April 15, 1980). The American Law Institute's forthcoming *RESTATEMENT OF THE LAW GOVERNING LAWYERS* may also address the issue.

⁹⁷ MRPC Rule 1.4(b). One commentator has described the rule appropriately as "the legal professions' regulatory counterpart to the medical informed consent doctrine." Maute, *supra* note 11, at 1062. For other commentary on the Model Rules in this context, see Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003.

Only a half-step away from the focus of the present article is the injunction in MRPC Rule 1.4(a): "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

⁹⁸ The official comments to MRPC Rule 1.4 provide some guidance on the nature of the communication requirement. The rule does not require detailed explanation of trial or negotiation tactics, but a lawyer should review "all important provisions" to a negotiation with the client. MRPC Rule 1.4 comment. Cf. *Blanton v. Womancare, Inc.*, 38 Cal. 3d 396, 696 P.2d 645, 212 Cal. Rptr. 151 (1985) (client not bound by arbitration agreement signed by lawyer on behalf of client, where lawyer lacked authority to enter agreement). Presumably the review requirements would apply to estate and business plans as well.

The rule's requirement that the lawyer explain the matter "to the extent reasonably necessary to permit the client to make informed decisions" seems to adopt a subjective standard for measuring the adequacy of the information disclosed. In contrast, the comment, though not entirely clear, appears to set a "reasonable client" standard. See MRPC Rule 1.4 comment ("Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult."). For commentary on some of the conflict inherent in the comments, see Spiegel, *supra* note 97, at 1005-07. As noted in the text, the subjective standard is preferable. See *supra* notes 26-31 and accompanying text.

The MRPC Rule 1.4 comment recognizes both the utility of a system of limited reporting for

the model rules recognize that the doctrine's appropriate scope will vary according to the circumstances.⁹⁹ Other rules,¹⁰⁰ particularly those involving conflict of interest situations,¹⁰¹ support the policy of 1.4(b).

The lawyer disciplinary system can help inform lawyers that traditional approaches of leaving decisions to the lawyer are no longer appropriate. Rule 1.4 and its associated rules are broad, covering situations which might fall between the cracks of other sanctions.¹⁰² Because of the wide discretion usually available to disciplinary bodies regarding imposition of sanctions,¹⁰³ however, those bodies should be particularly careful not to use the informed decisionmaking doctrine to harass unpopular, but competent, members of the bar.¹⁰⁴

History suggests that lawyer discipline is largely restricted to a relatively few "serious" cases.¹⁰⁵ Also, the professional regulation system usually does not compensate harmed

some clients and the need for accommodations in emergency situations. MRPC Rule 1.4 comment. See also *supra* notes 21 and 91.

⁹⁹ The comment to the rule notes "[a]dequacy of communication depends in part on the kind of advice or assistance involved." MRPC Rule 1.4 comment.

¹⁰⁰ See MRPC Rules 1.1 (lawyer competence), 1.2(a) (lawyer shall abide by client's decisions, with exceptions), 1.2(c) ("[a] lawyer may limit the objectives of the representation if the client consents after consultation"), and 1.5(b) (lawyer shall communicate fee in writing).

¹⁰¹ See MRPC Rules 1.7(a)(2), 1.7(b)(2), 1.8(a)(3), 1.8(b), 1.8(f)(1), 1.8(g), 1.8(i), 1.9(a), 1.10(d), 1.11(a), 1.12(a), 1.13(e), 2.2(a)(1), 2.3(a)(2) (requiring client consent after consultation in a variety of situations).

¹⁰² For example, discipline might still be appropriate if damages are too small to justify the effort of litigation on a malpractice theory. This problem can be alleviated to some extent if the plaintiff's attorneys' fees incurred in pursuing the malpractice action are recoverable in that action. See Martyn, *supra* note 3, at 349-50. *But see, e.g.*, McClain v. Faraone, 369 A.2d 1090, 1093-94 (Del. Super. Ct. 1977) (attorneys' fees incurred pursuing subsequent malpractice action not recoverable); Stinson v. Feminist Womens' Health Center, 416 So. 2d 1183 (Fla. Dist. Ct. App. 1982) (attorneys' fees in subsequent malpractice action are not recoverable as damages); Erving's Hatcheries v. Thompson, 204 So. 2d 188 (Miss. 1967) (contingent attorneys' fees not allowed as damages in the malpractice action). See also *infra* notes 138-40 and accompanying text. Of course, attorneys' fees paid for the legal services in which the breach occurred ought to be recoverable as part of the damages suffered as a consequence of the inadequate representation. See Sperring v. Sullivan, 361 F. Supp. 282 (D. Del. 1973); Budd v. Nixen, 6 Cal. 3d 195, 201-02, 491 P.2d 433, 437, 98 Cal. Rptr. 849, 853 (1971); Winter v. Brown, 365 A.2d 381, 386 (D.C. 1976); Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, 269 So. 2d 239 (1972); Hoekstre v. Golden B. Products, 77 Or. App. 104, 712 P.2d 149 (1985).

¹⁰³ A wide range of sanctions is and ought to be available. See A.B.A. Standards for Lawyer Discipline and Disability Proceedings, Standard 6 (1979) (dispositions and sanctions). The A.B.A. standard gives discretion to disciplinary bodies, however, which is often very broad: "[t]he discipline to be imposed should depend upon the specific facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline, and may take into account aggravating or mitigating circumstances." *Id.* at Standard 7.1. For recent commentary on the status of lawyer disciplinary efforts, see McPike & Harrison, *The True Story of Lawyer Discipline*, 70 A.B.A. J. Sept. 1984, at 92.

¹⁰⁴ On the question of abuse of the lawyer discipline system, see generally Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?* 69 GEO. L.J. 705, 720-22 (1981) (citing numerous authorities and expressing concern that the profession has singled out "attorneys who hold unpopular beliefs, represent unpopular clients, or who have marginal incomes" for discipline).

¹⁰⁵ See *id.* at 718-19; Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 546-50 (1985); Steele & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 979-99. *But c.f.* Maute, *supra* note 11, at 1050 n.2 (stating a preference for direct self-regulation by the profession).

parties.¹⁰⁶ Thus, in most cases, courts should also consider breach of the duties imposed by an informed decisionmaking doctrine to be legal malpractice.¹⁰⁷

2. Malpractice Liability

As noted earlier, some writers have proposed that the law impose malpractice liability upon lawyers who breach an informed consent doctrine.¹⁰⁸ Problems arise, however, when applying malpractice doctrine in a planning context. Difficult causation questions arise for the claimant in a malpractice action if the client has died or if third parties are involved. Third parties can also complicate the claimant's establishing damages. Further, conflict of interest situations call for separate treatment regarding damages. Finally, if informed decisionmaking is to be a viable doctrine for a planning practice, courts and legislatures should revise traditional defenses regarding privity and statutes of limitation.

Traditionally, plaintiffs in legal malpractice actions have had to show not only that their lawyers made mistakes, but that the mistakes harmed the plaintiffs.¹⁰⁹ In the context of litigation mistakes, proof of these elements has often required a "suit within a suit" in which the client effectively retries the original claim to establish that he or she would have prevailed in the first lawsuit but for the lawyer's mistake there.¹¹⁰ Where planning has been involved, plaintiffs have had to establish that the mistake caused tangible loss, like higher taxes,¹¹¹ a share of their mother's estate,¹¹² or loss of a job.¹¹³

A traditional malpractice law approach to informed decisionmaking would require a plaintiff to establish a causal connection between the lawyer's failure to provide ade-

¹⁰⁶ Some jurisdictions have established funds to repay clients whose lawyers have stolen their funds, but compensation for other harms is left to civil law. See, e.g., CAL. BUS. & PROF. CODE § 6140.5 (West 1974); MASS. SUP. JUD. CT. R. 4.03-4.06 (1986).

