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The Informed Consent Doctrine in Legal Malpractice Law

Vincent R. Johnson
St. Mary's University School of Law, vjohnson@stmarytx.edu

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ARTICLE

Vincent R. Johnson

The Informed Consent Doctrine in Legal Malpractice Law

Abstract. The doctrine of informed consent is now deeply embedded into the law of legal ethics. In legal malpractice litigation, the doctrine holds that a lawyer has a duty to disclose to a client material information about the risks and alternatives associated with a course of action. A lawyer who fails to make such required disclosures and fails to obtain informed consent is negligent, regardless of whether the lawyer otherwise exercises care in representing a client. If such negligent nondisclosures cause damages, the lawyer can be held accountable for the client's losses.

Shifting the focus of a legal malpractice action from garden-variety negligence (such as ignorance of the law, late filing of a complaint, or failure to safeguard client funds or data) to a lack of informed consent can potentially transform a losing case into a winner. Among other things, the doctrine has the potential to simplify and clarify the plaintiff's argument, which may be especially useful if the case is tried to a jury. The informed consent doctrine also makes sense as a matter of public policy, because clients have a right to control important matters related to their representation.

This Article explores the informed consent doctrine in legal malpractice law. It discusses the rise of the informed consent doctrine in medical malpractice law and traces the transplantation of the language and principles of informed consent, first, into the law of lawyer discipline, and then into the law of lawyer civil liability. The Article explores what the relevant legal malpractice case law says about the obligation to obtain informed consent. Finally, the Article

addresses certain pivotal issues in the operation of the informed consent doctrine in claims by clients against lawyers, including the nature of lawyer disclosure obligations, the limits imposed by the scope of the representation, the role of expert testimony, and the standard for proving factual causation.

Author. Professor Vincent Johnson is a South Texas Distinguished Professor of Law at St. Mary's University, San Antonio, Texas. He earned his B.A. and LL.D. from St. Vincent College; his J.D. from the University of Notre Dame; an LL.M. from Yale University; and an LL.M. from the London School of Economics and Political Science.

Professor Johnson's books have been taught at more than forty American law schools. By appointment of the Texas Supreme Court, he is now serving a second three-year term on the Committee for Disciplinary Rules and Referenda. That group plays a key role in formulating proposed changes to the Texas Disciplinary Rules of Professional Conduct. In 2019–2020, Professor Johnson was interim dean of St. Mary's University School of Law.

Professor Johnson thanks Ross Harold Potter, Jr., a student at St. Mary's University School of Law, whose tenacious research greatly aided the preparation of this Article.

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I. INTRODUCTION

There are many ways for a plaintiff to lose a legal malpractice case, even if the defendant-lawyer grievously erred. A claim may fail due to lack of privity;[1] or expert testimony;[2] or insufficient evidence of factual causation[3] or damages;[4] or due to defenses based on untimely filing[5] or unlawful conduct;[6] or for many other reasons.[7]

Representing a plaintiff asserting a legal malpractice claim is not for the timid or the unprepared. Indeed, the doctrinal and procedural obstacles to recovery facing victims of lawyer negligence are so numerous and so potent, one might suspect the deck is stacked against them.[8]

In contrast, the rules that make it easier for legal malpractice plaintiffs to recover are few and far between. In rare cases, plaintiffs do not need to adduce expert testimony;[9] or the burden of proof on causation is shifted to the defendant;[10] or a business transaction between a lawyer and client is

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1. *See* Susan Saab Fortney & Vincent R. Johnson, *Legal Malpractice* § 5-4.1(a), *in* LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION 810, 810–11 (2018) [hereinafter Fortney & Johnson, *Legal Malpractice*] (discussing "[t]he [p]rivity [o]bstacle").

2. *See id.* § 5-2.2(f)(1), at 752–53 (discussing the necessity of expert testimony "to [e]stablish the [s]tandard of [c]are").

3. *See id.* § 5-2.3(a), at 772 (discussing factual causation).

4. *See id.* § 5-5.1, at 851–53 (discussing compensatory damages).

5. *See id.* § 5-6.4(a), at 879 (discussing malpractice statutes of limitations).

6. *See id.* § 5-6.2(c), at 870–74 (discussing unlawful conduct); *see also* Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. REV. 43, 45–46 (2008) (explaining modern legal malpractice law currently recognizes the outlaw doctrine in various forms).

7. *See, e.g.*, Vincent R. Johnson, *Causation and "Legal Certainty" in Legal Malpractice Law*, 8 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 374, 399–400 (2018) (citations omitted) ("Suits by clients may flounder because the matter in question fell outside the scope of the representation, involved a permissible exercise of lawyer discretion, or resulted in nothing more than the client's 'loss of chance' to secure a more favorable result.").

8. *Cf.* Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV. 2033, 2056 (2017) ("[I]t is time to reexamine whether our civil liability regime provides meaningful remedies to numerous consumers injured by attorney misconduct."); Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 453 (2008) ("[M]any legal outcomes can be explained, and future cases predicted, by asking a very simple question: is there a plausible legal result in this case that will significantly affect the interests of the legal profession (positively or negatively)? If so, the case will be decided in the way that offers the best result for the legal profession.").

9. Fortney & Johnson, *Legal Malpractice*, *supra* note 1, § 5-2.2(f)(2), at 753 (discussing the exception to the expert testimony requirement for obvious negligence).

10. *Id.* § 5-2.3(a)(5), at 780 (discussing "[s]hifting the [b]urden of [p]roof on [c]ausation"); Jeffrie D. Boysen, *Shifting the Burden of Proof on Causation in Legal Malpractice Actions*, 1 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 308, 323–24 (2011) (discussing burden shifting in Louisiana).

presumed to have been unfair.[11] In the usual case, however, a legal malpractice plaintiff faces obstacle after obstacle.

Against this sobering backdrop reflecting the realities of legal malpractice litigation,[12] an important doctrine has emerged that, in a broad range of cases spanning more than forty years,[13] makes it easier for legal malpractice plaintiffs to recover damages by way of court judgments and private settlements. The doctrine is the rule of informed consent. Now deeply embedded into the law of legal ethics,[14] the doctrine holds a lawyer has a duty to disclose material information about the risks and alternatives associated with a course of action, allowing the client to make informed decisions related to their representation.[15] Thus, in *Sierra Fria Corp. v. Donald J. Evans P.C.*,[16] the First Circuit wrote:

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11. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 126 cmt. e (AM. L. INST. 2000) ("Unintended overreaching is a possibility in transactions involving lawyers and their clients. Accordingly a lawyer must overcome a presumption that overreaching occurred by demonstrating the fairness of the transaction.").

12. *See generally* Vincent R. Johnson, *Legal Malpractice Claims: What the Data Indicate*, 9 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 138, 145 (2018) (reviewing HERBERT M. KRITZER & NEIL VIDMAR, WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS (2018)) [hereinafter Johnson, *Legal Malpractice Claims*] (citations omitted) ("Only a small fraction of LPL [lawyer professional liability] claims is brought by lawyers with substantial expertise in this area[;] . . . [A] large percentage of LPL claims do[] not result in compensation being paid[.]" (quoting Kritzer & Vidmar, *supra*, at 12, 62) (second, third, and fourth alterations in the original)).

13. *See* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 67 (1979) (citations omitted) ("Hornbook agency law states that the agent has a duty to disclose all material information to his client."); *id.* at 73 ("[A] lawyer should be affirmatively required to obtain informed consent when client values or lawyer conflicts of interest are involved."). Professor Martyn stated long ago:

> Clients have successfully alleged in malpractice suits, or as grounds for other relief, failure to disclose information material to the client's decision, failure to disclose conflicts of interest, and failure to disclose an attorney's opinion regarding the merits of a case. By creating an affirmative duty to inform the client, these decisions permit the client to make an informed choice about the next course of action.

Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 330 (1980).

14. Fortney & Johnson, *Legal Malpractice*, *supra* note 1, § 5-2.2(n), at 769–70.

15. *See id.* (describing the meaning of "informed consent"); *cf.* Rice v. Downs, 203 Cal. Rptr. 3d 555, 569–70 (Cal. Ct. App. June 28, 2016) (holding a legal malpractice action based on failure to disclose information and obtain informed consent with respect to actual and potential conflicts was not barred by an arbitration clause); Lewellen v. Phillips, No. C062277, 2010 WL 4851362, at *5 (Cal. Ct. App. Nov. 30, 2010) (finding evidence negated the plaintiff's allegations that her lawyer "badgered her into accepting the settlement agreement and failed to obtain her informed consent before it was executed").

16. Sierra Fria Corp. v. Donald J. Evans, P.C.,127 F.3d 175 (1st Cir. 1997).

> [W]hen a client seeks advice from an attorney, the attorney owes the client "a duty of full and fair disclosure of facts material to the client's interests." This means that the attorney must advise the client of any significant legal risks involved in a contemplated transaction, and must do so in terms sufficiently plain to permit the client to assess both the risks and their potential impact on his situation.[17]

A lawyer who fails to make such required disclosures and obtain informed consent is negligent, regardless of whether the lawyer otherwise exercises care in representing a client.[18] If the negligent nondisclosures cause damages, the lawyer can be held accountable for the client's losses.[19]

There is a divergence of authority as to whether causation of damages is assessed by use of a subjective test, an objective test, or some combination thereof. That issue is discussed in detail near the end of this Article in Part V.D. In other parts of this Article, such as quoted materials or discussions referencing the decisions or opinions of other authorities, readers should expect to encounter varying tests for proving whether a nondisclosure of material information caused damages.

The Illinois Appellate Court explained the doctrine of informed consent in the following terms:

> [A]n attorney's liability for failing to advise a client of the foreseeable risks attendant to a given course of legal action is not predicated upon the impropriety of the recommended course of action; rather, it is predicated upon the client's exposure to a risk that the client did not knowingly and voluntarily assume. Consequently, to establish the element of proximate cause, it is necessary for the client to both plead and prove that had the

17. *Id.* at 179–80 (citation omitted).

18. *Cf.* Metrick v. Chatz, 639 N.E.2d 198, 653–54 (Ill. App. Ct. 1994) ("If a client suffers damage because of the happening of a foreseeable risk of which he or she was not informed, the attorney may be liable. In such a case, the attorney's liability is not predicated upon the impropriety of the chosen course of action, but rather upon the failure to inform the client sufficiently to enable him or her to voluntarily accept the risk attendant thereto."). *But see* Friedman v. Kahn, No. 1-12-0881, 2013 WL 6858452, at *12 (Ill. App. Ct. Dec. 27, 2013) (affirming, in relevant part, a judgment adverse to the client in a legal malpractice action based on lack of informed consent where the trial court refused to instruct the jury that "[i]f a lawyer fails to advise his clients regarding the foreseeable risk of a course of action he advises the client to take, the lawyer is negligent regardless of the propriety of the course of action the lawyer recommends").

19. *Cf.* Frazee v. Proskauer Rose LLP, No. B254569, 2016 WL 6236400, at *1–2 (Cal. Ct. App. Oct. 25, 2016) (affirming dismissal of legal malpractice claims based on failure to obtain informed consent to the terms of a settlement because plaintiff failed to prove proximate causation of damages).

undisclosed risk been known, he or she would not have accepted the risk and consented to the recommended course of action.[20]

A jury instruction used in the state of Washington captures the key features of the legal malpractice informed consent doctrine in the following terms:

> A lawyer has a duty to inform a client of all material facts, including risks and alternatives, which a reasonably prudent client would need to make an informed decision on whether to consent to or reject a proposed course of action. A material fact is one to which a reasonably prudent person in a position of a client would attach significan[ce] in deciding whether or not to follow the proposed course of action.
>
> A lawyer's duty to properly advise and counsel the lawyer's client in accordance with the applicable standard of care cannot be delegated to another person or entity.[21]

Shifting the focus of a legal malpractice action from garden-variety negligence (e.g., ignorance of the law,[22] late filing of a complaint,[23] or

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20. *Metrick*, 639 N.E.2d at 202.

21. Edleman v. Russell, No. 65668-6-I, 2012 WL 1501064, at *2–3 (refusing to review a challenge to the jury instruction that was not adequately preserved). The last sentence of the instruction presumably means not that the duty cannot be delegated, but rather that, if the duty is delegated and misperformed, the lawyer who delegated the duty is responsible for the misperformance. "[N]ondelegable duty arguments have been raised, and have sometimes succeeded, in legal malpractice cases . . . ." Vincent R. Johnson & Stephen C. Loomis, *Malpractice Liability Related to Foreign Outsourcing of Legal Services*, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 262, 307–08 (2012) (footnotes omitted); *see also* Fortney & Johnson, *Legal Malpractice*, *supra* note 1, § 5-7.3(f), at 925 (discussing nondelegable duties); Kleeman v. Rheingold, 614 N.E.2d 712, 713–14, 718 (N.Y. 1993) (holding a law firm had a nondelegable duty to its client to assure proper service of legal process); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 122 cmt. c(i) (AM. L. INST. 2000) ("When several lawyers represent the same client, responsibility to make disclosure and obtain informed consent may be delegated to one or more of the lawyers who appears reasonably capable of providing adequate information.").

22. According to a recent study, 15.90% of legal malpractice claims involve failure to know or properly apply the law. STANDING COMM. ON LAWS.' PRO. LIAB., 2020–2021, AM. BAR ASS'N, PROFILE OF LEGAL MALPRACTICE CLAIMS 2016–2019, at 22 (2020) [hereinafter PROFILE OF LEGAL MALPRACTICE CLAIMS]. *See generally* Fortney & Johnson, *Legal Malpractice*, *supra* note 1, § 5-2.2(d)(1), at 748 (noting the duty of "[c]ompetence entails many things, including . . . knowledge" of the applicable law).

23. About 10% of legal malpractice cases relate to failure to properly calendar deadlines (7.40%) or failure to react to calendared deadlines (2.54%). PROFILE OF LEGAL MALPRACTICE CLAIMS, *supra* note 22, at 22. *See generally* Fortney & Johnson, *Legal Malpractice*, *supra* note 1, § 5-2.2(d)(3), at 749 (stating the duty of diligence "requires timely attention to the client's affairs").

failure to safeguard client funds[24] or data[25]) to a lack of informed consent can potentially transform a losing case into a winner. Among other things, the doctrine has the potential to simplify and clarify the plaintiff's argument, which may be especially useful if the case is tried to a jury.

Essentially, what the plaintiff needs to prove in a case alleging lack of informed consent is that a certain fact was material[26] and required to be disclosed, that it was known to the defendant-lawyer but not disclosed by the lawyer or otherwise known to the plaintiff, and that if the fact had been disclosed the plaintiff would have chosen a different course and achieved a more favorable result.[27] These three factors—required disclosure, breach

24. *See generally* Gregory C. Sisk, *Duties to Effectively Represent the Client* § 4-5.6, *in* LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION 273, 297–303 (2018) (discussing "The Duty to Safeguard Client Funds and Property"); *see also* Vincent R. Johnson, *The Limited Duties of Lawyers to Protect the Funds and Property of Nonclients*, 8 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 58, 66 (2017) ("Any discussion of the duties of lawyers to protect the funds or property of third persons must undoubtedly begin with the text of Rule 1.15 of the American Bar Association's Model Rules of Professional Conduct.").

25. *See* Hiscox Ins. Co. v. Warden Grier, LLP, 474 F. Supp. 3d 1004, 1006 (W.D. Mo. 2020) (discussing claims against a law firm involving failure to protect data based on contract, implied contract, fiduciary duty, and negligence); Nell Gluckman & Christine Simmons, *Cravath Admits Breach as Law Firm Hacks Go Public*, AMLAW DAILY, Mar. 30, 2016, at 1 (describing an IT breach that occurred at two firms during the summer of 2015); *see also* Vincent R. Johnson, *Cybersecurity, Identity Theft, and the Limits of Tort Liability*, 57 S.C. L. REV. 255, 281 (2005) (footnotes omitted) ("In light of the fiduciary-duty rules on confidentiality (and the related obligations requiring safekeeping of client property), a lawyer or law firm could not plausibly argue that there is no duty to safeguard computerized client data from intruders."); Vincent R. Johnson, *Credit-Monitoring Damages in Cybersecurity Tort Litigation*, 19 GEO. MASON L. REV. 113, 130–31 (2011) (discussing a case where "[t]he court ordered the responsible attorney to pay for five years of credit monitoring to protect the plaintiff from identity theft").

26. *See* Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 782 (2003) (discussing "materiality" and stating "[c]ourts have repeatedly recognized that the fiduciary obligations of an attorney require disclosure of facts that are material to the representation").

27. In addressing the factual causation requirement in legal malpractice actions, the language of the courts varies, but the underlying ideas are often the same. In *Reppucci v. Nadeau*, 238 A.3d 994, 999 (Me. 2020), the Supreme Judicial Court of Maine simply stated that "a legal malpractice plaintiff must establish that he or she was deprived of a 'more favorable result' in the underlying case by proving what its outcome would have been had the attorney not been negligent." Similarly, in *Gulfport OB-GYN, P.A. v. Dukes, Dukes, Keating & Faneca, P.A.*, 283 So. 3d 676, 679 (Miss. 2019), the Supreme Court of Mississippi made clear that showing there would have been a "[b]etter [d]eal" or "[n]o [d]eal" are ways of showing there would have been a more favorable result. As the court explained:

> Causation in a negligence-based legal-malpractice claim for a breach of the duty of care requires proof that, but for the attorney's negligence, a more favorable result would have been obtained. Thus, when the complaint is that the attorney should have proposed different or additional terms to a transaction, the malpractice plaintiff must show that such terms would have been accepted

of that duty, and a different course that would have achieved a better outcome—may be proved, to an important extent, based on the plaintiff's own testimony.[28] This tight focus tends to cut through the bewildering complexities that are common to legal malpractice litigation: a wide-ranging battle of experts, multitudinous documents, confusing layers of litigation, and a cast with too many actors and entities.[29]

The informed consent doctrine also makes sense as a matter of public policy because clients have a right to control important matters related to their representation.[30] As expressed by the Illinois Appellate Court:

> The purpose of such a rule is to enable the client to make an informed decision as to whether the foreseeable risks of a proposed legal course of action are justified by its potential benefits when compared to other alternative courses of action.[31]

How can a lawyer defending a negligence action claim to have acted reasonably if the lawyer failed to disclose material risks and alternatives related to the representation? If the negligent nondisclosure causes harm,

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> by the other party or that the client would not have entered into the deal and would have been better off for doing so.

Id. at 681.

28. *Cf.* Tye v. Beausay, 156 N.E.3d 331, 343 (Ohio Ct. App. 2020) ("[I]n situations involving informed consent, a 'patient's hindsight' (i.e., testimony as to her hypothetical response to the undisclosed information), while relevant, is not determinative." (quoting Nickell v. Gonzalez, 477 N.E.2d 1145, 1149 (Ohio 1985))); Conklin v. Hannoch Weisman, 678 A.2d 1060, 1070 (N.J. 1996) ("[A] legal malpractice claimant's testimony concerning whether he or she would have entered into a transaction, if adequately informed of its risks, is [not] irrelevant. A client's attitude about risk is a part of that client and is a component of proximate cause.").

29. *See* Fortney & Johnson, *Legal Malpractice*, *supra* note 1, § 5-2.3(a)(2)(A), at 777 (discussing factual complexity in legal malpractice litigation).

30. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 22(1) (AM. L. INST. 2000) ("[T]he following and comparable decisions are reserved to the client except when the client has validly authorized the lawyer to make the particular decision: whether and on what terms to settle a claim; how a criminal defendant should plead; whether a criminal defendant should waive jury trial; whether a criminal defendant should testify; and whether to appeal in a civil proceeding or criminal prosecution."); *see also* Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 81 (1988) (footnote omitted) ("Clients alone have the right to decide who shall represent them. They cannot exercise such rights intelligently if they are deprived of relevant information."); *cf.* MODEL RULES OF PROF'L CONDUCT R. 1.17 cmt. 9 (AM. BAR ASS'N 2020) ("All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.").

31. Metrick v. Chatz, 639 N.E.2d 198, 201 (Ill. App. Ct. 1994).

imposing liability for proximately caused damages is fair. "The ultimate test for any body of law addressing issues of professional liability is whether the law operates with a sufficient degree of fairness that aggrieved individuals are willing to resolve their disputes through legal channels, rather than by resorting to brute force."[32] The doctrine of informed consent helps ensure legal malpractice law measures up to this jurisprudential standard of fairness.

This Article explores the informed consent doctrine in legal malpractice law. Part II discusses the rise of the informed consent doctrine in medical malpractice law. Part III traces the transplantation of the language and principles of informed consent into the law of lawyer discipline.[33] Part IV explores what the relevant legal malpractice case law says about the obligation to obtain informed consent. Part V addresses certain pivotal issues in the operation of the informed consent doctrine in claims by clients against lawyers, including the nature of lawyer disclosure obligations, the limits imposed by the scope of the representation, the role of expert testimony, and the standard for proving factual causation. Part VI offers concluding thoughts.

II. INFORMED CONSENT IN MEDICAL MALPRACTICE LAW

In medical malpractice law, the doctrine of informed consent, first recognized around 1960,[34] is widely established today.[35] In some jurisdictions, it requires not only disclosure of risks related to a course of

32. Vincent R. Johnson, *The Importance of Doctor Liability in Medical Malpractice Law: China Versus the United States*, 10 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 2, 28 (2019).

33. *See Metrick*, 639 N.E.2d at 201 ("It is the duty of every attorney to inform a client of the available options for alternative legal solutions, as well as to explain the foreseeable risks and benefits of each. . . . This proposition is nothing more than an application of the long-standing rule pertinent to a cause of action for medical negligence premised upon a lack of informed consent.").

34. *See* Spiegel, *supra* note 13, at 44 ("Beginning about 1960, courts began to reexamine the consent doctrine. They began looking beyond the explicit or implicit signal from patient to doctor to examine the content of the 'bargaining process.' They began asking whether the doctor had communicated sufficient information to the patient about the proposed treatment and possible alternatives.").

35. *See* Sam F. Halabi, *Against Fiduciary Utopianism: The Regulation of Physician Conflicts of Interest and Standards of Care*, 11 UC IRVINE L. REV. 433, 447 (2020) (footnotes omitted) ("Since its first official appearance in 1957, informed consent has been significantly expanded. Now situated in medical negligence, a physician has a duty to disclose to a patient the material risks associated with a proposed procedure when a reasonable patient would need to hear that information to make an informed decision."); *see also* Buu Nguyen v. IHC Med. Servs., 288 P.3d 1084, 1091–92 (Utah Ct. App. 2012) (holding it may be "appropriate to impose a duty on a hospital to obtain informed consent when unfamiliar equipment on loan to the hospital, as the hospital considers its possible purchase, is used outside of the normal course of the hospital's established procedures").

treatment,[36] but also the potentially conflicting research and economic interests of the medical professional seeking to obtain consent.[37]

The informed consent doctrine in medicine is rooted in a fundamental belief that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his [or her] own body[.]"[38] "[T]he patient's right of self-determination implies a right to important information . . . ."[39] Under the doctrine, a physician has an obligation to disclose the material risks of, and relevant alternatives to, a proposed course of treatment. "The gist of the informed consent claim is that the physician failed to provide information to the patient, usually about the risk of the proposed procedure or about safer alternatives."[40] The failure to make such disclosures and obtain patient consent before rendering treatment may be a

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36. *See* Caroline Lowry, *Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice*, 52 COLUM. J.L. & SOC. PROBS. 321, 336 (2019) ("The common law duty of informed consent obligates doctors to disclose information pertaining to diagnosis, procedures, and the likely outcomes of procedures.").

37. In *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990), the California Supreme Court wrote:

> Moore repeatedly alleges that Golde failed to disclose the extent of his research and economic interests in Moore's cells before obtaining consent to the medical procedures by which the cells were extracted. These allegations, in our view, state a cause of action against Golde for invading a legally protected interest of his patient. This cause of action can properly be characterized either as the breach of a fiduciary duty to disclose facts material to the patient's consent or, alternatively, as the performance of medical procedures without first having obtained the patient's informed consent.

Id. at 483 (footnote omitted).

38. Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972) (quoting Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914)); *see* Brad Nokes et al., *Difficult Discharges: Sending Patients Out Without Getting Into Trouble*, 14 J. HEALTH & LIFE SCI. L. 60, 81 (2020) ("Autonomy and self-determination have long been pillars of informed consent."); *cf.* Samuel D. Hodge, Jr. & Jack E. Hubbard, *Covid-19: The Ethical and Legal Implications of Medical Rationing*, 56 GONZ. L. REV. 159, 183 (2021) (footnotes omitted) ("There may come a time when hospitals will have to make difficult decisions on how to ration ventilators. Some say that ethical principles should be the guide for ventilator allocation based upon 'respect for persons and their autonomy, beneficence . . . , and justice.' This first principle, deference and respect to patients and their autonomy, mandates doctors secure a person's informed consent and honor any informed refusal." (quoting Ventilator Document Workgroup, *Ethical Considerations for Decision Making Regarding Allocation of Mechanical Ventilators During a Severe Influenza Pandemic or Other Public Health Emergency*, CDC 10 (July 1, 2011), https://www.cdc.gov/about/advisory/pdf/VentDocument_Release.pdf [https://perma.cc/6ACH-C4E9])).

39. DAN B. DOBBS ET AL., HORNBOOK ON TORTS 513 (2d ed. 2016).

40. *Id.* at 495 (footnote omitted).

breach of the professional duties the physician owes to the patient.[41] That breach will permit the patient to recover damages from the physician in a negligence action, even if the physician otherwise exercised care, provided the plaintiff proves that but for the nondisclosure the patient would have chosen a different course and thereby avoided the harm caused by the undisclosed risks.[42] "Some courts require the physician to disclose all material information, while others say that what the physician must disclose is determined by medical custom, not by what is relevant to the patient's decision-making."[43]

As summarized by the Ohio Court of Appeals:

> The tort of lack of informed consent, as established in Ohio, contains the following requirements:
>
> (a) The physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any;
>
> (b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and
>
> (c) a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy.[44]

A. *Materiality*

With respect to materiality, it is normally "for the trier of fact to determine whether a reasonable person in the plaintiff's position would have

41. *See* Brodsky v. Osunkwo, No. L-2564-08, 2012 WL 1161598, at *2 (N.J. Super. Ct. App. Div. Apr. 10, 2012) (reinstating an informed consent negligence claim against a doctor who failed to tell a sixteen-year-old male leukemia patient that chemotherapy would cause infertility and he could have banked his sperm before submitting to the treatment).

42. DAN B. DOBBS ET AL., *supra* note 39, at 515 (requiring a plaintiff to prove proximate causation).

43. *Id.* at 495 (footnote omitted).