¹⁰⁷ The question of whether violation of professional ethical standards should create any presumption of malpractice is subject to dispute. The Model Rules explicitly note that the rules "are not designed to be a basis for civil liability." MRPC, preamble. Professor Peck predicts that "[t]he attempt [to avoid malpractice liability] will almost certainly fail in light of the generally accepted proposition that members of a profession are under an obligation . . . to exercise at least the normal skills, ability, and competence of that profession." Peck, *supra* note 4, at 1291. See also Lipton v. Boesky, 110 Mich. App. 589, 313 N.W.2d 163 (1981) (violation of Code of Professional Responsibility is rebuttable evidence of malpractice).

¹⁰⁸ See *supra* notes 11-17 and accompanying text.

¹⁰⁹ See, e.g., Williams v. Bashman, 457 F. Supp. 322 (E.D. Pa. 1978); Sperring v. Sullivan, 361 F. Supp. 282 (D.C. Del. 1973); Kilmer v. Carter, 274 Cal. App. 2d 81, 78 Cal. Rptr. 800 (1969).

¹¹⁰ See, e.g., Kessler v. Gray, 77 Cal. App. 3d 284, 143 Cal. Rptr. 496 (1978); Togstad v. Vesely, Otto, Miller, & Keefe, 291 N.W.2d 686 (Minn. 1980); Ortiz v. Barrett, 222 Va. 118, 278 S.E.2d 833 (1981); Coggin, *Attorney Negligence . . . A Suit Within a Suit*, 60 W. VA. L. REV. 225 (1958). Recent authority, however, undercuts the suit-within-a-suit approach. In a medical malpractice case, a court allowed a plaintiff to prove that the malpractice reduced the patient's survival chances, rather than requiring the plaintiff to show that the patient would have survived if treated properly. *Herskovits v. Group Health Co-op*, 99 Wash. 2d 609, 664 P.2d 474 (1983). See also King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981).

For the view that lawyers should be liable for the settlement value of bungled cases, see Peck, *supra* note 4, at 1300. See also Spiegel, *supra* note 4, at 137-38.

¹¹¹ See, e.g., Bucquet v. Livingston, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976).

¹¹² See, e.g., Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

¹¹³ See, e.g., Kushner v. McLarty, 165 Ga. App. 400, 300 S.E.2d 531 (1983).

quate information and the plaintiff's harm.¹¹⁴ In particular, a plaintiff would need to prove that the lawyer failed to discuss a topic relevant to the individual client; that the client, if adequately informed, would have acted differently; and that the plaintiff would have been better off under the "new" approach. As noted earlier,¹¹⁵ because conflicts of interest so threaten the integrity of the lawyer-client relationship, if a plaintiff establishes a breach regarding disclosures of conflicts, the court should presume harm. Otherwise, plaintiffs must prove they would have fared better if there had been adequate disclosure.

The causation requirement poses two sets of significant proof problems in a planning context. First, much of the evidence available to establish answers to hypothetical questions will be of questionable reliability. The client may well be dead at the time the question arises.¹¹⁶ Second, if more than one party is involved, it may be very difficult to determine whether the parties would have followed a different course had they been adequately informed. A completed deal might have collapsed; a deal which fell apart might have been completed.

One approach to controlling false or frivolous claims would be to require plaintiffs, in appropriate cases, to establish by clear and convincing evidence the causal connection between the inadequate disclosure and their harm. Courts regularly use a "clear and convincing" standard to discourage frivolous claims by making recovery less likely. For example, courts often apply that standard to a plaintiff claiming under a contract to make a will,¹¹⁷ seeking to impose a constructive trust upon a will,¹¹⁸ or trying to reform a contract within the Statute of Frauds.¹¹⁹ Applying a clear and convincing standard in all informed decisionmaking cases would be inconsistent with the mainstream of civil law, which typically requires only a preponderance of the evidence, and would substantially undercut the deterrence value of the informed decisionmaking doctrine. The clear and convincing standard, however, is appropriate in situations which present substantial risks of fraudulent claims.

Therefore, courts should subject a plaintiff to the clear and convincing standard of proof in those situations where recovery from the lawyer would place the plaintiff in substantially the same position as if the plaintiff had recovered in a direct action requiring

¹¹⁴ See Martyn, *supra* note 3, at 346 (proposing model statute which requires "that the undisclosed information, if disclosed, would reasonably, under all the surrounding circumstances, have changed the client's choice"). Professor Martyn's language calls for a subjective test. See *id.* at 348-49. For a discussion of the subjective and objective tests, see *supra* notes 26-31 and accompanying text.

The medical malpractice cases also require a judgment about whether the information would have changed the patient's (or a reasonable patient's) mind. See *Canterbury*, 464 F.2d at 790-91 (discussing which standard to apply and adopting an objective test). See generally Andrews, *supra* note 8, at 176-77.

¹¹⁵ See *supra* note 25 and accompanying text.

¹¹⁶ Extrinsic evidence would be required. Important evidence might include the lawyer's testimony about how the client responded to various explanations which the lawyer made during representation. From those reactions, it might be possible to anticipate how the client would have responded to the undisclosed information. The death of the client is likely to erase any claim that the client's statements are inadmissible because privileged. See MCCORMICK ON EVIDENCE, § 94 (3d ed. 1984).

¹¹⁷ See 1 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 10.43, at 528-32 (1960).

¹¹⁸ See 5 A. SCOTT, THE LAW OF TRUSTS § 462.6 (1967).

¹¹⁹ See J. CALAMARI & J. PERILLO, LAW OF CONTRACTS § 9-31 (2d ed. 1977). See also Langbein & Waggoner, *supra* note 5, at 578-79 (advocating a clear and convincing standard for the reform of wills for mistake).

the higher standard of proof. For example, in *Ogle v. Fruiten*¹²⁰ the court held that nephews of a decedent stated a malpractice cause of action against the lawyer who drafted their uncle's will. The will required the uncle's spouse to survive by 30 days in order to take and made an alternative gift to the nephews, conditioned on both spouses dying in a common disaster. When the uncle's spouse died of separate causes 15 days after the uncle, the property went to the intestate heirs, instead of the nephews, since the will did not cover the event which happened.¹²¹ If the nephews were able to recover against the lawyer, they would be in substantially the same position as if the court had reformed the will to give them the property.¹²² Because a clear and convincing standard of proof ought to be required in any reformation action,¹²³ that standard ought also to apply in the malpractice action which places the plaintiffs in the same position. Moreover, such a case typically will involve answering a hypothetical "what would you have done if you had known?" question. Under the preponderance of the evidence standard of proof, claimants would be tempted to stretch the truth and say, "I would have demanded a different contract term" or "Uncle Charlie would have given the property to me."¹²⁴ Requiring clear and convincing evidence in such cases would encourage informed decisionmaking while protecting lawyers from abuse of the doctrine.

The presence of other parties to a transaction also affects the analysis. A lawyer who admits to having failed to inform a client of significant information might nonetheless argue that the non-disclosure was irrelevant because it had no effect on the outcome. Even if the client had known more and wanted other terms, the lawyer argues, the other parties would not have agreed. If *that* were the case, and conflicts of interest were not involved, the plaintiff ought not to prevail. On the other hand, what was significant to the client might not have been significant to the others.¹²⁵ If *that* were the case, the other parties might well have agreed to new terms proposed by a fully-informed client. Then malpractice law should subject the lawyer to liability.

If courts required plaintiffs to establish how other parties to a transaction would have reacted, however, lawyers often would escape liability even if they failed to engage in informed decisionmaking. Because the doctrine seeks to encourage useful dialogues between lawyers and clients, lawyers should have the burden of establishing that the other parties would not have agreed with the client.¹²⁶ A plaintiff should have the initial

¹²⁰ 102 Ill. 2d 356, 80 Ill. Dec. 772, 466 N.E.2d 224 (1984).

¹²¹ *In re Estate of Smith*, 68 Ill. App. 3d 30, 385 N.E.2d 363 (1979).

¹²² The cases are not exactly the same. For example, reforming a will for mistake could involve taking the property from named beneficiaries and giving it to unnamed claimants. Recovery by those claimants in the malpractice action would not affect the rights of the named beneficiaries; rather, the recovery would remedy the claimants' harm at the expense of the lawyer. See Langbein & Waggoner, *supra* note 5, at 589.

¹²³ For a discussion of the reformation remedy, see *infra* notes 160-85 and accompanying text.

¹²⁴ Professors Langbein and Waggoner would protect against this sort of claim in a will reformation context by requiring that the plaintiff make the claim with particularity. They would also require clear and convincing evidence. See Langbein & Waggoner, *supra* note 5, at 578-79.

¹²⁵ Cf. R. FISHER & W. URY, GETTING TO YES 41-57 (1981) (distinguishing between positions taken and interests pursued). The authors illustrate their point by describing two persons arguing whether to close a window. One wants fresh air; the other wants to avoid a draft. When the persons see the window's position as a means to an end, instead of the end itself, a solution (an open window in another room) which meets both interests is possible. *Id.* at 41. In any multi-party transaction there are likely to be some terms of significant importance to some parties, but not to others; the whole group may well accept some items significant to each party.

¹²⁶ Courts have used the device of shifting the burden of proof in other lawyer-disclosure

burden to prove that the lawyer failed to discuss a topic relevant to the client and that the fully-informed client would have proceeded differently. Then, the burden of production should shift to the lawyer to establish that the other participants would have rejected the terms the fully-informed client would have proposed.¹²⁷

In a multi-party transaction, an ill-informed client might be harmed in one of two ways. A transaction might have been completed on different terms than an adequately informed client would have preferred, or a deal which fell apart might have been completed. Consider, for example, the situation of a restaurateur who seeks to assure himself a supply of chickens.¹²⁸ His lawyer, unaware that the client only needs stewing chickens, drafts an agreement requiring a supplier to deliver a number of "chickens" at a particular price. The lawyer does not explain that the term "chickens" might be an ambiguous term, nor does he inquire further to learn the meaning of "chicken" in the trade. After the deal is closed, the supplier delivers higher-quality frying or broiling chickens and the client realizes he has paid more than necessary for the quality of chicken he needs. The client tries to avoid contract liability, fails,¹²⁹ and then sues his lawyer. In a malpractice action against the lawyer, the restaurateur would need to show that the meaning of "chickens" was relevant to him and that had the lawyer informed him of its meaning, he would have ordered "stewing chickens" instead, at a lower price. The burden of production would then shift to the lawyer to establish that lower-priced stewing chickens were not available and that the restaurateur would have ordered the expensive chicken rather than no chicken at all.¹³⁰

contexts. See, e.g., *Meara v. Hewitt*, 455 Pa. 132, 314 A.2d 263 (1974) (conflict of interest); *Baker v. Otto*, 180 Md. 53, 22 A.2d 924 (1941) (fraud, undue influence).

Placing the burden of proof on the lawyer in this context is consistent with other situations in which the party best in a position to establish a point has the burden on that point. Here, the lawyer will most likely have been active in the negotiations and familiar with the positions of all the parties. Cf. R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 11.8 (W. Raushenbush 3d ed. 1975) (burden of proof on bailee to avoid negligence if goods are damaged while in bailee's possession).

Often the lawyer will be able to rely upon a history of dealings between the parties or general practices in the trade in order to bolster the case that the other parties really would have rejected the clients' position. See generally U.C.C. § 1-205 (Course of Dealing and Usage of Trade); J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 3-15 (2d ed. 1977); J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 3-3 (1980); Note, *Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law*, 55 COLUM. L. REV. 1192 (1955).

¹²⁷ See generally G.C. LILLY, *AN INTRODUCTION TO THE LAW OF EVIDENCE* 40-47 (1978). Because a plaintiff armed with a strong presumption might be more likely to make questionable claims, the more prudent approach in this context would be to leave the ultimate burden of persuasion on the plaintiff.

¹²⁸ This example is an adaptation of the celebrated case of *Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

¹²⁹ One factor which makes recovery by the restaurateur more difficult is the tendency of courts to construe agreements against the drafting party. Adoption of an informed decisionmaking doctrine is consistent with the rationale for an "against-the-drafter" approach to document interpretation. In each case, the goal is to encourage a fuller discussion of relevant issues. Interpreting against drafters encourages them to cover more points in the agreement, rather than leave gaps to be filled later. The more complete draft presumably puts the other party on notice to discuss more issues. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 206 (Interpretation Against the Draftsman), comment a ("[The drafting party] is . . . more likely than the other party to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert.").

¹³⁰ For another example, consider a client in a divorce action who agrees to a property settlement

The presence of an adequately informed client can also mean completion of a transaction which in fact fell apart. Consider a client planning to establish a new business with a friend. The friend insists upon a corporate form for the business; the client, inadequately informed that she could pass tax losses through the corporation under Subchapter S,¹³¹ insists upon a partnership form so that she can claim business losses on her personal income tax return.¹³² The deal collapses. In a malpractice claim against her lawyer, the client establishes that if she had understood the consequences of Subchapter S election, she would have agreed to the corporate form. The lawyer then has the burden to show that the other party would not have agreed to the Subchapter S approach.¹³³

As the examples illustrate, plaintiffs in informed decisionmaking cases will need to establish what the client would have done if properly informed. In situations where recovery from the lawyer would place the plaintiff in substantially the same position as if the plaintiff had recovered in a direct action requiring clear and convincing evidence, that higher standard should also apply in the informed decisionmaking action. In multilateral transactions, proposals of importance to one participant, but not to others, are likely to be accepted by the others. Consequently, an informed decisionmaking plaintiff should be favored by a rebuttable presumption that in multilateral situations the other parties would have accepted the terms the adequately informed client would have proposed.

How best to structure claims for damages is the second major problem posed when designing an appropriate malpractice action for a planner's¹³⁴ breach of the informed decisionmaking doctrine. In many situations, courts can readily ascertain damages.¹³⁵ If multiple parties are involved, however, there may be some question about whether or how a project would have been completed if the lawyer had adequately informed one of the parties. While the question is relevant primarily to determining causation, it has implications for measuring damages as well. A shift of the burden of proof, analogous to the approach developed above, is appropriate. Also, special considerations are relevant

without the lawyer informing the client of the possibility of seeking a different appraisal of specific property. After learning of such an option, the client brings an informed decisionmaking claim against the lawyer. The client establishes that, if informed of the option, he would have requested an appraisal, which other evidence shows would have set a higher value for the property. In turn, the client proves that he would have demanded a property settlement reflecting that higher value. The lawyer argues that the client has proved no harm because it is impossible to know whether the former wife would have agreed to such a higher value. Under the approach suggested here the lawyer would have the burden to show that the former wife would not have agreed. *Stare v. Tate* suggests the example. 21 Cal. App. 3d 432, 98 Cal. Rptr. 264 (1971). In this context, the question of showing causation ties directly into the question of showing damages. See *infra* notes 136-37 and accompanying text.