44. Tye v. Beausay, 156 N.E.3d 331, 342–43 (Ohio Ct. App. 2020); *see also* DAN B. DOBBS ET AL., *supra* note 39, at 515 (footnotes omitted) ("[T]he plaintiff must prove five things: (1) nondisclosure of required information[;] (2) actual damage . . . [;] (3) resulting from risks about which the patient was not informed; (4) factual cause, which is to say that the plaintiff would have rejected the medical treatment if she had known the risk[;] and (5) that reasonable persons, if properly informed, would have rejected the proposed treatment.").

attached significance to the undisclosed material risks and dangers inherently and potentially involved with the procedure and would have decided against the procedure."[45] However, the test for materiality in some states may be objective or subjective. In such jurisdictions, information is material if it is that "which a reasonable patient would consider in deciding whether to undergo the medical procedure[,]"[46] *or* "[i]f the patient attaches special importance to some particular matter and the doctor knows or should know [that] . . . ."[47]

B. *Exceptions*

Case law and commentary have recognized there are a limited number of situations where a disclosure of risks need not be made. As the Supreme Court of Oklahoma explained in *Scott v. Bradford*:[48]

> There is no need to disclose risks that either ought to be known by everyone or are already known to the patient. Further, the primary duty of a physician is to do what is best for his patient and where full disclosure would be detrimental to a patient's total care and best interests a physician may withhold such disclosure, for example, where disclosure would alarm an emotionally upset or apprehensive patient. Certainly too, where there is an emergency and the patient is in no condition to determine for himself whether treatment should be administered, the privilege may be invoked.[49]

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45. *Tye*, 156 N.E.3d at 343 (quoting White v. Leimbach, 959 N.E.2d 1033, 1041 (Ohio 2011)); *cf.* DAN B. DOBBS ET AL., *supra* note 39, *at* 517 (stating "expert testimony is not required" on the issue of materiality). *But see id.* at 516 (footnotes omitted) ("[A] little more than half the states, many under the command of a statute, appear to adopt the medical standard of disclosure as a general rule rather than the materiality standard, or alternatively specify major limitations on the claim that are more demanding than the materiality standard.").

46. DAN B. DOBBS ET AL., *supra* note 39, at 518 (quoting Moure v. Raeuchle, 604 A.2d 1003, 1008 (Pa. 1992)).

47. *Id.*

48. Scott v. Bradford, 606 P.2d 554 (Okla. 1979).

49. *Id.* at 558 (footnotes omitted); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 192 (5th ed. 1984) (footnotes omitted) (stating "the physician is not required to disclose risks that are unexpected or immaterial" or where the patient has waived the "right to receive the information"); Conklin v. Hannoch Weisman, P.C., 678 A.2d 1060, 1069 (N.J. 1996) (discussing informed consent in the legal malpractice context, the court stated "some clients may sufficiently understand aspects of a financial transaction, such as the priority of mortgages, so as not to impose a duty on their lawyer to explain the transaction in detail").

C. *Factual Causation of Damages*

Because all negligence actions require proof that damage was caused by a breach of duty, a patient must show, in an informed consent action, not only that there was a failure to disclose but also that the non-disclosure was causally related to some injury. No action will lie if the factfinder believes the patient would have consented to the same course of treatment had full disclosure been made.[50] Of course, it is difficult to ascertain, retrospectively, what a patient would or would not have done had the facts been different, and courts, predictably, are split on the question of what test to apply in making that inquiry.

Most jurisdictions have rejected the subjective approach and have adopted an objective test, which inquires whether a reasonable person would have consented to the treatment if the risks and alternatives had been disclosed.[51] The theory is that if a reasonable person would have refused treatment, it is likely this particular plaintiff would also have refused.

Some states hold that both a subjective test and an objective test must be met.[52] In these jurisdictions, a patient will not recover damages in an informed consent action if, when fully informed, either a reasonable person or the particular plaintiff would have agreed to the treatment in question.[53]

D. *Medical Informed Consent Statutes*

In some states, the common law doctrine of informed consent in medicine has been augmented or replaced by statutory developments. For example, Texas has adopted detailed legislation[54] which creates a state Medical Disclosure Panel "to determine which risks and hazards related to

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50. *But see* Fitzpatrick v. Natter, 961 A.2d 1229, 1237 (Pa. 2008) (citation omitted) (stating a patient bringing a claim based on lack of informed consent must prove the undisclosed "information would have factored substantially into her decision-making process. The patient need not show that she would have chosen differently had she possessed the missing information, but only that the missing information would have been a substantial factor in this decision").

51. *See* Ashe v. Radiation Oncology Assocs., 9 S.W.3d 119, 122–24 (Tenn. 1999) (endorsing the majority objective standard, which requires the jury to find that a reasonable person would have made a different decision).

52. *See* DAN B. DOBBS ET AL., *supra* note 39, at 522 (discussing the dual requirement).

53. *See id.* ("[T]he plaintiff will fail if she would have accepted the medical procedure even when fully informed, and she will also fail if she would have rejected [treatment] but a reasonable person would not have.").

54. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.101–.107 (regulating the only theory of recovery, the duties and responsibilities of the Texas Medical Disclosure Panel, the disclosure duty of physicians or health care providers, the manner and effect of such disclosures, and informed consent for hysterectomies).

medical care and surgical procedures must be disclosed by health care providers or physicians . . . ."[55] A New York statute provides:

> *Limitation of medical, dental or podiatric malpractice action based on lack of informed consent*
>
> 1. Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.
> 2. The right of action to recover for medical, dental or podiatric malpractice based on a lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body.
> 3. For a cause of action therefor it must also be established that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought.
> 4. It shall be a defense to any action for medical, dental or podiatric malpractice based upon an alleged failure to obtain such an informed consent that:
>
>   (a) the risk not disclosed is too commonly known to warrant disclosure; or
>
>   (b) the patient assured the medical, dental or podiatric practitioner he would undergo the treatment, procedure or diagnosis regardless of the risk involved, or the patient assured the medical, dental or podiatric practitioner that he did not want to be informed of the matters to which he would be entitled to be informed; or
>
>   (c) consent by or on behalf of the patient was not reasonably possible; or
>
>   (d) the medical, dental or podiatric practitioner, after considering all of the attendant facts and circumstances, used reasonable discretion as to the manner and extent to which such alternatives or risks were disclosed to the patient because he reasonably believed that the manner and extent

55. TEX. CIV. PRAC. & REM. CODE ANN. § 74.102(a).

> of such disclosure could reasonably be expected to adversely and substantially affect the patient's condition.[56]

Some courts have held that carelessness on the part of a patient is a defense to an action under the state medical informed consent statute. For example, in *Brown v. Dibbell*,[57] the Supreme Court of Wisconsin stated:

> A patient is usually the primary source of information about the patient's material personal, family and medical histories. If a doctor is to provide a patient with the information required by Wis. Stat. § 448.30, it is imperative that in response to a doctor's material questions a patient provide information that is as complete and accurate as possible under the circumstances.[58]

III. INFORMED CONSENT IN THE LAW OF LAWYER DISCIPLINE

With respect to the practice of law, there is some evidence informed consent principles may have been recognized in legal malpractice actions for damages even before they formed the basis for lawyer discipline.[59] However, during the past two decades, the pattern of development has been strongly to the contrary, spreading informed consent principles from lawyer ethics codes to the common law principles, which define the terms for legal malpractice liability.

The American Bar Association (ABA) *Model Code of Professional Responsibility* (Model Code) was promulgated in 1969, and the Model Code was amended at various times as late as 1980.[60] Versions of the Model Code were once the law in almost every state.[61] A search of the 1980 text

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56. N.Y. PUB. HEALTH LAW § 2805-d (McKinney 2021).

57. Brown v. Dibbell, 595 N.W.2d 358 (Wis. 1999).

58. *Id.* at 368.

59. *See* Martyn, *supra* note 13, at 330 (discussing caselaw demonstrating the importance of informing clients about their options). Professor Martyn stated long ago:

> Clients have successfully alleged in malpractice suits, or as grounds for other relief, failure to disclose information material to the client's decision, failure to disclose conflicts of interest, and failure to disclose an attorney's opinion regarding the merits of a case. By creating an affirmative duty to inform the client, these decisions permit the client to make an informed choice about the next course of action.

Id. (footnotes omitted).

60. *See generally* MODEL CODE OF PROF'L RESP. (AM. BAR ASS'N 1980) (detailing the responsibilities of lawyers).

61. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 56 (1986) ("[T]he 1969 Code was an impressive and quick success."). "[B]y 1972 the adoption committee could report that every

of the Model Code reveals that nowhere did it use the term "informed consent," even though the term "consent" was mentioned in at least eight Ethical Considerations (ECs)[62] and eight Disciplinary Rules (DRs).[63] By 1980, "informed consent," as a term of art, had not yet found a place in the language of lawyer discipline, nor in the developing field of legal malpractice. In 1980, Professor Mark Spiegel wrote:

> The doctrine of informed consent . . . combines the patient's right to make a decision with a requirement that the physician provide sufficient information to make the exercise of that right meaningful. No similar general doctrine applies to the lawyer-client relationship.[64]

Yet, it is possible to see that by 1980 the law of lawyering was moving in the direction of recognizing the doctrine of informed consent as a key principle. At least two ECs[65] and four DRs[66] in the Model Code coupled consent with a requirement of full disclosure. One DR was even more specific, conditioning consent to an aggregate settlement on the prior disclosure of the "existence and nature of all the claims . . . ."[67] By 1986, Professor Charles Wolfram's landmark hornbook, *Modern Legal Ethics*, richly detailed "[a] fuller description than the lawyer codes suggest" concerning "the contents of a disclosure or consultation specifically addressed to conflicts problems."[68]

In 1983, the Model Code of Professional Responsibility was superseded as a pattern ethics code by the ABA *Model Rules of Professional Conduct* (Model Rules).[69] The Model Rules have frequently been amended. The current version of the Model Rules defines the term "informed consent" as follows:

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jurisdiction had taken steps to adopt the Code except three states . . . . Two of those states adopted the Code soon thereafter, and it has had a strong influence in California as well . . . ." *Id.* at 56–57 (footnote omitted).

62. *See* MODEL CODE OF PROF'L RESP. ECS 2-21, 2-22, 4-2, 4-5. 5-3, 5-16, 6-3, 7-18 (AM. BAR ASS'N 1980) (mentioning "consent").

63. *See id.* at DRS 2-107, 4-101, 5-101, 5-104, 5-105, 5-106, 5-107, 7-104 (noting the same).

64. Spiegel, *supra* note 13, at 48–49.

65. *See* MODEL CODE OF PROF'L RESP. ECS 4-2, 4-5 (AM. BAR ASS'N 1980) (requiring consent after full disclosure).

66. *See id.* at DRS 4-101, 5-101, 5-104, 5-107 (requiring the same).

67. *Id.* at DR 5-106.

68. WOLFRAM, *supra* note 61, at 345.

69. *See* Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 348 (2008) (footnotes omitted) ("Despite [the Model Code's] overwhelming success, the ABA appointed a commission in 1977 to evaluate 'all facets of legal ethics.' The commission, chaired by Nebraska lawyer Robert Kutak, fashioned the Model Rules of Professional Conduct, approved by the ABA in 1983.").

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.[70]

The term informed consent, which was added to the Model Rules in 2002, "replaced the term 'consent after consultation,' which had been used in the rules as promulgated in 1983."[71] "[The] change in terminology was not controversial, because everyone agreed that the original phraseology was intended to convey exactly the same meaning . . . ."[72]

The term "informed consent" is used today in the Model Rules in ten blackletter rules (often coupled with a requirement that the informed consent be "confirmed in writing")[73] and eight official comments.[74] The blackletter rules provide as follows:

- Model Rule 1.2 ("Scope of Representation & Allocation of Authority Between Client & Lawyer"): "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent[;]"[75]
- Model Rule 1.4 (Communications): "A lawyer shall . . . promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules[;]"[76]
- Model Rule 1.6 (Confidentiality of Information): "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure

70. MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (AM. BAR ASS'N 2020).

71. GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING 3-6 (4th ed. 2020).

72. *Id.*

73. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0(b) (AM. BAR ASS'N 2020) ("'Confirmed in writing,' when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.").

74. *Id.* at R. 1.1 cmt. 6, R. 1.7 cmt. 1, R. 1.10 cmt. 6, R. 1.17 cmt. 11, R. 3.7 cmt. 6, R. 5.4 cmt. 2, R. 6.5 cmt. 2, R. 8.5 cmt. 5.

75. *Id.* at R. 1.2(c).

76. *Id.* at R. 1.4(a)(1).

is permitted by paragraph (b) [which details seven exceptions to the duty of confidentiality;]"[77]

- Model Rule 1.7 ("Conflict of Interest: Current Clients"): "Notwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if: . . . each affected client gives informed consent, confirmed in writing[;]"[78]
- Model Rule 1.8 (Conflict of Interest: Current Clients: Specific Rules):

  (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

  . . . .

  (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction;[79]

  (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

  (1) the client gives informed consent;[80]

  (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client.[81]

- Model Rule 1.9 (Duties to Former Clients):

  (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are

77. *Id.* at R. 1.6(a)–(b).
78. *Id.* at R. 1.7(b)(4).
79. *Id.* at R. 1.8(a)(3).
80. *Id.* at R. 1.8(f)(1).
81. *Id.* at R. 1.8(g).

materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.[82]

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.[83]

- Model Rule 1.11 ("Special Conflicts of Interest for Former & Current Government Officers & Employees"):

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c) [restricting use or disclosure of information concerning a former client]; and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.[84]

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate

82. *Id.* at R. 1.9(a).
83. *Id.* at R. 1.9(b).
84. *Id.* at R. 1.11(a)(1)–(2).