¹³¹ I.R.C. § 1372(b) (1982).

¹³² *Id.* § 1374 (1982) (as amended in 1984).

¹³³ The "lost profits" aspects of this example raise a damages problem discussed *infra* notes 141-43 and accompanying text.

¹³⁴ For discussions of the damages question primarily from a litigation perspective, see Martyn, *supra* note 3, at 349-59; Spiegel, *supra* note 4, at 137-38.

¹³⁵ For example, if an ill-informed client executed a will that included a testamentary trust, but the client, if fully informed, would have chosen an inter vivos trust, the damages would be the cost of obtaining a suitable inter vivos trust. This example assumes the client is still alive and could have a lawyer prepare a new trust agreement. Of course, if the client had died, the situation would be different. Damages presumably would be the increased cost of administering a testamentary trust under the circumstances.

if a conflict of interest is involved. In such situations attorneys' fees ought to be recoverable. Further, lost profits or punitive damages might well be appropriate elements of damages.

Damages might be difficult to establish because they involve speculation about how others would have acted in hypothetical situations. As noted above,¹³⁶ complications arise in establishing causation if someone other than the ill-informed client is involved: the other party or parties might have responded differently to an adequately informed client. Because the evidence needed to establish causation might involve identifying the *amount* of the damage, a court might consider the proof problem to be one of damages, rather than one of causation. If the court takes that approach, appropriate presumptions, parallel to those discussed regarding causation, ought to be available.

Consider a client interested in selling real estate while retaining a mortgage on the property.¹³⁷ The deal is closed, but the buyer later defaults. At that time the client discovers that the mortgage is worthless because it is second in priority to one obtained by a bank. She argues that she would have demanded a higher price for the property had she known she was getting only a second mortgage. The requirement that she establish that the other party would have agreed to the higher price can be considered a causation question (establishing her harm) or a damages question (considering her harm established by the loss of the security and the extent of her harm established in part by the price question). In either case, the lawyer should have the burden of establishing that the other party would not have agreed to the higher price. Otherwise, as a practical matter lawyers will be insulated from liability in situations involving multi-party transactions.

The particular threat that conflicts of interest pose to the lawyer-client relationship calls for an expanded notion of appropriate elements of "damages." Primarily to encourage plaintiffs to bring claims which in the public interest ought to be aired, courts and legislatures have created exceptions to the general rule against allowing recovery of the attorneys' fees plaintiffs incur in pursuing their claims.¹³⁸ Courts can strike a balance

¹³⁶ See *supra* notes 125-33 and accompanying text.

¹³⁷ *Offe v. Gordon* suggests the example. 93 Wis. 2d 173, 286 N.W.2d 573 (1980).

¹³⁸ The so-called "American Rule" generally denies attorneys' fees in the malpractice action. Effectively, they come out of the plaintiffs' recovery for other harms. See *Arcambel v. Wiseman*, 3 U.S. (Dall.) 306 (1796). See also *First Nat'l Bank of Clovis v. Diane, Inc.*, 102 N.M. 548, 698 P.2d 5 (1985) (the general rule is that attorneys' fees are not awardable); *Stinson v. Feminist Women's Health Center*, 416 So. 2d 1183, 1185 (Fla. App. 1982) (it is a fundamental proposition that without an express statute or contract, attorneys' fees are not recoverable). See generally D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 194-204 (1973).

Of course, attorneys' fees incurred because of the representation in which the malpractice occurred ought to be recoverable. See *Kramer v. Emche*, 64 Md. App. 27, 42, 494 A.2d 225, 233 (1985) (plaintiffs are entitled to recover reasonable legal expenses and attorneys' fees caused by the additional litigation); *Hinman, Straub, Pigors & Manning, P.C. v. Broder*, 89 A.D.2d 278, 456 N.Y.S.2d 834 (1982) (legal fees caused by the need to retain additional counsel are recoverable); *Wiggin v. Gordon*, 115 Misc. 2d 1071, 455 N.Y.S.2d 205 (1982) (former client allowed to recover attorneys' fees incurred to recover money from previous attorney).

Some "exceptions" to the American Rule have developed. See, e.g., Freedom of Information Act, Pub. L. No. 93-502, § 1(b)(2), 88 Stat. 1561 (1974), amending 5 U.S.C. § 552(a) (1970) (attorneys' fees awardable for successfully suing agency over failure to comply with statute); MICH. STAT. ANN. § 3.548(802) (Callaghan 1985) (in appropriate actions such as civil rights actions, a court may award reasonable attorneys' fees); *Serrano v. Priest*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315

in informed decisionmaking cases between encouraging public-interest litigation and honoring traditional doctrine if they distinguish conflict of interest circumstances from other situations.¹³⁹ The law should encourage conflict of interest claims, which redress harms to the core of the lawyer-client relationship, by allowing attorneys' fees in those cases.¹⁴⁰ In more typical circumstances, however, as where a lawyer fails to explain the differences between testamentary and living trusts, the need for court review is not as great. Therefore, the law should retain the traditional rule against allowing recovery of attorneys' fees in these non-conflict situations.

Courts should take a similar approach regarding recognition of damages for lost profits. Consider again the example of the client who, if adequately informed, would have insisted upon a Subchapter S designation for a new corporation. The business was never formed. Even if the other parties would have accepted the Subchapter S approach, the client will have trouble establishing damages in the form of profits which never were made.¹⁴¹ The problem of how much specificity the law should require in such cases has

(1977) ("Private attorney general" theory allows court to award to plaintiffs' their counsel fees after suit disclosed that California's public school financing system violated the California Constitution's Equal Protection Clause); *Weiss v. Bruno*, 83 Wash. 2d 911, 523 P.2d 15 (1974) (plaintiffs properly recovered reasonable attorneys' fees under common fund principle after their suit exposed unconstitutional state expenditures).

The question of when to grant such fees and how to structure them, has prompted considerable commentary over a period of many years. See, e.g., Cohen, *Awards of Attorneys' Fees Against the United States: The Sovereign Is Still Somewhat Immune*, 2 W. NEW ENG. L. REV. 177 (1979); Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435; Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Fioretti & Convery, *Attorneys' Fees: The Mushrooming Cloud of Litigation*, 34 DE PAUL L. REV. 943 (1985); Hill, *Equal Access to Justice Act — Paving the Way for Legislative Change*, 36 CASE W. RES. 50 (1985); Kimble, *Attorneys' Fees in Civil Rights Cases: An Essay on Streamlining the Formulation to Attract General Practitioners*, 69 MARQ. L. REV. 373 (1986); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); Note, *Attorney Fees: Exceptions to the American Rule*, 25 DRAKE L. REV. 717 (1976); Comment, *Attorney Fees: Slipping from the American Rule Strait Jacket*, 40 MONT. L. REV. 308 (1979).

¹³⁹ In order to encourage "the use of the courts as a forum in which to seek and define standards of performance" for lawyers, one commentator would grant attorneys' fees to plaintiffs in all legal informed consent cases. Martyn, *supra* note 3, at 349 (contending "no other alternative [forum] exists"). The text takes a more cautious approach because I am not convinced that all informed decisionmaking cases deserve "special" status.

¹⁴⁰ Availability of attorneys' fees will be particularly important in encouraging redress to dignitary harm where only nominal damages would be available. See *supra* text accompanying note 115 and see note 26.