> government agency gives its informed consent, confirmed in writing . . . .[85]

- Model Rule 1.12 ("Former Judge, Arbitrator, Mediator or Other Third-Party Neutral"):

> (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.[86]

- Model Rule 1.18 (Duties to Prospective Client): "When the lawyer has received disqualifying information . . . representation is permissible if: (1) both the affected client and the prospective client have given informed consent, confirmed in writing";[87] and

- Model Rule 2.3 ("Evaluation for Use by Third Persons"): "When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent."[88]

The unifying threat running throughout these black letter rules is that a clear majority of the quoted informed consent provisions deal with conflicts of interest.[89] However, four of the informed consent provisions are definitely more wide-ranging and may apply to matters not involving conflicts of interest. These include: Model Rule 1.2 (Scope of Representation);[90] Model Rule 1.4 (Communications), Model Rule 1.6

85. *Id.* at R. 1.11(d)(1)–(2)(i).

86. *Id.* at R. 1.12(a).

87. *Id.* at R. 1.18(d)(1).

88. *Id.* at R. 2.3(b).

89. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 122 (AM. L. INST. 2000) ("(1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.").

90. *See* SCB Diversified Mun. Portfolio v. Crews & Assocs., No. 09-7251, 2012 WL 13708, at *2 (E.D. La. Jan. 4, 2012) (noting plaintiff unsuccessfully sought to recover damages against the

(Confidentiality of Information), and Model Rule 1.1 comment 6 (Competence).[91] Thus, it is not possible to minimize the breadth of informed consent principles in lawyer discipline by dismissing them as merely special rules related to conflicts of interest. Instead, these disclosure requirements define a broader range of obligations.

A failure to obtain informed consent when required by applicable disciplinary rules will, of course, give rise to disciplinary liability.[92] The next Part examines how informed consent principles have been broadly incorporated into legal malpractice jurisprudence. Three types of cases are examined: (1) malpractice cases applying the informed consent provisions set down in the Model Rules or state variations thereof; (2) malpractice cases expressly recognizing the obligations of lawyers to obtain informed consent, but not expressly relying on provisions in the Model Rules or state variations; and (3) malpractice cases recognizing the obligation of lawyers to disclose the risks of, and alternatives to, a proposed course of action, but without using the language of informed consent or expressly relying on the Model Rules or state variations. These cases show, in a wide range of disputes, failure to disclose risks and alternatives and obtain informed consent will support a legal malpractice action for damages.

Over the course of many years, the extension of informed consent principles from medical malpractice law to legal malpractice law was aided by the arguments of scholars who sought to advance this course of jurisprudential development.[93] The continuing influence of medical

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defendants for, among other things, "failure to obtain informed consent for the limited scope of representation it outlined in its engagement letter").

91. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 6 (AM. BAR. ASS'N 2020) ("Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client.").

92. *See* Cincinnati Bar Ass'n v. Begovic, 137 N.E.3d 87, 92, 95 (Ohio 2019) (imposing a one-year suspension from practice based on various ethics violations, including the lawyer's violation of "his duty to inform the client of any decision or circumstance with respect to which the client's informed consent was required and the duty to keep the client reasonably informed"); *see also* Iowa Sup. Ct. Att'y Disciplinary Bd. v. Willey, 889 N.W.2d 647, 658 (Iowa 2017) (suspending an attorney's license to practice law "with no possibility of reinstatement for sixty days" based on failure to obtain informed consent to various conflicts); Att'y Grievance Comm'n of Md. v. Shapiro, 108 A.3d 394, 418 (Md. 2015) (basing an indefinite suspension, in part, on violations of the informed consent duties imposed by the disciplinary rules); Cleveland Metro. Bar Ass'n v. Walker, 32 N.E.3d 437, 438–39 (Ohio 2015) (imposing a one-year suspension based, in part, on a violation of informed consent requirements).

93. *See* Martyn, *supra* note 13, at 310–11, 346–47 (examining the "philosophical basis and the common law roots of the informed consent doctrine" and proposing a model statute); *see also* Lisa G.

malpractice law on legal malpractice law is sometimes vividly apparent with respect to informed consent. In Washington State, for example, the language of the legal malpractice informed consent jury instruction "is nearly identical to Washington pattern instruction 105.04, the medical health care informed consent instruction."[94]

IV. INFORMED CONSENT IN LEGAL MALPRACTICE LAW

It is not surprising that the doctrine of informed consent is now recognized in legal malpractice law as well as medical malpractice law:

> Clients, like patients, have a right to exercise extensive control over their own affairs, including their legal representation. Consequently, there is no reason why the informed consent doctrine should not apply as readily to legal malpractice cases as it does in suits against physicians.[95]

A. *Malpractice Cases Citing and Applying Informed Consent Provisions Found in Ethics Rules*

It is well established that the mere violation of a disciplinary rule by an attorney does not create a civil cause of action for an aggrieved client. However, it is equally clear that in legal malpractice actions, many courts treat the disciplinary rules as evidence of the standard of care, and violations of those rules as evidence of professional negligence or breach of fiduciary duty. According to the *Restatement (Third) of the Law Governing Lawyers*:

Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 670 (1990) ("Some scholars call for an informed consent doctrine in legal malpractice, such as has become a standard in medical malpractice."); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 515 n.1 (stating "[m]uch has been written over the past two decades about informed consent and its applicability to lawyering" and identifying commentators and scholars).

94. Edleman v. Russell, 167 Wash. App. 1050, at *4 n.3 (Apr. 30, 2012).

95. Fortney & Johnson, *Legal Malpractice*, *supra* note 1, § 5-2.2(n), at 769. *But see* Conklin v. Hannoch Weisman, 678 A.2d 1060, 1069 (N.J. 1996) ("The difference that we see is that in many instances the business client, unlike the medical patient, is not sick when the client consults an attorney. The business client is often motivated to enter into a legal transaction for many more reasons than a medical patient and may be at no risk at all at the inception of the transaction. Moreover, while most patients will not appreciate the risks of medical treatments absent an explanation by a doctor, many clients may understand as well as their attorney, if not better, the risks of a commercial business transaction.").

> Proof of violation of a rule or statute regulating the conduct of lawyers:
>
> (a) does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty;
>
> (b) does not preclude other proof concerning the duty of care . . . ; and
>
> (c) may be considered by a trier of fact as an aid in understanding and applying the standard of [care] to the extent that (i) the rule or statute was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant's claim.[96]

Legal malpractice cases frequently refer to the informed consent requirements imposed by the Model Rules, or state variations thereof, in explaining the standard of care applicable to claims by clients against lawyers.[97] Some of these cases do little to illuminate the requirements of

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96. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 52(2) (AM. L. INST. 2000).

97. *See, e.g.*, Dziesinski v. Mack, No. 208555, 1999 WL 33327124, at *1 (Mich. Ct. App. Dec. 10, 1999) ("Defendant failed to discuss with plaintiffs any potential or actual conflict of interest arising out of his simultaneous representation of them and Brian. Disclosure of any such potential or actual conflict of interest is required. MRPC 1.7. . . . [I]t was more likely than not that defendant's actions resulted in actual injury to plaintiffs . . . ."). *But see* ITC Com. Funding, LLC v. Crerar, 713 S.E.2d 335, 337–38 (S.C. Ct. App. 2011) (stating the rule does not create a presumption of a breach of duty). The *Crerar* court wrote:

> The Appellant argues West represented her in default negotiations for one year, and she had the right to assume he would continue to represent her. The Appellant contends that considering her age and inexperience in legal matters, West's letter should have contained an explanation of the risks regarding his limited representation. She also maintains West should have discussed his representation with her personally and in the presence of a family member or family attorney, and obtained a response from her to ensure she understood his inability to represent her. The Appellant contends the trial court erred in failing to consider Rule 1.2 of the Rules of Professional Conduct (RPC), Rule 407, SCACR.
>
> Pursuant to Rule 1.2(c), RPC: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Informed consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."
>
> . . . .
>
> We find the trial court did not abuse its discretion in finding West's letter to the Appellant sufficiently advised her that West could not represent her. While the Appellant maintains she is entitled to relief from judgment because she did not give West her informed consent pursuant to Rule 1.2(c), RPC, we note our supreme court determined "the failure to comply with the RPC should not . . . be considered as evidence of negligence per se." Smith v. Haynsworth, Marion,

informed consent or the potential applicability of informed consent obligations to cases not citing disciplinary rules imposing such requirements. Other cases are very much to the contrary.

1. The Aggregate Settlement Rule

Some of the references in legal malpractice cases to "informed consent" are related to the Model Rule provision imposing informed consent requirements tied to aggregate settlements.[98] Consider, for example, *Frank v. OOO RM Invest*.[99] In that case, the analysis of a federal court in New York unhesitatingly embraced provisions patterned on the informed consent requirements of Model Rule 1.8(g)[100] in ruling on motions in a legal malpractice case. As the court explained:

> The parties dispute the relevance of a rule governing the Florida Bar, referred to as an "aggregate settlement rule," which provides that "[a] lawyer who represents 2 or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client." The Settling Parties' counterclaim alleges that the Frank Parties committed legal malpractice by negotiating the underlying settlement "without first seeking and obtaining an agreement among the Settling Parties regarding the division of the Settlement

> McKay & Geurard, 322 S.C. 433, 437 n.6, 472 S.E.2d 612, 614 n.6 (1996); *see also* Preamble to RPC, Rule 407, SCACR ("[A] violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached").

Id. at 337–38 (alterations in original) (second omission in original).

98. *See* Booth v. Davis, No. 10-4010-KHV, 2016 WL 1624076, at *8 (D. Kan. Apr. 25, 2016) ("[P]laintiffs assert that Davis breached his duties to Connie and Scott Booth (1) in negotiating the aggregate settlement without pushing for a better offer, (2) failing to disclose to Connie Booth the existence and nature of all claims and the participation of each person in the aggregate settlement and thus (3) failing to obtain her informed consent to the aggregate global settlement."). Booth was later affirmed. Booth v. Davis, 690 F. App'x 571, 573–75 (10th Cir. 2017). The opinion of the Tenth Circuit mentioned, but did not discuss, the informed consent requirement for aggregate settlements. *Id.* at 573, 575.

99. Frank v. OOO RM Inv., No. 17-CV-1338 (NGG) (ARL), 2020 WL 7022317 (E.D.N.Y. Nov. 30, 2020).

100. MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (AM. BAR ASS'N 2020) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.").

> Funds as required by Rule 4-1.8(g)." . . . [U.S. Magistrate] Judge Lindsay recommended denying the Frank Parties' motion to dismiss this aspect of the malpractice claim, finding that the Frank Parties' compliance with the rule was a factual issue, and that its alleged violation of the rule could be evidence of negligence. . . .
>
> The Settling Parties contend that by failing to address the apportionment of the settlement among its clients, the Frank Parties deprived them of their ability to give informed consent to the settlement, as required by the aggregate settlement rule. . . .
>
> Because the Frank Parties do not adequately establish that their alleged failure to counsel their clients to determine how the settlement funds would be divided is not actionable, the court agrees with Judge Lindsay and declines to dismiss that aspect of the legal malpractice counterclaim.[101]

The *Frank* opinion further indicates the court believed informed consent language based on the Model Rules is shaping the law of legal malpractice broadly. The court wrote:

> Khavinson's objection to Judge Lindsay's consideration of the aggregate settlement rule misses the mark. Khavinson suggests that the rule is irrelevant to the evaluation of whether he behaved negligently because he is not a member of the Florida Bar and did not seek [pro hac vice] admission . . . in connection with the underlying litigation. However, as the Settling Parties point out, the Bars of many other states, including New York, have substantially identical rules. Thus, regardless of which jurisdiction's rule applied to Khavinson, he cannot establish that the substance of the aggregate settlement rule was irrelevant to the standards of professional conduct that governed his behavior. . . . [T]he court finds that the counter-defendants' compliance with the aggregate settlement rule is relevant evidence regarding their alleged negligence . . . .[102]

In *Jones v. ABC Insurance Co.*,[103] a Louisiana appellate court appeared to have no doubt that a legal malpractice claim could be grounded in the "informed consent" language of Louisiana's versions of Model Rule 1.8

101. *Frank*, 2020 WL 7022317, at *14 (first alteration in original) (first omission in original) (citations omitted).

102. *Id.* at *16 (citations omitted).

103. Jones v. ABC Ins. Co., 249 So. 3d 310 (La. Ct. App. 2018).

(dealing with aggregate settlements) and Model Rule 1.4 (dealing with communication). The court wrote:

> Rule 1.4 of the Rules of Professional Conduct requires that an attorney give a client sufficient information to participate intelligently in decisions concerning the objectives of the representation. A legal malpractice claim for failure to obtain informed consent, therefore, is based upon allegations that the attorney failed to properly communicate sufficient information to the client in order that the client can make an intelligent decision concerning the objectives of the representation. The issue of lack of informed consent therefore raises the question of with whom Mr. Roth had a duty to communicate regarding the settlement of Haley's lawsuit.[104]

The *Jones* court answered that question adverse to the plaintiff because the lawyer who was first hired to represent the interests of an unemancipated child in a personal injury suit had been discharged by the plaintiff's mother, who subsequently hired another lawyer who represented the child's interests at the time of settlement.[105]

2. The Former Client Conflict of Interest Rule

Today, cases readily adopt the informed consent language of the Model Rules, or the relevant state variation, as defining the standard of care in legal malpractice actions. For example, in *Abreu v. Mackiewicz*,[106] a legal malpractice action, a New Jersey appellate court reviewed a no cause judgment after a jury trial. In affirming the judgment, the court wrote:

> After informing the jury that RPC 1.7 [the current client conflict of interest rule] did not apply, but RPC 1.9 [the former client conflict of interest rule] did, the court recited RPC 1.9(a), which states: "A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing." The court instructed, "Now . . . that's the duty that Mr. Mackiewicz had. Whether he breached that

104. *Id.* at 319.