¹⁴¹ The lost profits problem could also arise in an estate planning context. Consider a settlor who wants to limit the amount of income his widow would receive under a trust, but whom the lawyer does not inform that such an approach could disqualify the gift for the estate tax marital deduction. If the estate could establish that the settlor, if informed, would have given the income to get the deduction, the damages would include the increased taxes which the estate would have saved. Those damages should be relatively easy to calculate. The widow should also recover, however, the increased income to which she would have been entitled. In order to set those damages, the widow would have to estimate the trust earnings over her life expectancy and discount her loss to present value. The situation in *Estate of Mittleman v. Comm'r* suggests the example. 552 F.2d 132 (D.C. Cir. 1975) In *Mittleman*, although a trust did not expressly provide that all income go to the widow, the court interpreted the document as giving all income and thus qualifying for the marital deduction. For discussions of *Mittleman*, see *supra* notes 49-56 and accompanying text; Langbein & Waggoner, *supra* note 5, at 552-54, 584-85.

long troubled courts and commentators alike, and courts might deny damages as "speculative" in the Subchapter S situation.¹⁴² One expert offers this general observation, however, regarding damages: "The more important it seems to vindicate a given claim, the more willing a court may be to accept pretty incomplete evidence on the damages issue."¹⁴³ Courts should apply this principle in conflict of interest situations and allow damages which in other situations they might deny as "speculative."

In addition, in some rare circumstances, punitive damages will be appropriate in an informed decisionmaking case. In the words of the Restatement (Second) of Torts, "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."¹⁴⁴ While lawyers may have "evil motives" on some occasions, the more probable circumstance for assessing punitive damages in an informed decisionmaking case would be an exhibition of reckless indifference to the rights of others. For example, an attorney also serving as a trustee might be tempted to invade the trust to cover expenses of beneficiaries, but direct some of the funds to cover attorneys' fees owed him, without disclosing such use of funds.¹⁴⁵

Courts should set rules governing damages in informed decisionmaking cases with reference to the situation in which the breach arises. In most cases, the burden of proof should stay with the plaintiff and the court should limit damages to that which the injured client lost. If the breach occurred in the context of a multi-party transaction, appropriate presumptions ought to aid the plaintiff. If the breach occurred in a conflict of interest situation, then attorneys' fees would be an appropriate element of damages. Further, damages for lost profits and punitive damages might be appropriate.

¹⁴² See generally D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 150-57 (1973); Gruendel, *Economic Loss: Recovery of Damages for Economic or Financial Harm*, 16 J. MAR. L. & COM. 568 (1985); McThenia & Ulrich, *A Return to Principles of Corrective Justice in Deciding Economic Loss Cases*, 69 VA. L. REV. 1517 (1983); Comment, 34 DRAKE L. REV. 569 (1985); Note, *An Economic Approach to Hadley v. Baxendale: EVRA Corp. v. Swiss Bank, Corp.*, 62 NEB. L. REV. 157 (1983); Comment, *Lost-Profits Damage Awards under Uniform Commercial Code Section 2-708(2)*, 37 STAN. L. REV. 1109 (1985); Comment, *Lost Profits for the Lost Volume Seller: A Businessperson's Pipe Dream or Entitlement?*, 90 WM. MITCHELL L. REV. 266 (1983).

¹⁴³ D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 152 (1973).

¹⁴⁴ RESTATEMENT (SECOND) OF TORTS § 908(2) (1977).

¹⁴⁵ The activities of Wayne R. Starr, Jr. suggest this example. For a chronicle of events leading to his removal as fiduciary, assessment of punitive damages, and disbarment, see *In re Starr*, 538 S.W.2d 334 (Mo. banc. 1976) (disbarred); *In re Estate of Gould*, 547 S.W.2d 863 (Mo. Ct. App. 1977) (removed as executor); *Gould v. Starr*, 558 S.W.2d 755 (Mo. Ct. App. 1977) (removed as trustee; punitive damages assessed). See also *Werschull v. United Cal. Bank*, 85 Cal. App. 3d 981, 149 Cal. Rptr. 829 (1978) (wrongful conduct by pension plan trustee); *Bowman v. Doherty*, 235 Kan. 870, 686 P.2d 112 (1984) (attorney failed to notify his client of the trial date because the client had not paid his legal fees); *Stinson v. Feminist Women's Health Center, Inc.*, 416 So. 2d 1183 (Fla. Dist. Ct. App. 1982) (attorneys overbilled and wrongfully withheld settlement check); *Finch v. Hughes Aircraft, Co.*, 57 Md. App. 190, 469 A.2d 867 (1984) (attorney failed to notify corporation of potential patent restrictions in order to bill the corporation for more work). Cf. *KAN. STAT. ANN. § 59-1704* (1983) (allows for double the value of the property embezzled from a decedent or conservator to be awarded as damages).

Outrageous conduct might also give rise to damages for emotional distress suffered. See *Peck*, *supra* note 4, at 1302.

In addition, if the law is going to require lawyers in a planning practice to engage in informed decisionmaking, as a practical matter non-clients harmed by a breach must, in some circumstances, be able to recover against the lawyer. Under traditional rules, the lawyer typically relies initially on two defenses when a non-client sues: privity (my duty is owed only to my client, not to third parties)¹⁴⁶ and the statute of limitations (the statute started to run at the time of the execution of the will, for example, rather than the date of the client's death).¹⁴⁷ Consider the situation of a client seeking a will. Inadequately informed about the meaning of the words "per stirpes," the client executes a will providing for that kind of distribution. Had the client known more, he would have chosen a "per capita" distribution. A beneficiary who would have received more under the per capita approach¹⁴⁸ sues the lawyer for breach of the informed decisionmaking doctrine. Because the privity and statute of limitations defenses effectively preclude *any* recovery in most estate planning situations, a number of courts have rejected them in the last several years.¹⁴⁹ These important developments strongly suggest that non-clients will be able to recover under the informed decisionmaking doctrine in the estate planning context. In addition, they illustrate the obvious importance of reforms to the viability of an informed decisionmaking doctrine for estate planners.¹⁵⁰

Outside of estate planning, the privity defense also is falling. Both courts¹⁵¹ and

¹⁴⁶ See, e.g., *Savings Bank v. Ward*, 100 U.S. 195 (1879) (attorney has no liability to later third parties); *Favata v. Rosenberg*, 106 Ill. App. 3d 572, 436 N.E.2d 49 (1982) (attorneys are not liable to third parties); *Hill v. Willmott*, 561 S.W.2d 331 (Ky. Ct. App. 1978) (attorney's negligence does not make the attorney liable to third parties); *Scholler v. Scholler*, 10 Ohio St. 3d 98, 462 N.E.2d 158 (1984) (an attorney who acts in good faith is immune from liability to third parties).

¹⁴⁷ See, e.g., *Alter v. Michael*, 64 Cal. 2d 480, 483, 413 P.2d 153, 155-56, 50 Cal. Rptr. 553, 555-56 (1966); *Master Mortgage Corp. v. Byers*, 130 Ga. App. 97, 98, 202 S.E.2d 566, 567-68 (1973); *Goldberg v. Bosworth*, 29 Misc. 2d 1057, 1060, 215 N.Y.S.2d 849, 853 (Sup. Ct. 1961).

¹⁴⁸ For example, the decedent's will might have provided "to my issue, per stirpes." If child A and grandchildren C & D (the children of predeceased child B) survived the decedent, the share under the will would be one-half to A and one-quarter each to C & D. A per capita share would be one-third to each. Either C or D might make the claim in the text.

¹⁴⁹ See, e.g., *Fickett v. Superior Court*, 27 Ariz. App. 793, 558 P.2d 988 (1976) (privity should be no bar); *Heyer v. Flaig*, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969) (statute of limitations runs from date of death in will beneficiary situations); *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (privity no longer always a defense; courts should balance the factors involved) *cert. denied*, 368 U.S. 987 (1962); *Lorraine v. Grover, Ciment, Weinstein & Stauber P.A.*, 467 So. 2d 315 (Fla. App. 1985) (some situations involving wills do not require privity); *McAbee v. Edwards*, 340 So. 2d 1167 (Fla. App. 1976) (privity not needed).

¹⁵⁰ The text is brief because these developments have received thorough coverage elsewhere. See, e.g., *Johnston*, *supra* note 23, at 60-86; *Johnston*, *supra* note 28, at 645-50.

A rule against perpetuities case further illustrates the weakness of traditional approaches to document interpretation and third-party liability. A will gave an interest to the children of the testator's "brothers and sisters," then an open class because the testator's parents were alive (though aged). Refusing to save the gift by limiting the class to those siblings alive when the testator died, the House of Lords noted, "[h]e [the testator] has used the words 'brother and sister' without explanation or glossary, and I am afraid he must take the consequences." *Ward v. Van der Loeff*, 1924 A.C. 653 (Opinion of Lord Dunedin). Cf. J. DUKEMINIER & S. JOHANSON, *WILLS, TRUSTS, AND ESTATES* (3d ed. 1984) 809 n.15 (commenting on the quoted language as follows: "He must take the consequences?").

¹⁵¹ See *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976) (attorney, representing a general partnership, liable for damages to third party investor whom the attorney's advice intended to benefit); *Flaherty v. Weinberg*, 303 Md. 116, 492 A.2d 618 (1985) (mortgagor stated claim against mortgagee's lawyer under third-party beneficiary theory).

commentators¹⁵² have urged that lawyers should be liable to third parties in a range of situations.¹⁵³ For example, stockholders might rely on bad securities law advice that the lawyer gave to a corporation. Because stockholders foreseeably might so rely, a court may find them to be proper plaintiffs.¹⁵⁴ Third parties might be harmed in an informed decisionmaking context as well. Consider our earlier example of a client who, inadequately informed about the consequences of Subchapter S election, insists upon a partnership form for a new business.¹⁵⁵ If the inadequate advice prevented the formation of the business, the lawyer harmed both the client and the other potential participants. Because persons other than the client foreseeably might also suffer loss if the inadequate advice to the client prevents her participation, the other members of the group which never got together would be proper plaintiffs. The continuing erosion of the privity defense is critical to enforcing an informed decisionmaking doctrine for estate planners. Planners in other contexts as well ought to be aware that their failure to engage in adequately-informed decisionmaking may subject them to liability to non-clients who foreseeably might be harmed.¹⁵⁶

As noted above, because a lawyer might have drafted a bad will years before a problem was discovered on the testator's death, several recent estate planning decisions have allowed statutes of limitation to run from the testator's death, rather than from the time of the drafting.¹⁵⁷ In circumstances in which even the testator's death would not

But see Goodman v. Kennedy, 18 Cal. 3d 335, 343-45, 556 P.2d 737, 743, 134 Cal. Rptr. 375, 381 (1976); Smith v. Griffiths, 327 Pa. Super. 418, 476 A.2d 22 (1984) (plaintiff must show a lawyer-client relationship in an action against a lawyer for professional negligence.) Cf. Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir. 1985) (attorney who formed tax shelter liable to investors for misrepresentation when IRS disallowed shelters).

¹⁵² See Comment, *Attorney Liability to Third Parties for Corporate Opinion Letters*, 64 B.U.L. REV. 415 (1984) [hereinafter Comment, *Attorney Liability*]; Note, *Attorney Negligence and Third Parties*, 57 N.Y.U. L. REV. 126 (1982); Comment, *The Pelham Decision, Attorney Malpractice and Third-Party Nonclient Recovery: The Rise and Fall of Privity*, 3 N. ILL. U.L. REV. 357 (1983); Comment, *Lawyers' Negligence Liability to Non-Clients: A Texas Viewpoint*, 14 ST. MARY'S L.J. 405 (1983).

¹⁵³ Courts have imposed liability on other professionals who offer advice that can harm third parties. See *Rusch Factors, Inc. v. Levin*, 284 F. Supp. 85 (D.R.I. 1968) (accountants); *Aluma Kraft Mfg. Co. v. Elmer Fox & Co.*, 493 S.W.2d 378 (Mo. Ct. App. 1973) (accountants); *Quail Hollow E. Condominium Ass'n v. Donald J. Scholz Co.*, 47 N.C. App. 518, 268 S.E.2d 12 (1980) (architects).

¹⁵⁴ Cf. Goodman v. Kennedy, 18 Cal. 3d 355, 556 P.2d 737, 134 Cal. Rptr. 375 (1976) (suggesting corporate attorney's duty could extend to stock purchasers if it were foreseeable that the advice would be transmitted to or relied upon by purchasers). An examination of the appropriate breadth of liability to third parties in general is beyond the scope of this study. The approach casting the broadest net, and the one used in the text for illustration, would allow any foreseeable plaintiff to sue. Others have proposed a more limited abrogation of the privity doctrine. For a helpful analysis, see Note, *Attorneys' Negligence and Third Parties*, 57 N.Y.U. L. REV. 126 (1982). See also, R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* §§ 71-82 (2d ed. 1981); Comment, *Attorney Liability*, *supra* note 152.

¹⁵⁵ See *supra* notes 131-33 and accompanying text.

¹⁵⁶ Earlier I proposed that a client should have an action for dignitary harm suffered in circumstances threatening the core of the lawyer-client relationship. See *supra* notes 136-43 and accompanying text. Because the harm was to the dignity of the client, that claim should not be available to third parties.

¹⁵⁷ See, e.g., *Heyer v. Flaig*, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); *Auric v. Continental Cas. Co.*, 111 Wis. 2d 507, 331 N.W.2d 325 (1983). See generally R. MALLIN & V. LEVIT, *supra* note 154, at § 397; Note, *Drafting Attorneys' Liability to Intended Beneficiaries of a Will: A Reasonable Approach to Accrual of Statutes of Limitations*, 18 VAL. U.L. REV. 119 (1983).

reveal a problem, courts should follow a "discovery rule" approach.¹⁵⁸ For example, the testator's will might have created a power of appointment for a survivor. Questions about the adequacy of advice regarding the creation of the power might not arise until well after the testator's death. Accordingly, statutes of limitation should begin to run when the injured party reasonably should have discovered the lawyer's breach.¹⁵⁹

In sum, the law should direct at the lawyers themselves remedies for failure to engage in informed decisionmaking. The sanctions might take either (or both) of two forms: professional discipline for violation of ethics strictures or legal malpractice. The new Model Rules of Professional Conduct's emphasis on meaningful communication should help both lawyers and disciplinary bodies better appreciate the importance of informed decisionmaking. To give teeth to the enforcement effort and compensation to injured persons, courts should consider informed decisionmaking part of competent legal representation. They should develop a malpractice doctrine which recognizes reliability-of-evidence and difficulty-of-proof problems. Selective use of proof requirements of clear and convincing evidence and of presumptions should tailor general malpractice doctrine to the needs of informed decisionmaking. Furthermore, courts should set damages in informed decisionmaking cases with reference to the situation in which the breach arises. In most cases the burden should stay on the plaintiff and the court should limit damages to what the injured client lost. In some special circumstances appropriate presumptions should aid the plaintiff or the court should award the plaintiff attorneys' fees or punitive damages. In addition, courts should allow third party recovery, and statutes of limitation should run from the time a plaintiff should have discovered a breach.