105. *Id.* at 320.

106. Abreu v. Mackiewicz, No. A-2828-09T3, 2012 WL 6027701 (N.J. Super. Ct. App. Div. Dec. 5, 2012).

> duty involves an assessment of the facts which you have to decide." The court proceeded to . . . explain what constituted "informed consent."[107]

The appellate court held it was not reversible error for the trial judge to distribute to the jury a written copy of New Jersey's version of Model Rule 1.9 (and its informed consent requirements) because "[t]he distribution of the rule was designed to avoid confusion, and was not likely to lead to overemphasis on the rule."[108]

In *Annie Sloan Interiors, Ltd. v. Kappel*,[109] Annie Sloan Interiors (ASI) alleged that an attorney, Kappel, breached his fiduciary duties and committed legal malpractice "by representing Jolie Design & Decor, Inc. ("JDD") and Jolie Home, LLC ("Jolie Home") in an attack on the CHALK PAINT® trademark" despite the fact that "he had previously represented ASI in registering and defending the trademark."[110] In denying the defendant's motion to dismiss, a federal court in Louisiana relied in part on the informed consent language of a Louisiana former client conflict of interest rule patterned on ABA Model Rule 1.9.[111] The court wrote:

> The Louisiana State Bar Association's Rules of Professional Conduct ("RPC") "have the force and effect of substantive law."
>
> . . . .
>
> By its terms, the duty of loyalty codified in RPC 1.9 applies to former representation, and thus survives termination of the representation. Accordingly, the 2015 termination letter, if effective, is irrelevant to the breach of fiduciary duty claim based upon Kappel's former representation. Second, no breach of confidentiality is required to bring a claim under RPC 1.9(a). All that is required is that the new client's interests be adverse to the original client's interests in a substantially related matter, and that the original client did not provide *informed consent* to the new representation.

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107. *Id.* at *10 (first omission in original).

108. *Id.* at *13.

109. Annie Sloan Interiors, Ltd. v. Kappel, No. 19-807, 2019 WL 2492303 (E.D. La. June 14, 2019).

110. *Id.* at *1.

111. Model Rule 1.9 provides in relevant part: "(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." MODEL RULES OF PROF'L CONDUCT R. 1.9 (AM. BAR ASS'N 2020).

> Defendants argue that ASI provided *informed consent* to Kappel's later representation of JDD and Jolie Home, because ASI executed a conflict waiver at the time Kappel took on the representation. However, while a conflict waiver was executed waiving the conflict with Kappel with respect to representation of ASI and JDD, no waiver was executed waiving a conflict with respect to Kappel's subsequent representation of Jolie Home. Therefore, the waiver does not constitute *informed consent* to Kappel's representation of Jolie Home.
>
> . . . .
>
> In sum, ASI's argument is straightforward: it alleges that Kappel breached a duty of loyalty by using knowledge gained during his representation of ASI to assist a different client in a challenge to its mark, and that its damages consist of the money expended in defending the mark and any resulting diminution in the value of the mark. The claim is plausible on its face, and under the facts pleaded, the court could "draw the reasonable inference that the defendant is liable for the misconduct alleged," and thus the claim can withstand a 12(b)(6) challenge.[112]

The court's three quoted references to informed consent leave little doubt it believed informed consent was an essential touchstone in determining whether there was a breach of fiduciary duty based on an alleged former client conflict of interest. In addition, the court found that in the absence of "informed consent to Kappel's representation of Jolie Home," a claim for breach of fiduciary duty was "plausible on its face."[113]

3. The Current Client Conflict of Interest Rule

The informed consent requirements imposed by the current client conflict of interest provisions of the Model Rules, and by state variations,[114]

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112. *Kappel*, 2019 WL 2492303, at *2–3 (emphasis added) (citations omitted).

113. *Id.* at 3.

114. *See* England v. Feldman, No. 11 Civ. 1396(CM), 2011 WL 1239775, at *4–5 (S.D.N.Y. Mar. 28, 2011) (refusing to dismiss a legal malpractice claim based on negligence because the defendant's alleged violation of the informed consent requirements for joint representation set down in the state's disciplinary rules tended to show the defendant's conduct fell below the standard of care); *see also* Flycell, Inc. v. Schlossberg LLC, No. 11-CV-0915-CM, 2011 WL 5130159, at *7 (S.D.N.Y. Oct. 28, 2011) (discussing a malpractice claim alleging "[d]efendants ignored their duties to investigate conflicts of interest associated with their dual representation and seek [p]laintiff's informed consent"); Frias Holding Co. v. Greenberg Traurig, LLP, No. 2:11-cv-160-GMN-VCF, 2012 WL 4490855, at *7 (D. Nev. Sept. 27, 2012) (discussing "a plausible [legal malpractice] claim that [d]efendants failed to obtain [p]laintiffs' informed consent to [a] conflict").

are readily recognized in legal malpractice actions for damages[115] and related litigation, such as claims for disgorgement[116] or unpaid attorney's fees.[117] Ordinarily, "[a] proper conflict waiver requires the client's 'informed written consent,' meaning the attorney must tell the client about all the relevant circumstances and material risks, including any actual and reasonably foreseeable adverse consequences from the representation."[118] The Restatement is even more specific:

> In a multiple-client situation, the information normally should address the interests of the lawyer and other client giving rise to the conflict; contingent,

115. For example, in *Rivera v. Estate of Ruiz*, a federal court in New York wrote:

> In an action for legal malpractice where a plaintiff alleges that her attorney had a conflict of interest, "the client must demonstrate that (1) a conflict existed and (2) that [she] was damaged thereby." . . . If such a conflict exists, Rule 1.7(b) states that, in order [for a lawyer] to represent parties with conflicting interests, . . . "each affected client" must give "informed consent, confirmed in writing."

Rivera v. Est. of Ruiz, No. 16 Civ. 7328 (ER), 2020 WL 1503663, at *4 (S.D.N.Y. Mar. 30, 2020) (first alteration in original) (citation omitted). *See* Scott v. Chuhak & Tecson, P.C., No. 09 C 6858, 2011 WL 4462915, at *5 (N.D. Ill. Sept. 26, 2011) (alterations in original) ("Rules 1.4 and 1.7, which require a lawyer to obtain informed consent from a client when 'there is a significant risk that the [lawyer's] representation of [the client] will be materially limited by the lawyer's responsibilities to another client,' are the embodiment of the duty of 'undivided fidelity' that lawyers, as a matter of law, owe to their clients."); Stanley v. Richmond, 41 Cal. Rptr. 2d 768, 774, 776 (Cal. Ct. App. 1995) (finding claims for professional negligence and breach of fiduciary duty in an action involving failure to obtain informed written consent to a conflict of interest); LK Operating, LLC v. Collection Grp., 331 P.3d 1147, 1168 (Wash. 2014) (affirming a malpractice judgment where an attorney "violated former RPC 1.7 by engaging in simultaneous representation of multiple clients with adverse interests without making the necessary disclosures or receiving the clients' informed consent"); Salvemini v. Spector, No. A-3579-11T2, 2013 WL 6508500, at *5 (N.J. Super. Ct. App. Div. Dec. 13, 2013) ("The judge instructed the jury that it could consider RPC 1.7 . . . in determining the standard of care and any deviation from that standard.").

116. *See* Rodriguez v. Disner, 688 F.3d 645, 653–55 (9th Cir. 2012) (affirming a denial of all fees and stating that "[t]he representation of clients with conflicting interests and without informed consent is a particularly egregious ethical violation that may be a proper basis for complete denial of fees"); Giannini, Chin & Valinoti v. Super. Ct. of San Francisco, 42 Cal. Rptr. 2d 394, 405, 407 (Cal. Ct. App. 1995) (recognizing, in a malpractice action seeking fee disgorgement, the "attorneys' duties to obtain informed consent before engaging [in] representing a client in the face of a potential conflict of interest[,]" and holding summary judgment was improperly granted to the defendant-lawyer).

117. *See* Brown Rudnick, LLP v. Surgical Orthomedics, Inc., No. 13-CV-4348 (JMF), 2014 WL 3439620, at *5, 9 (S.D.N.Y. July 15, 2014) (quoting the informed consent requirements set down by New York's current-client conflict of interest rule in the context of malpractice claims asserted incidental to a fee dispute).

118. Michael S. Leboff, *Increase Collections and Avoid Costly Fee Disputes: Nine Practical Tips*, 62 ORANGE CNTY. LAW. 37, 37–38 (2020).

> optional, and tactical considerations and alternative courses of action that would be foreclosed or made less readily available by the conflict; the effect of the representation or the process of obtaining other clients' informed consent upon confidential information of the client; any material reservations that a disinterested lawyer might reasonably harbor about the arrangement if such a lawyer were representing only the client being advised; and the consequences and effects of a future withdrawal of consent by any client, including, if relevant, the fact that the lawyer would withdraw from representing all clients.[119]

A lawyer's failure to obtain informed consent to a conflict will establish that the defendant-lawyer breached a duty of care to the client, though it will still be necessary for the plaintiff to prove that the breach caused damages[120] and that the claim is not barred by an applicable defense or privilege.[121]

Sports Management Network v. Busch[122] involved a claim by a race car driver against the lawyer who represented him. One of the issues in the case was whether a fee modification agreement was enforceable by the lawyer against the client. As a federal court in Michigan explained:

> The alleged 2013 RA [Representation Agreement] Modification is violative of Michigan's Rules of Professional Ethics. It required [lawyer] John Caponigro to split his loyalty between his client and his company, between his client and his company's clients, and between his client and his law firm's clients. The Court need not rule on whether all these conflicts were even waivable, because no one ever asked Busch for informed consent. Knowledge[] that one's attorney represents adverse parties is no substitute for a candid explanation of why such conflicts may impair the quality of the attorney's representation, and why retaining outside counsel is advisable. Though an agent's connection to racing teams may be exactly what attracts drivers to seek his or her representation, when the agent is also providing legal services he or she must be sure that the driver understands what he or she is giving up by becoming a client of his boss's attorney.

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119. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 122 cmt. c(i) (AM. L. INST. 2000) (citation omitted).

120. *See* Fortney & Johnson, *Legal Malpractice*, *supra* note 1, § 5-2.3, at 772 (discussing factual and proximate causation); *id.* § 5-5.1, at 851 (discussing compensatory damages).

121. *See id.* § 5-6.1, at 867 (discussing defenses and obstacles to recovery).

122. Sports Mgmt. Network v. Busch, No. 17-10413, 2019 WL 1057314 (E.D. Mich. Mar. 6, 2019).

> Because SMN and FCWS failed to provide his client with a meaningful choice on whether such conflicts were permissible, they will not be able to enforce their 2013 RA Modification. This does not mean that their representation actually caused injury, however. Having reviewed the record, the Court finds that Busch has not advanced sufficient evidence of damages to bring the case to a jury.[123]

In the case of *In re Concepts America, Inc.*,[124] the complaint contained "a single count for legal malpractice[,]" which alleged that the defendants had breached their duties to the plaintiffs by, among other things, "advising Greenfield to 'restructure' operations so that successor entities and Plaintiffs were subjected to claims of fraud and fraudulent transfer," and "failing to properly advise Greenfield of the conflict of interest and his right to independent counsel[.]"[125] The United States Bankruptcy Court sitting in Illinois found that:

> "[The plaintiff's] allegations clearly invoke[d] Defendants' obligations under Illinois Rules of Professional Conduct Rule 1.4(b), to provide necessary information to a client, and Rule 1.7(b), to obtain informed consent when the lawyer's personal interests pose a significant risk of materially limiting the representation."[126]

However, the court found the plaintiffs' pleadings to be deficient. It wrote: "If Plaintiffs wish to allege that RSP Defendants breached its duty of care by failing to provide necessary information and to obtain informed consent, Plaintiffs must amend their complaint to allege sufficient factual matter, accepted as true, to state a claim to relief."[127] The plaintiffs were granted leave to amend their complaint.[128]

4. The Business Transaction Conflict of Interest Rule

In *Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office*,[129] a legal malpractice action, one of the questions was whether an attorney breached

123. *Id.* at *11.
124. *In re* Concepts Am., Inc., No. 14 B 34232, 2020 WL 6929249 (Bankr. N.D. Ill. Aug. 17, 2020).
125. *Id.* at *3–4.
126. *Id.* at *7.
127. *Id.* at *8.
128. *Id.* at *10.
129. Robinson-Podoll v. Harmelink, Fox & Ravnsborg L. Off., 939 N.W.2d 32 (S.D. 2020).

her professional duties to a client, by taking an anniversary ring as collateral for a $3,800.00 loan and continuing to hold the ring without returning it to the client.[130] Discussing relevant authority, the Supreme Court of South Dakota wrote:

> Rule of Professional Responsibility 1.8 prohibits a lawyer from knowingly acquiring "an ownership, possessory security or other pecuniary interest adverse to the client unless:" the attorney satisfies three stated requirements, including a written disclosure by the attorney for the client to seek independent legal advice and a written and signed informed consent by the client. We discussed in *Behrens*, 2005 S.D. 79, ¶ 51, 698 N.W.2d at 576, that Rule 1.8, regarding conflict of interests, may support a separate tort duty.[131]

Thus, the *Robinson-Podoll* court clearly signaled that the informed consent provisions of the disciplinary rule regulating business transactions between lawyers and clients may set the standard of care for a malpractice action.