B. *Reforming the Document*

In a planning context, production of documents is often the primary goal of the representation. Instead of directing their attention at lawyers, courts might remedy harms by focusing on the documents produced in the absence of informed decisionmaking. In many cases, reforming the documents to read as if there had been an informed decision might cure much of the harm. A significant risk to allowing reformation in such cases, however, is that lawyers, at least partially relieved of malpractice

¹⁵⁸ Courts have adopted the discovery rule, providing that a statute of limitations does not begin to run until the plaintiff knows or reasonably could have discovered the injury in a variety of contexts. See PROSSER AND KEETON, *supra* note 25, at § 30. In addition, courts have applied the rule to attorney malpractice. See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971). See generally R. MALLIN & V. LEVIT, *supra* note 154, at § 397.

¹⁵⁹ Courts also ought to follow a "discovery rule" approach in informed decisionmaking cases outside of the estate planning area. The law is complex; courts should not expect clients to recognize inadequacies in the representation they are getting. See R. MALLIN & V. LEVIT, *supra* note 154, § 380 at 426-27 ("Frequently, the client did not know and usually *could not have known* he had a cause of action because of his attorney's negligence [T]he client usually lacks the special skill and knowledge necessary to recognize the difference between competence and negligence.") (emphasis in original).

liability, will not take seriously their obligation to encourage informed decisionmaking.¹⁶⁰ Nevertheless, because the relative strengths of a reformation approach outweigh the deterrence value which results when the court limits plaintiffs to a malpractice remedy, courts should treat inadequately informed decisionmaking as mistake for which reformation is an appropriate remedy. Of course, reformation will not be appropriate in all contexts, especially if other parties have relied upon documents.

Reformation has long been available as a way of correcting inter vivos documents executed in the presence of fraud or mistake.¹⁶¹ Its purpose is to make the document reflect what the parties intended. Traditional doctrine prohibits reformation of wills for mistake because reformation would give effect to unattested language and thereby violate the Statute of Wills.¹⁶² Problems unanticipated at the time of drafting, however, often have been solved by a court interpreting a document as if it expressed what the parties would have intended had they known more.¹⁶³

In a comprehensive and persuasive article, Professors Langbein and Waggoner criticize such use of "construction" as a way to avoid unjust results. Instead, they propose a carefully defined approach to reforming wills while recognizing the policies behind

¹⁶⁰ A different kind of risk of allowing reformation is that reformation will encourage unjustifiable claims. See Langbein & Waggoner, *supra* note 5, at 589-90. Because the informed decision-making doctrine involves asking "what would the client have done, if the client had known?," the whole doctrine, rather than merely the reformation remedy, is subject to that kind of risk. One check against nonmeritorious or frivolous claims would be to require clear and convincing evidence. See *supra* notes 116-24 and accompanying text. Lawyers who do engage in informed decisionmaking can protect themselves by preserving evidence of their discussions. See *supra* notes 86-95 and accompanying text.

¹⁶¹ See generally 4 G. PALMER, THE LAW OF RESTITUTION § 20.1 (Mistake in Testamentary Disposition), § 20.2 (Wrongful Acquisition of a Bequest) (1978). A wide variety of documents have been subject to reformation. See, e.g., *Dyson v. Ferncliff Properties, Inc.*, 696 S.W.2d 767 (Ark. Ct. App. 1985) (deed); Department of Mental Health and Developmental Disabilities v. Phillips, 133 Ill. App. 3d 337, 478 N.E.2d 1052 (1985) (trust); *Williams v. United Ins. Co. of America*, 618 S.W.2d 229 (Mo. Ct. App. 1981) (contract, which court ultimately did not reform); *George Backer Management Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 385 N.E.2d 1062, 413 N.Y.S.2d 135 (1978) (lease, which court ultimately did not reform); *Dorsey v. Dorsey*, 306 N.C. 545, 293 S.E.2d 777 (1982) (deed).

¹⁶² See 4 G. PALMER, *supra* note 161, at § 20.1.

¹⁶³ See, e.g., *Smith v. Usher*, 108 Ga. 231, 233, 33 S.E. 876, 877 (1899) (court implied cross-remainders where testator "made no express disposition of the land in the event one daughter died childless and the other had children, and this is the condition that has now arisen"); *In re Wolcott*, 95 N.H. 23, 26, 56 A.2d 641, 643 (1948) (court gave trustee "authority to do what the testator presumably would have authorized had he foreseen the emergency"); *In re Estate of Burke*, 48 N.J. 50, 64, 222 A.2d 273, 280 (1966) (when a will does not provide for a particular contingency which occurs, a court may "strive reasonably to ascertain and carry out what the testator probably intended . . . if the present situation developed").

When circumstances have changed, a drafter may not have addressed a particular problem that arises. For a recent proposal to follow the English by taking a statutory approach to trust revision in changed circumstances, see Comment, *A Proposal for a Variation of Trusts Statute in Washington*, 8 U. PUGET SOUND L. REV. 625 (1985). See also MO. ANN. STAT. § 456.590(2) (Vernon Supp. 1985) (allowing judicial approval of changes in trust terms in some circumstances).

Contract law traditionally resolves unanticipated problems by deciding what reasonable persons in the position of the parties would have meant had they anticipated the problem. See generally E. FARNSWORTH, CONTRACTS § 7.9 at 491-92 (1982). For discussion of whether an objective (reasonable person) or subjective (individual client) approach is more appropriate in informed decisionmaking cases, see *supra* notes 26-31 and accompanying text.

the Statute of Wills.¹⁶⁴ Their approach is also appropriate for informed decisionmaking problems.

Professors Langbein and Waggoner would allow courts to reform wills for mistake if "the error be shown to have affected specific terms in the will,"¹⁶⁵ the claim is "sufficiently circumscribed to be susceptible to proof,"¹⁶⁶ and the evidence is clear and convincing.¹⁶⁷ These requirements are intended to identify an appropriate line between the cases clearly crying for reformation, such as when a husband and wife each sign the other's will,¹⁶⁸ and claims which are too generalized to be remediable, such as "if only my aunt had known how much I loved her, she'd have left me more."¹⁶⁹ The estate tax marital deduction case of *Estate of Mittleman v. Commissioner*¹⁷⁰ is an example of a situation between those extremes and yet appropriate for reformation.¹⁷¹ In *Mittleman*, the attorney testified that the decedent wanted to qualify for a marital deduction. The deduction is allowed only if all of the income from the trust set up by the decedent goes to the surviving spouse.¹⁷² The document stated that the trust's purpose was to provide the widow support, but did not expressly direct that all of the income go to the widow.¹⁷³ Applying the Langbein and Waggoner analysis, a court could reform Mittleman's will by concluding that the drafting error affected specific terms regarding the allocation of the trust income, the widow's marital deduction claim was sufficiently circumscribed, and the lawyer's testimony, other trust language and the size of the corpus provided clear and convincing evidence of Mittleman's intent.

As noted earlier,¹⁷⁴ *Mittleman* can also be seen as an informed decisionmaking case. A document executed in the absence of informed decisionmaking can be viewed as a mistakenly-executed document. As Langbein and Waggoner have demonstrated, the appropriateness of reformation as a remedy for the mistake should not turn on whether the document is a will. Rather, the concern ought to be the character of the proof regarding what would have been done if the client had been adequately informed.

Though reformation may be consistent with established (or, in the case of wills, emerging) doctrine, the remedy may be unsuitable in some contexts. To the extent that reformation "cures" the harm caused by uninformed decisionmaking, it reduces the cost

¹⁶⁴ See Langbein & Waggoner, *supra* note 5. The authors demonstrate that courts use reformation for mistakes regarding other wealth-transfer devices, such as deeds and trusts, and that under current wills doctrine courts give testamentary effect to unattested language in a wide variety of cases, ranging from resolving questions of "ambiguity" to reforming documents which violate the rule against perpetuities. See *id.* at 524-54. They believe "that a reformation doctrine would often constitute less an innovation in principle than in candor." *Id.* at 524.