Other recent cases have reached similar conclusions. For example, in *Sin Ho Nam v. Quichocho*,[132] an "exotic island real estate contract dispute between a Saipan lawyer lessor . . . and a Korean businessman,"[133] the client/lessee asserted a breach of fiduciary duty claim "against the attorney-lessor, with whom the lessee believed that he had an attorney-client relationship."[134] The federal District Court for the Northern Mariana Islands quoted the provisions of Model Rule 1.8, which govern business transactions between lawyers and clients.[135] The court denied the defendant attorney-lessor's motion for summary judgment, stating:

> [T]he greatest uncertainty is whether Nam [the lessee and putative client] gave informed consent not just to the terms of the transaction, but to [attorney-lessor] Quichocho's "role in the transaction, including whether the lawyer is representing the client in the transaction."[136]

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130. *Id.* at 37.
131. *Id.* at 48 n.11.
132. Sin Ho Nam v. Quichocho, 841 F. Supp. 2d 1152 (D. N. Mar. I. 2011).
133. *Id.* at 1154.
134. *Id.*
135. *See id.* at 1178 (alteration in original) (questioning whether Quichocho "fully disclosed and transmitted the terms of the transaction 'in a manner that can be reasonably understood by [Nam]'").
136. *Id.*

5. The Confidentiality Rule

St. John Haney v. Kavoukjian[137] involved professional negligence and breach of fiduciary duty claims that arose from estate planning work.

> [The] Plaintiffs allege[d] Defendant Kavoukjian breached professional and fiduciary duties owed to Muriel Farr when he sent an email in 2016 to a third-party that allegedly represented the Farr Claimants and divulged confidential information obtained during his representation of Muriel Farr.[138]

A federal court in South Carolina recognized the potential relevance of informed consent principles by stating:

> Plaintiffs' claims implicate duties that arise out of a fiduciary relationship. . . . South Carolina Rules of Professional Conduct ("RPC"), Rule 1.6 states that lawyers owe a duty of confidentiality to their clients and "(a) shall not reveal information relating to the representation of a client unless the client gives informed consent, or the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).["]
>
> . . . .
>
> Plaintiffs' claims also implicate a lawyer's duty of loyalty owed to clients. The RPC generally prohibits lawyers from revealing information related to a lawyer's prior representation of a former client. Rule 1.9 reads in pertinent part:
>
> "(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing . . . ."[139]

However, the judge concluded that, on the facts in the case, it was "premature for the Court to determine which duties Defendants owed Muriel Farr and whether Defendants breached any duty or deviated from any standard of care."[140]

137. St. John Haney v. Kavoukjian, No. 2:19-cv-2098-RMG, 2020 WL 2092490 (D.S.C. May 1, 2020).

138. *Id.* at *1.

139. *Id.* at *3. (third omission in original) (footnote omitted) (citation omitted).

140. *Id.* at *5.

In *Parkinson v. Bevis*,[141] the Supreme Court of Idaho addressed a breach of fiduciary duty claim based on breach of confidentiality. The court allowed an equitable fee forfeiture claim to go forward because there were sufficient facts alleging (attorney) Bevis "breached his fiduciary duty to Parkinson by forwarding an email without her informed consent," even if the breach was the result of negligent acts.[142]

B. *Cases Using the Term "Informed Consent" But Not Citing Ethics Rules*

The language of informed consent increasingly appears in legal malpractice cases even when there is no direct link to similar language in the Model Rules or state ethics codes.[143] For example, *Atlanta Channel, Inc. v. Solomon*[144] involved "legal malpractice claims stemming from a [lawyer's] failure to completely fill out a form sent to the Federal Communications Commission" on behalf of a client, ACI.[145] The lawyer (Solomon) then moved to a different law firm—the Garvey Firm—where a Ms. Virtue allegedly "took over ACI's attempt to remedy the effects of the incomplete submission, [and] failed to fulfill several 'obligations' she owed to ACI . . . ."[146]

In the malpractice action, "ACI argue[d] that Ms. Virtue should have alerted ACI that Mr. Solomon had committed malpractice by failing to

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141. Parkinson v. Bevis, 448 P.3d 1027 (Idaho 2019).

142. *Id.* at 1027, 1037.

143. *See* Friedman v. Kahn, No. 1-12-0881, 2013 IL App (1st) 120881-U, ¶¶ 51–54 (Ill. App. Ct. Dec. 27, 2013) (discussing informed consent in legal malpractice and medical malpractice.); Peters v. Hyatt Legal Servs., 469 S.E.2d 481, 484 (Ga. Ct. App. 1996) (stating "Hyatt represented adverse parties in a divorce proceeding without obtaining the informed consent of both," in terms that echoed, but did not cite, the informed consent requirements of Model Rule 1.7 or state variations); Walden v. Hoke, 429 S.E.2d 504, 509–10 (W. Va. 1993) (stating "it is improper for a lawyer to represent both the husband and the wife at any stage of the separation and divorce proceeding, even with full disclosure and informed consent[,]" but finding a legal malpractice action was properly dismissed because "no evidence was presented showing that the [lawyer's] preparation of the answer prejudiced the [plaintiff]").

In *O'Neal v. Agee*, a husband and wife sued their lawyers for legal malpractice arising from their simultaneous representation of the husband's personal injury claims and the wife's loss of consortium claim arising from an auto accident. O'Neal v. Agee, 8 S.W.3d 238, 240–41 (Mo. Ct. App. 1999). In the action, the plaintiffs alleged that "Ms. Agee [a lawyer] was negligent in having them execute general releases, which had the legal effect of releasing drivers # 2 and # 4, without plaintiffs' informed consent." *Id.*

144. Atlanta Channel, Inc. v. Solomon, No. 15-1823 (RC), 2020 WL 4219757 (D.D.C. July 23, 2020).

145. *Id.* at *1.

146. *Id.*

complete the form, that the statute of limitations was running on that claim, that the Garvey Firm had a potential conflict of interest, and that ACI should consult with independent counsel."[147] As stated by a federal court in the District of Columbia, "ACI argues that Ms. Virtue 'failed to obtain ACI's fully informed consent to her assumption of responsibility for and working on the FCC Proceeding and Appeal.'"[148] Without expressly addressing the informed consent claim, the court ruled it would "not declare as a matter of law that Ms. Virtue did not owe her client, ACI, a duty resembling the 'obligations' ACI claims were required."[149]

Similarly, in *D&S Remodeling, LLC v. Pinciaro*,[150] a plaintiff asserting a legal malpractice claim made three references to informed consent, none of them relating to a provision in the Model Rules or a state ethics code that requires informed consent. According to the Connecticut Superior Court, the plaintiff alleged:

> The defendants agreed to provide the plaintiff with legal representation on a number of cases . . . . The defendants settled *Mariani* without the plaintiff's informed consent, and the plaintiff neither consented to the payment of sums to the *Mariani* plaintiffs, nor waived its claims against the *Mariani* plaintiffs. The defendants also filed a withdrawal of action in *ADC*, which was granted by the court on the same day, without the plaintiff's informed consent. . . . The defendants breached the applicable standard of care owed to the plaintiff in that they failed to abide by the plaintiff's wishes and instructions and obtain the plaintiff's informed consent regarding *Mariani* and *ADC* . . . .[151]

However, the court did not rule on the informed consent claims.

1. Arbitration Provisions

There is no provision in the Model Rules that expressly conditions the validity of an arbitration provision in a lawyer-client contract on informed consent from the client. Nevertheless, in *Castillo v. Arrieta*,[152] a New Mexico appellate court found that informed consent was the appropriate standard for determining whether an arbitration provision was valid, stating:

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147. *Id.*
148. *Id.* at *3.
149. *Id.* at *2.
150. D&S Remodeling, LLC v. Pinciaro, 66 Conn. L. Rptr. 369 (Conn. Super. Ct. May 17, 2018) (No. FSTCV1616029768), 2018 WL 2422903, at *1.
151. *Id.* at *1.
152. Castillo v. Arrieta, 368 P.3d 1249 (N.M. Ct. App. 2016).

> We conclude that if an attorney is going to require his client, within the context of their relationship of trust, to waive the right to a jury trial for a future malpractice dispute, such a waiver should be made knowingly with the client's informed consent. "[F]or the purpose of obtaining informed consent, adequate communication will ordinarily include disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives." At a minimum, the attorney should inform his client that arbitration will constitute a waiver of important rights, including, the right to a jury trial, potentially the right to broad discovery, and the right to an appeal on the merits.[153]

The *Castillo* court justified the application of an informed consent standard by reference to an "attorney's fiduciary duties of 'candor and loyalty in all dealings with a client[,]'"[154] and to the Model Rule on communication which requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[155]

Other courts have reached similar conclusions. For example, in *Snow v. Bernstein, Shur, Sawyer & Nelson, P.A.*,[156] the Supreme Judicial Court of Maine held that "Maine attorneys must obtain a client's informed consent regarding the scope and effect of any contractual provision that

153. *Id.* at 1257 (alteration in original) (citation omitted); *see also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 02-425, at 1 (2002) ("It is permissible under the Model Rules to include in a retainer agreement with a client a provision that requires the binding arbitration of disputes concerning fees and malpractice claims, provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement.").

154. *Castillo*, 368 P.3d at 1256 (alteration in original).

155. MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (AM. BAR ASS'N 2020); *see Castillo*, 368 P.3d at 1257 (quoting the New Mexico Rules of Professional Conduct, which are "identical to Model Rule 1.4(b)").

156. Snow v. Bernstein, Shur, Sawyer & Nelson, P.A., 176 A.3d 729 (Me. 2017).

> The Maine Rules of Professional Conduct do not explicitly address the issue presented by this appeal: if, and to what extent, an attorney or law firm must inform a prospective client about the effect of a provision that prospectively requires the client to submit malpractice claims against that attorney or firm to arbitration. However, interpretations of the Rules by both the Maine Professional Ethics Commission and the ABA, expressed in advisory opinions, indicate that for such a provision to comply with the Rules, the client must be fully informed of its scope and effect.

Id. at 735.

prospectively requires the client to submit malpractice claims against those attorneys to arbitration."[157] The opinion of the court used the phrase "informed consent" seventeen times, which, in light of the court's holding, clearly suggests the importance of informed consent principles in the law of lawyering.

While the *Snow* court noted that a comment in the Maine Rules of Professional Conduct, similar to language in the Model Rules,[158] "provides that an attorney may permissibly enter into an agreement to prospectively submit malpractice claims to arbitration if 'the client is fully informed of the scope and effect of the agreement[,]'"[159] it rested its decision on a broader body of law. It stated that conditioning the enforceability of an arbitration provision on informed consent "is based on the long-standing principle that *attorneys owe a fiduciary duty of 'undivided loyalty' to their clients*, a duty that is derived from the common law and that 'predate[s] and exist[s] despite independent, codified ethical standards.'"[160] The court added:

> [T]his obligation is rooted in principles unrelated to arbitration in particular and applies to situations that go beyond arbitration: namely, that as a general matter, an attorney—who stands as a fiduciary to his client—should fully inform that client as to the scope and effect of her decision to waive significant rights.[161]

Other courts have reached different results on similar facts.[162] For example, in *Innovative Images, LLC v. Summerville*,[163] the Supreme Court of Georgia upheld the enforceability of a provision requiring arbitration of legal malpractice claims "without deciding whether GRPC [Georgia Rules

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157. *Id.* at 737.

158. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 17 (AM. BAR ASS'N 2020) (stating a lawyer and client may be able to "enter[] into an agreement . . . to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement").

159. *Snow*, 176 A.3d at 736 (quoting ME. RULES OF PROF'L CONDUCT R. 1.8 cmt. 14).

160. *Id.* (alteration in original) (emphasis added) (quoting Sargent v. Buckley, 697 A.2d 1272, 1275 (Me. 1997)).

161. *Id.* at 739.

162. *See, e.g.*, Andrew Grossman, Venerable Grp. v. McAfee & Taft, No. CIV-10-853-M, 2011 WL 463035, at *2 (W.D. Okla. Feb. 4, 2011) ("Although plaintiffs allege that the Engagement Agreement lacked informed consent, the Court finds that plaintiffs have cited no legitimate authority to support the contention that arbitration [of a legal malpractice claim] can be avoided on these grounds.").

163. Innovative Images, LLC v. Summerville, 848 S.E.2d 75 (Ga. 2020).

of Professional Conduct] Rule 1.4 (b) prohibits attorneys from entering into agreements requiring arbitration of legal malpractice claims without their prospective clients' informed consent."[164]

2. Bad Business Advice

Estate of West by West v. Domina Law Group[165] was a legal malpractice lawsuit alleging a claim of negligence. The action arose out of the defendants' "allegedly incomplete or incorrect legal advice to Doug West (West) regarding his options to resolve his corporation's deadlock, specifically the possible consequences of West's decision to request that an Iowa state court dissolve his corporation."[166] In the malpractice action, West's estate argued:

> Defendants had a duty to fully inform West of all relevant aspects of filing for dissolution, including that Finken could elect to purchase West's shares and that Finken's [e]lection prevented West from withdrawing his petition for dissolution, accepting his brother's alleged offer to buy WMA, or retiring/withdrawing from WMA. The Estate asserts that Defendants recommended dissolution, but never informed West that Finken's election would foreclose his Buy-Sell Agreement options before West filed for dissolution. The Estate also asserts that Defendants misinformed West about his options. The Estate asserts that Defendants' actions and communications with West before, during, and after the valuation proceedings indicate that they did not fully understand the consequences of dissolution.[167]

The United States District Court for the Southern District of Iowa allowed the negligence claim to go forward because the evidence was in dispute. There was no discussion of any provisions in the Model Rules or the Iowa ethics code, but the court clearly recognized that the case was alleging negligence liability based on lack of informed consent because when it addressed the issue of causation, it wrote:

> To prove this element, the Estate must show that a reasonable person would have taken an alternative path towards ending his business arrangement with Finken, if Defendants had fully informed him of the consequences of

164. *Id.* at 79, 84.

165. Est. of West by West v. Domina L. Grp., No. 1:16-cv-30-HCA, 2018 WL 3454904 (S.D. Iowa May 1, 2018).

166. *Id.* at *1.

167. *Id.* at *7.

> dissolution. The parties, along with the Court, agree that the informed consent standard is an objective one.[168]

In a footnote, the court added:

> The Iowa Supreme Court uses an objective causation standard when it analyzes informed consent in a medical context. *See Pauscher v. Iowa Methodist Med. Ctr.*, 408 N.W.2d 355, 360 (Iowa 1987). The Court finds that, in the context of an informed consent legal malpractice case, an objective standard is appropriate as well.[169]

3. Bad Litigation Advice

In *Hermansen v. Riebandt*,[170] the plaintiffs brought a legal malpractice action against attorneys (Riebandt, DeWald, and Ottenheimer) and their law firms, alleging that the "defendants failed to properly inform [the clients] of the risks of litigating the propriety of a mortgage lien on their residence . . . ."[171] The Illinois Appellate Court held that genuine issues of fact precluded summary judgment for the defendants. Discussing the plaintiffs' allegations, the court wrote:

> The count against Riebandt alleged that he was negligent in . . . (3) failing to obtain plaintiffs' informed consent prior to signing the Fidelity indemnity agreement, which resulted in the entirety of the net proceeds from the sale of their personal residence being held in escrow; (4) failing to inform plaintiffs of the risks of proceeding to litigation against Bank of America, including the rejection of multiple settlement offers . . . . The count against DeWald contained similar allegations. The count against Ottenheimer contained similar allegations as to Ottenheimer's failure to inform plaintiffs of the risks of pursuing litigation against Bank of America and also alleged that Ottenheimer negligently advised plaintiffs as to the effect of the bankruptcy on their obligations to Bank of America.[172]

Addressing the facts of the case, the court further explained:

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168. *Id.* at *10.
169. *Id.* at *10 n.11.
170. Hermansen v. Riebandt, No. 1-19-1735, 2020 IL App (1st) 191735 (Nov. 25, 2020).
171. *Id.* ¶ 1.
172. *Id.* ¶ 27.

> [P]laintiffs have provided the testimony of an expert who has opined that it was not reasonable for defendants to fail to obtain plaintiffs' informed consent in the instant litigation. Specifically, Robinson identified a number of instances during their representation when defendants failed to disclose information to plaintiffs that was necessary to enable them to make informed decisions. First, in 2011, when Riebandt discovered that the mortgage lien had been discovered but failed to inform plaintiffs or to counsel them as to the risk of inaction. Second, when defendants began their attempts to remove the lien and Riebandt and DeWald failed to inform plaintiffs that they had an interest in resolving the issue in a way that did not reflect negatively on Riebandt. Third, when Ottenheimer failed to inform plaintiffs that he had overlooked the presence of the mortgage lien when handling their bankruptcy. Fourth, when Riebandt and DeWald failed to disclose Riebandt's relationship with Fidelity, leading plaintiffs to believe that Riebandt was acting with undivided loyalty in signing the indemnity agreement. Fifth, when defendants advised plaintiffs to reject two settlement offers without informing them of the risks of loss, their exposure in the event of loss, the limits to their recovery if they won, and the length of time it would take to litigate. Thus, plaintiffs have provided evidence that defendants did not exercise a reasonable degree of care or skill in representing plaintiffs. Ottenheimer also presented the report of an expert, Flaxman, who opined that Ottenheimer's conduct in addressing the lien did not violate the standard of care. While we note that Flaxman's report did not address Robinson's contention that Ottenheimer violated the standard of care by failing to inform plaintiffs of the risks of their course of conduct, at a minimum, there is a question of fact as to the propriety of defendants' conduct. In the presence of this question of fact, we cannot find that summary judgment on this basis is appropriate.[173]

The *Hermansen* court did not rely upon provisions in the Model Rules or state ethics codes that require informed consent. However, the court clearly implied that lack of informed consent is a valid theory on which liability for negligence can be proved.

4. Unauthorized Litigation

In *Tye v. Beausay*,[174] two sons of a medical malpractice plaintiff brought a legal malpractice action against a lawyer (Beausay) who had involved them in the medical malpractice case without their knowledge and caused them to sign a release of their medical malpractice claims as part of the

173. *Id.* ¶ 100 (emphasis omitted).

174. Tye v. Beausay, 156 N.E.3d 331 (Ohio Ct. App. 2020).

settlement.[175] Upon discovering the true facts, the brothers argued that Beausay had failed to obtain informed consent with respect to the initiation and prosecution of the litigation, and the signing of the release.[176] The opinion of the Court of Appeals is rooted in earlier tort decisions in Ohio and other states, including an extensive discussion of informed consent in medical malpractice law and legal malpractice law. There is no reference to informed consent requirements in the Model Rules or state variations thereof. With respect to proving causation in an informed consent case, the court wrote:

> The question does arise whether an objective standard, with even some subjective element, . . . would properly apply in legal malpractice cases that involve informed consent.
>
> We have not found Ohio authority extending an objective, "reasonable person" standard to legal malpractice cases where the contention is that the lawyer took actions without properly informing a client. The authority outside Ohio is also virtually non-existent.[177]

The court concluded:

> Having reviewed these authorities, or rather, the lack of authority, we cannot find a basis for incorporating the medical malpractice standards for informed consent, which would allow consideration of what a reasonable person would do, as opposed to what Matthew Tye said he would do. There may be arguments for using an objective standard as well as some subjective analysis, but we have not been able to find such authority.[178]

Applying a subjective causation standard, the court barred one brother's informed consent claim because he admitted that even if he had been properly informed, he would still have signed a release of his claims in the underlying medical malpractice action.[179] However, with respect to the other brother, who was intellectually disabled, there was a genuine issue of material fact as to whether Beausay's actions were the proximate cause of any harm.[180]

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175. *Id.* at 335–36.
176. *Id.* at 336.
177. *Id.* at 344.
178. *Id.* at 347.
179. *Id.* at 348.
180. *Id.*

In *Walsh v. Cunniff*,[181] the plaintiffs filed a legal malpractice action against the defendant alleging he "was negligent in the underlying litigation" for allowing certain viable defendants "to be dismissed for want of prosecution in 2010 without the informed consent of plaintiffs . . . ."[182] The Illinois Appellate Court found the claim was barred by the statute of limitations.[183] However, absent such a barrier, it is reasonable to argue that this is precisely the type of information a client has a right to know, and which a lawyer should be obliged to disclose without a request.

C. *Cases Not Using the Term "Informed Consent" Nor Citing Ethics Rules*

There are some cases that neither use the term "informed consent" nor cite the Model Rules or state variations, that nevertheless recognize the principles on which the doctrine of informed consent is based.[184] For example, in *Bowman v. Gruel Mills Nims & Pylman, LLP*,[185] a malpractice action, a federal court in Michigan concluded that regardless of whether a lawyer's decision not to press ERISA claims in a retirement benefit dispute was a protected exercise of professional discretion, that choice, as a key strategic decision, needed to be discussed with the client.[186]

Similarly, in *Sierra Fria Corp. v. Donald J. Evans, P.C.*,[187] former clients brought a legal malpractice action based on negligence, arguing that their lawyers had failed to advise them of the dangers of proceeding with the purchase of two hotels in Aruba without a property survey.[188] After the deal closed, the clients learned that "assets having an appraised value in excess of $4,000,000—tennis courts, parking spaces, and an administrative building housing the hotels' laundry facilities—lay on land belonging to" an adjacent business.[189]

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181. Walsh v. Cunniff, No. 1-16-1046, 2017 IL App (1st) 161046-U (June 16, 2017).

182. *Id.* ¶ 7.

183. *Id.* ¶ 21.

184. *Cf.* Thomas & Wong, Gen. Contractor, Inc. v. Wallace, No. 1 CA-CV 08-0634, 2010 WL 475690, at *9 (Ariz. Ct. App. Feb. 11, 2010) (finding that a lawyer acting as an agent had "a duty to use reasonable efforts to provide the company with material information she was aware of or should have been aware of that could affect Thomas & Wong's decision to enter into the loan transaction").

185. Bowman v. Gruel Mills Nims & Pylman, LLP, No. 5:06-CV-87, 2007 WL 1203580 (W.D. Mich. Apr. 24, 2007).

186. *Id.* at *2, 5–6.

187. Sierra Fria Corp. v. Donald J. Evans, P.C., 127 F.3d 175 (1st Cir. 1997).

188. *Id.* at 179.

189. *Id.*

Addressing the lawyers' disclosure obligations, the First Circuit wrote:

> [W]hen a client seeks advice from an attorney, the attorney owes the client "a duty of full and fair disclosure of facts material to the client's interests." This means that the attorney must advise the client of any significant legal risks involved in a contemplated transaction, and must do so in terms sufficiently plain to permit the client to assess both the risks and their potential impact on his situation. Consequently, in a legal malpractice action that implicates an attorney's performance of his counseling function, the trier of fact must determine whether the attorney's advice permitted the client adequately to weigh the risks involved in a given course of action.[190]

The court affirmed a judgment for the lawyers because there was ample evidence to support the trial court's findings that the dangers of proceeding with the purchase had been repeatedly disclosed.[191] The First Circuit wrote:

> Massachusetts law requires an attorney performing a counseling function to advise the client in a manner that permits the latter intelligently to assess the risks of taking (or declining to take) a particular action. But lawyers—even high-priced lawyers—ordinarily are not guarantors of favorable results. It is neither fair, practical, nor legally appropriate to benchmark an attorney against a standard of prescience. Thus, lawyers are not obliged to relate in exquisite detail every fact or circumstance that might conceivably have a bearing on the client's business decision or to anticipate remote risks. By the same token, lawyers are not expected to persist relentlessly when clients—especially clients who are sophisticated businessmen—choose to go forward after being suitably informed of looming risks. *See Conklin v. Hannoch Weisman*, 145 N.J. 395, 678 A.2d 1060, 1069 (1996) (stating that "an attorney has no obligation 'to lie down in front of a speeding train' to prevent a bad deal").[192]

V. SPECIAL ISSUES

This section discusses four special issues of recurring importance: (1) the nature of lawyers' disclosure obligations to clients; (2) the ability of lawyers and clients to define the scope of the representation; (3) the role of expert testimony; and (4) the proof of factual causation.

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190. *Id.* at 179–80 (citation omitted).
191. *Id.* at 184.
192. *Id.* at 182 (citation omitted).

A. *The Nature of Lawyers' Disclosure Obligations to Clients*

In many representations, the operative law and the relevant facts are complex, and there is a need for a lawyer and client to agree on a course of action. In these types of cases, it is important for a lawyer to be able to exercise some degree of discretion and judgment in advising a client. In a particular case, a great deal of information related to risks and alternatives may qualify as "material," yet relaying every piece of information with equal emphasis would be a dubious way for a lawyer to attempt to fulfil disclosure obligations to the client.

Some judicial opinions discussing disclosure obligations to clients expansively state that lawyers owe clients a duty of "absolute and perfect candor."[193] However, as I have stated on other occasions, that "cannot possibly be an accurate statement of an attorney's obligations" in every situation:

> [S]uch a standard would be impractical. A duty of candor that is "absolute and perfect" would require a lawyer to convey to a client every piece of data coming into the lawyer's possession, no matter how duplicative, arcane, unreliable, or insignificant. Little would be gained by imposing such an exacting obligation, and much would be lost in terms of efficiency and expense. If lawyers were required to be mere relayers of information and not permitted to exercise judgment in terms of what facts to convey to clients, the legal system would run far less smoothly than it does today. . . . [T]he essence of good lawyering is the exercise of judgment. Arguably, evaluative discretion must extend just as readily to communicating with clients, as to investigating facts, examining witnesses, negotiating deals, drafting documents, or crafting solutions.[194]

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193. Recent cases include: Fitch v. L. Off. of Patricia Kane, No. NNHCV176068687, 2020 WL 3429142, at *22 (Conn. Super. Ct. May 18, 2020) (concerning duties arising out of a legal relationship); Guo Wengui v. Clark Hill, PLC, 440 F. Supp. 3d 30, 36 (D.D.C. 2020) (describing the foundations of a fiduciary relationship); Flores v. Gonzalez & Assocs. L. Firm, No. 13-15-00205-CV, 2016 WL 5845922, at *4 (Tex. App.—Corpus Christi–Edinburg Oct. 6, 2016, no pet.) (mem. op.) (explaining appellants argument that the lack of such candor constituted breach of fiduciary duty); *see also* Johnson, *supra* note 26, 753–70 (discussing cases from Texas, Oklahoma, and the District of Columbia).

194. Johnson, *supra* note 26, at 739 (footnotes omitted).

Further:

> [T]he duty of "absolute and perfect candor" applies most forcefully in instances where the interests of the attorney and client are adverse, as in the case of a business transaction between them.
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> . . . .
>
> [In addition,] a relatively small number of areas [in] the legal profession [have] developed [ethics] rules that call for . . . disclosure of [particular] information. For example, in seeking to obtain an effective client waiver of a conflict of interest, the lawyer must disclose the existence, nature, implications, and possible adverse consequences of the conflict. In dealing with client property, a lawyer must promptly notify a client of its receipt. In entering into an agreement for legal services with a new client, the lawyer must disclose the basis or rate of the fee. And upon receiving a settlement offer, a lawyer ordinarily must communicate the offer to the client promptly. . . . [W]here specific rules of conduct have crystalized, attorneys are [sometimes] faced with demanding disclosure obligations.
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> However, outside of these limited contexts, the disclosure obligations of attorneys are more properly described by the rule of negligence . . . .[195]

Some scholars anchor the disclosure obligations that are at the heart of the informed consent doctrine in the law of fiduciary duty, rather than the negligence principles of tort law. Thus, legal malpractice expert Ronald E. Mallen writes:

> A corollary of the fiduciary obligations of undivided loyalty and confidentiality is the attorney's responsibility to promptly advise the client of any important information that may impinge on those obligations. This means that there must be complete disclosure of all information that may bear on the quality of the attorney's representation. The disclosure must include not only all material facts but also should include an explanation of their legal significance.[196]

However, even if the analysis is framed in terms of breach of fiduciary duty (disloyalty) rather than negligence (lack of care), the necessity of

195. *Id.* at 771, 774–75 (footnotes omitted).