¹⁶⁵ *Id.* at 578. The authors call this requirement one of "materiality."

¹⁶⁶ *Id.* The authors call this requirement one of "particularity."

¹⁶⁷ *Id.* at 578-79.

¹⁶⁸ See *In re Snide*, 52 N.Y.2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981); *In re Estate of Pavlinko*, 394 Pa. 564, 148 A.2d 528 (1959). Mistakes of this sort might be very common. See Langbein & Waggoner, *supra* note 5, at 562 n.152.

¹⁶⁹ See Langbein & Waggoner, *supra* note 5, at 584.

¹⁷⁰ 522 F.2d 132 (D.C. Cir. 1975). See *supra* notes 49-56 and accompanying text.

¹⁷¹ See Langbein & Waggoner, *supra* note 5, at 584. The authors indicate that reformation of Rule Against Perpetuities violations is a parallel example. *Id.* at 549 n.104 (discussing the perpetuities cases).

¹⁷² *Mittleman*, 522 F.2d at 135.

¹⁷³ *Id.* at 133 n.1.

¹⁷⁴ See *supra* notes 49-56 and accompanying text.

to the offending lawyer. Consequently, lawyers could be tempted to be less careful. Other pressures to communicate, however, will bear upon lawyers.¹⁷⁵ Continued exposure to the professional disciplinary process should provide some pressure.¹⁷⁶ Further, because a drafter's goal is to avoid litigation, the risk of facing a reformation action would be an incentive to many lawyers to communicate adequately. In addition, the costs of the reformation action should be an element of damages in any malpractice action. In appropriate malpractice cases, attorneys' fees and punitive damages also would be available, providing further incentives for lawyers to avoid the possibility of litigation.¹⁷⁷

Even jurisdictions which choose to limit most plaintiffs to a malpractice remedy should allow reformation in some cases. A malpractice approach to informed decision-making could deny recovery to worthy plaintiffs in two contexts.¹⁷⁸ First, the court might excuse the lawyer's breach because of the emergency circumstances in which the transaction occurred.¹⁷⁹ Second, the available damages might be inadequate. The award may not cover lost profits or other "speculative" damages,¹⁸⁰ or the loss may involve unique property.¹⁸¹ Further, the lawyer may be judgment proof or underinsured.¹⁸²

Finally, reformation will not be appropriate in some informed decisionmaking cases. Though most planning situations ultimately involve documents, not all do. With no document, there is nothing to reform. Also, third parties, such as bona fide purchasers,¹⁸³ may have relied on the document as written, so reformation would be unfair to them. When contracts, as opposed to gifts, are involved, the law of reformation places emphasis on what the parties actually agreed. Reformation then is appropriate only "to put into effect the contract intended, not to make the contract the parties would have made had they been better informed."¹⁸⁴ In other cases, however, courts could use reformation to

¹⁷⁵ See Langbein & Waggoner, *supra* note 5, at 588-90.

¹⁷⁶ Given the recognized deficiencies in that process, however, see *supra* authorities cited in note 105, we should not over-emphasize its effect on lawyer-client communication. Particularly in jurisdictions which have not been aggressive in enforcing professional discipline or which have not adopted professional standards regarding communication, the reformation remedy might be inappropriate.

¹⁷⁷ See *supra* notes 138-40, 144-45 and accompanying text.

In light of these incentives to be competent, a sensible system would not attempt to "punish" lawyers by requiring harmed parties to bring malpractice actions worth only a fraction of the real loss. The value of the malpractice claim would fall short of the actual loss because of the expenses, delays, and risks of litigation. See Langbein & Waggoner, *supra* note 5, at 589. Cf. Spiegel, *supra* note 4, at 137-38 (discussing measures-of-damages problems posed by the suit-within-a-suit requirement in malpractice cases, Spiegel notes, "[b]efore verdict and judgment, . . . [a lawsuit's] value reflects an estimate of the probability of winning multiplied by the likely recovery."). Langbein and Waggoner note another consideration: failure to reform may perpetuate unjust enrichment. See Langbein & Waggoner, *supra* note 5, at 589. For example, a rule limiting parties to a malpractice remedy would allow the "wrong" will beneficiaries to keep their windfall while the lawyer pays damages to the "right" ones. See, e.g., *supra* note 146.

¹⁷⁸ Of course, the unavailability of a malpractice remedy does not require the availability of a reformation remedy. Other factors may preclude reformation. See *infra* notes 183-85 and accompanying text.

¹⁷⁹ See *supra* note 21.

¹⁸⁰ See *supra* notes 141-43 and accompanying text.

¹⁸¹ See Langbein & Waggoner, *supra* note 5, at 589.

¹⁸² *Id.*

¹⁸³ See generally 3 G. PALMER, *supra* note 161, at 486-89 for a discussion of bona fide purchasers.

¹⁸⁴ *Id.* at 16 (paraphrasing *St. Anthony Falls Water-Power Co. v. Merriman*, 35 Minn. 42, 27 N.W. 199 (1886)). Professor Palmer notes that "it is often necessary to separate an agreement from

aid a variety of victims of uninformed decisionmaking, especially in the context of gifts gone awry. In some of these reformation cases an additional malpractice remedy might also be appropriate to compensate fully the injured party.¹⁸⁵

IV. CONCLUSION

Clients deserve the opportunity to make fully informed decisions. The informed decisionmaking doctrine developed here should encourage lawyers to help clients realize that opportunity. It recognizes special obligations in conflict of interest situations because such situations most threaten the integrity of the lawyer-client relationship. It suggests a broad standard — discussing topics relevant to each individual client — as a way to resist the natural tendency to categorize clients and to treat them as members of typical groups instead of as individuals. Only if lawyers maintain a dialogue on a wide range of issues *potentially* relevant to each client will it be possible to discover which topics really warrant further discussion. Perhaps most importantly, a complete discussion should minimize the number of situations in which consequences follow even when no affirmative decision has been made, as when persons are bound by boilerplate language the client did not understand.

Good lawyers always have understood the importance of learning enough about their clients to be able to give adequate advice and of helping clients understand that advice. The remedies discussed here — professional discipline, malpractice, and reformation — all have been invoked as responses to inadequate advice. In order to shift the focus from accuracy of the advice itself to adequacy of the decisionmaking process, this article urges explicit recognition of an informed decisionmaking doctrine. Lawyers need not only to understand the law, but also to teach their clients enough of the law so that the clients can make intelligent decisions.

its objectives, and . . . the role of reformation is to give effect to the former, not to attain the latter.”
Id.

In contrast, “[t]he aim of reformation of an instrument of gift is to express in the writing the gift the donor intended to so express.” 4 G. PALMER, *supra* note 161, at 10. For reformation to work in an informed decisionmaking context, it must allow courts to express in writing what the donor would have intended, if adequately informed. *See supra* notes 161–68 and accompanying text (noting that will “interpretation” has taken such an approach and suggesting that outright reformation is more appropriate).

¹⁸⁵ For example, consider a will beneficiary whose share was made smaller when a lawyer wrongfully named himself as a beneficiary. A court could reform the will to eliminate the lawyer's share, and the injured beneficiary could maintain a malpractice action for the cost of action, attorney's fees, and, perhaps, punitive damages. Modern rules of procedure should allow a court to handle all of the issues in one action. *See, e.g.*, FED. R. CIV. P. 2 (One Form of Action), 20 (Permissive Joinder of Parties).