196. 2 RONALD E. MALLEN, LEGAL MALPRACTICE § 15:26 (2021 ed.) (footnotes omitted).

proving that the breach of fiduciary duty was culpable inevitably returns to the touchstone of negligence:[197]

> Breach of fiduciary duty is not a strict liability tort. A plaintiff alleging fiduciary breach must show that the defendant-lawyer acted negligently, recklessly, or intentionally in violating fiduciary principles. Absent proof of culpability, there is no liability for breach of fiduciary duty.[198]

Thus, the Restatement says "[a] lawyer who has acted with reasonable care is not liable in damages for breach of fiduciary duty."[199]

Consequently, as the foregoing discussion suggests, in deciding whether a lawyer has acted in accordance with the informed consent disclosure obligations imposed by the law of negligence and the law of fiduciary duty, it is necessary to consider whether the lawyer's obligations are governed (1) by the usual obligation of reasonable care,[200] (2) heightened standards articulated by ethics rules or other law that sometimes require specific disclosures (in addition to the exercise of reasonable care), or (3) an obligation of "absolute and perfect candor" because the interests of the lawyer and the client are adverse.

B. *The Scope of the Representation*

Within broad bounds, a lawyer and a client are free to define the scope of the representation and, consequently, the duties the lawyer owes to the client. Thus, it has long been recognized that, unless unreasonable on the

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197. *See* Friedman v. Kahn, No. 1-12-0881, 2013 IL App (1st) 120881-U, ¶ 54 (Ill. App. Ct. Dec. 27, 2013) ("[I]t is not true that whenever a lawyer fails to inform his client of a foreseeable risk, the lawyer is automatically negligent. Rather, the question is whether a reasonable divorce attorney would have informed his client of such a risk in similar circumstances.").

198. Fortney & Johnson, *Legal Malpractice*, *supra* note 1, § 5-3.1(d), at 791.

199. Johnson, *supra* note 26, at 776 (alteration in original) (citing RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 49 cmt. d (AM. L. INST. 2000)).

200. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 20 (AM. L. INST. 2000). Section 20 provides:

> (1) A lawyer must keep a client *reasonably informed* about the matter and must consult with a client to a *reasonable extent* concerning decisions to be made by the lawyer under §§ 21–23.
>
> (2) A lawyer must promptly comply with a client's *reasonable requests* for information.
>
> (3) A lawyer must notify a client of decisions to be made by the client under §§ 21–23 and must explain a matter to the extent *reasonably necessary* to permit the client to make informed decisions regarding the representation.

Id. (emphasis added).

facts,[201] a lawyer and a client may narrow the lawyer's disclosure obligations to the client.[202] This is still the rule. Section 20 of the *Restatement (Third) of the Law Governing Lawyers*, in discussing the communication duties of lawyers to clients, states: "*To the extent that the parties have not otherwise agreed*, a standard of reasonableness under all the circumstances determines the appropriate measure of consultation."[203] In addition, Section 19 of the Restatement expressly provides that: "(1) Subject to other requirements stated in this Restatement, a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances."[204] If a sophisticated and experienced business client tells a lawyer that he does not want any advice about the wisdom of a proposed merger, and that the lawyer's job is simply to draw up the documents, the lawyer can follow those directions without fear of being sued for failure to disclose risks related to the merger, provided that it is reasonable to believe that the client fully understood the risks.

C. *The Role of Expert Testimony*

Regardless of whether a legal malpractice case based on negligent nondisclosure does or does not use the term "informed consent," the analysis of whether there was a breach of duty should be governed by the usual rules,[205] which normally require the production of expert

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201. *See* Fortney & Johnson, *Legal Malpractice*, *supra* note 1, § 5-2.1(b)(3) at 738 (discussing "[u]nreasonable [l]imits on the [s]cope of [r]epresentation").

202. In 1958, the *Restatement (Second) of Agency* stated: "The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made . . . ." RESTATEMENT (SECOND) OF AGENCY § 376 (AM. L. INST. 1958). Explaining that provision, the commentary to Section 376 opined:

> Thus, the duties . . . of care, . . . of obedience, and . . . of loyalty . . . [as set forth in various provisions of the Restatement] are inferences drawn from the conduct of the parties in light of common experience and what reasonable men regard as fair. The rules stated in such Sections are the rules applicable to the normal case, in which the parties have not made a different agreement. . . . [T]he parties can make what agreements they please, . . . with [limited] exceptions . . . .

Id. § 376 cmt. a.

203. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 20 cmt. c (AM. L. INST. 2000) (emphasis added).

204. *Id.* § 19.

205. *See* Scott v. Chuhak & Tecson, P.C., No. 09 C 6858, 2011 WL 4462915, at *4 (N.D. Ill. Sept. 26, 2011) ("[T]he standard of care against which the attorney defendant's conduct will be

testimony.[206] The expert ordinarily should opine on (1) whether, in the circumstances, the nondisclosed matter was material, (2) whether the exercise of due care required its disclosure,[207] (3) whether sufficient information was clearly disclosed to permit a client to make an informed decision,[208] and, depending on the jurisdiction, (4) whether nondisclosure caused damages.[209] Absent the benefit of expert testimony, a jury should not be permitted to decide these matters, unless the answers would be obvious even to a layperson. That will not often be the case. As a federal court in California remarked: "The intricacies of the doctrine of informed consent . . . are not . . . 'readily apparent' to laymen."[210]

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measured must generally be established through expert testimony." (quoting Barth v. Reagan, 564 N.E.2d 1196, 1200 (Ill. 1990))).

206. *Cf.* Note, *Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship*, 79 YALE L.J. 1533, 1557 (1970) ("Only if there is a substantial conflict among professionals will the question of the proper standard of conduct get resolved by the jury . . . .").

207. *See* Vincent R. Johnson, *Legal Malpractice in International Business Transactions*, 44 HOFSTRA L. REV. 325, 345–51 (2015) (discussing tort liability for failure to disclose material risks related to international business transactions and offering illustrations).

208. With respect to conflicts of interest, the Restatement explains:

> Informed consent requires that each affected client be aware of the material respects in which the representation could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks of the conflicted representation. The client must be aware of information reasonably adequate to make an informed decision.

RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 122 cmt. c(i) (AM. L. INST. 2000).

209. Whether expert testimony on causation of damages is appropriate in a legal malpractice case is a matter of great dispute. A review of American law shows that it is sometimes permitted. *See id.* § 52 cmt. g ("[A] plaintiff alleging [malpractice] ordinarily must introduce expert testimony concerning the care reasonably required in the circumstances of the case and the lawyer's failure to exercise such care."). Other times it is required. *See* Primis Corp. v. Milledge, No. 14-08-00753-CV, 2010 WL 2103936, at *1, *3 (Tex. App.—Houston [14th Dist.] May 27, 2010, no pet.) (mem. op.) (determining expert testimony is necessary because the "causal link between the attorney's negligence and the alleged damages is beyond the trier of fact's common understanding"). While other times it is prohibited entirely. *See* Leibel v. Johnson, 728 S.E.2d 554, 556 (Ga. 2012) (holding expert testimony is not appropriate to prove proximate causation in a legal malpractice claim, but rather this would be a task for the jury); *see also* Conklin v. Hannoch Weisman, 678 A.2d 1060, 1069 (N.J. 1996) ("Without any insight into the make-up and needs of the legal malpractice plaintiff, expert testimony regarding what a reasonably prudent client would have done under similar circumstances in weighing the risks and complications of complex commercial business transactions appears of dubious value to the trier of fact.").

210. Lewellen v. Phillips, No. C062277, 2010 WL 4851362, at *7 (Cal. Ct. App. Nov. 30, 2010).

D. *Proof of Factual Causation*

With respect to whether the nondisclosure of a material fact caused harm, there are a range of choices for framing the inquiry into factual causation. The jury could be asked whether, but for the nondisclosure, (1) the plaintiff would not have consented;[211] (2) a reasonable person would not have consented;[212] (3) a reasonable person *in the plaintiff's position* would not have consented; or (4) both the plaintiff and a reasonable person would not have consented. Reasonable minds can differ as to which of these inquiries would be the most reliable guide to determining whether the nondisclosure did, in fact, cause harm.[213]

However, it is important to remember that the factual causation issue arises in two types of nondisclosure cases—cases which use the term "informed consent" and cases which do not. In the latter group of cases—ordinary negligence claims—it is well established that the assessment of factual causation is essentially a subjective inquiry. The question is whether but for the nondisclosure this particular plaintiff would have chosen a different course and would not have suffered harm.

If that is true, there is no reason to engraft a reasonable-person requirement onto the factual causation inquiry in the former group of cases merely because the cases use the terminology of informed consent. Thus, the question should be whether the particular plaintiff would not have consented. There is little reason to think that this subjective standard for assessing factual causation will risk the erroneous imposition of liability on

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211. *See Conklin*, 678 A.2d at 1070 (discussing "reasons for rejecting the subjective standard of informed consent in the medical malpractice context" and rejecting the subjective standard in the legal malpractice context).

212. *See id.* at 1069 ("The objective theory of informed consent, under which the jury would be asked to consider whether a reasonably prudent client would have entered into a business transaction if adequately informed of its attendant risks, fails to reflect the many highly subjective, personal, financial and strategic concerns that underlay most legal decisions and that are not present in the majority of medical decisions. A majority of medical patients are sick and consult a doctor for a single purpose—to get well. The patients usually bring little or no personal knowledge to the evaluation of the risks associated with their recovery.").

213. *See id.* at 1073 ("[W]e find that the objective and subjective tests for informed consent, borrowed from the medical malpractice context, are unsuited for legal malpractice cases in which inadequate or inaccurate advice is alleged as a concurrent cause of harm. Rather, we hold that usual principles of negligence apply, including an analysis of foreseeability. We hold, however, that the traditional jury charge on proximate cause as a continuous sequence is inapt for legal malpractice cases in which there are concurrent independent causes of harm and that a jury in such cases must be instructed to determine whether the negligence was a substantial factor in bringing about the ultimate harm.").

the defendant-lawyer. The plaintiff must still adduce expert testimony that the nondisclosed information was material, that requirements of reasonable care necessitated its disclosure, and that adequate information was not provided to secure informed consent. In addition, in assessing whether the plaintiff would have chosen a different course, the jury is not obliged to accept the plaintiff's self-interested testimony, but can, and likely will, assess the plaintiff's credibility by taking into account the reasonableness of what the plaintiff says.

Moreover, an objective test for factual causation would be inconsistent with the principles of self-determination on which the doctrine of informed consent is based. As the Supreme Court of Oklahoma stated in a medical malpractice case involving lack of informed consent:

> To the extent the plaintiff, given an adequate disclosure, 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. This basic right to know and decide is the reason for the full-disclosure rule. Accordingly, we decline to jeopardize this right by the imposition of the "reasonable man" standard.[214]

According to practitioners, factual causation often cannot be proved in medical malpractice cases because "the patient was suffering a life-threatening illness or condition for which reasonable people would undergo treatment, regardless of the risks involved."[215] Similar obstacles to recovery may be expected in legal malpractice cases alleging lack of informed consent. If the client had to act and had no good options, it will be hard to prove that a different course would have been taken and a better outcome achieved. However, in many instances, clients do not have to act or do have options. In such cases, it may well be possible to prove that a lawyer's failure to disclose material information caused harm.

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214. Scott v. Bradford, 606 P.2d 554, 559 (Okla. 1979) (emphasis omitted).

215. Thomas E. Albro & Thomas M. Hendell, *What Practitioners Can Teach Academics About Tort Litigation—the Plaintiff's Perspective in Medical Malpractice Litigation*, 13 J. TORT L. 273, 278 (2020) ("Consent cases are generally only worth taking when the procedures involved are elective.").

VI. CONCLUSION

The informed consent doctrine in legal malpractice law is not a fad or an aberration. Rather, it is the expression of a core value of American legal ethics which holds that clients have both a right to decide important matters related to their representation and a right to material information that bears upon those decisions. As stated by the American Law Institute in the *Restatement (Third) of the Law Governing Lawyers*:

> When a client is to make a decision, a lawyer must bring to the client's attention the need for the decision to be made, unless the client has given contrary instructions . . . . Before a client signs a contract, . . . the lawyer ordinarily should explain its provisions. . . . The lawyer [also] ordinarily must explain the pros and cons of reasonably available alternatives. The appropriate detail depends on such factors as the importance of the decision, how much advice the client wants, what the client has already learned and considered, and the time available for deliberation.[216]

A lawyer's failure to obtain informed consent from a client related to important choices during the representation is a breach of the duty of care that will support an action for negligence. If the client proves that but for the nondisclosure different choices would have been made and harm would have been avoided, it is fair to hold the lawyer liable for the losses the client needlessly suffered.

216. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 20 cmt. e (AM. L. INST. 2000) (citation omitted).