A New Tort Liability for Lack of Informed Consent in Legal Matters

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CONSENT IN LEGAL MATTERS

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How could one better honor a great teacher and scholar of tort law than by offering for view the bud of a new tort? Particularly would it be so if the incentive to be created to avoid that new tort liability will produce an improvement in the legal profession and the service that profession gives to society. It is with the hope that this discussion of a predictable development will serve as such an offering that I offer tribute to Wex Malone, whose scholarly works have much improved my understanding of torts from the time I first taught the subject to the present day. It may be that he and others will realize that the roots of the plant, if not the bud itself, were taken from beds carefully cultivated by others, but, knowing his gentle ways, I trust that he, and perhaps others, will be forgiving.

The new tort I suggest is that lawyers will be held liable in their dealings with clients for failure to obtain informed consent to pursuit of a course of action, in a manner similar to that in which members of the medical profession have been subjected to liability for failure to obtain patients' consent to use of medical procedures and treatment, or the foregoing of such procedures and treatment. If so, the liability of lawyers will not be determined only by the standards of the legal profession, but will also turn upon what members of the consuming public expect in the way of legal services. The result will be a substantial increase in lawyer exposure to liability for legal malpractice.

There already has been an increase in the frequency with which lawyers have been sued for malpractice. Reported decisions on legal malpractice between 1970 and 1980 quadrupled over those reported in the prior decade, reaching a number almost equal to all of the previously reported cases involving legal malpractice.1 A survey of attorneys conducted by the Southern Conference of Bar Presidents produced information that the number of malpractice cases reported by an attorney or his insurer increased every year between 1972 and 1977, with five times more claims reported for the last year than for the first.2 One major insurer against legal malpractice liability reported that its losses have doubled in each year after 1972, with an increase in both the frequency of claims per insured lawyer and the average value of each claim.3

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3. McCarthy, Insurance Aspects of Legal Malpractice, in PROFESSIONAL LIABILITY OF TRIAL LAWYERS: THE MALPRACTICE QUESTION 50, 65 (ABA 1979). The ratio of claims increased from one for every forty-one lawyers to one for every twenty-nine lawyers insured. The average value of a claim increased from $5,622 to $11,936.
Most of the malpractice claims currently made against attorneys do not involve a failure to advise or obtain informed consent. A recent publication of the American Bar Association reporting the proceedings of a conference on legal malpractice issues contains no discussion of liability for lack of informed consent or failure adequately to advise. The second edition of the major treatise on legal malpractice contains only a three page discussion of the problems associated with the giving of advice and a discussion of equal length concerning the obligation of an attorney with respect to informing a client and making recommendations concerning settlements. The short discussion concerning advice does state, citing recent decisions, that liability can exist because of the attorney's failure to provide advice, and that, while the obligation does not extend to every possible alternative, it does require discussion of those alternatives likely to result in adverse consequences. However, the implication of the passage is that the attorney who is sure of his advice need not discuss alternatives and their consequences. Likewise, there is no discussion of liability for lack of informed consent in recent law review articles on legal malpractice.

The recently adopted Model Rules of Professional Conduct (Model Rules) do give considerably greater emphasis to a lawyer's responsibilities as an advisor than did the earlier promulgated disciplinary rules of the Model Code of Professional Responsibility (Model Code). They thereby promote the concept that lawyers have an obligation to obtain the informed consent of their clients to courses of conduct which they advise.

4. ABA STANDING COMM. ON LAWYERS' PROFESSIONAL LIABILITY, LAWYERS' PROFESSIONAL LIABILITY UPDATE, Feb. 1983, at 78, table 9 [hereinafter cited as LIABILITY UPDATE].
6. R. MALLEN & V. LEVIT, supra note 1, § 434, at 492-94, § 580, at 726-29. The doctrine of informed consent is mentioned in a discussion of the occasions upon which a client's judgment is to control a decision, such as whether a potential defect affects marketability of title, but general application of the doctrine to the legal profession is rejected. Id. § 214, at 306-09.
7. Id. § 434, at 493.
8. Id.
Thus, the preamble to the Model Rules states: "As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications." Rule 1.4(b) provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The comment to rule 1.4 states that the "client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so." Rule 2.1 provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." The comment to Rule 2.1 explains: "Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate." The obligation to discuss more than legal considerations is reinforced by the statement in the comment to Rule 2.1 that when a request for advice of a purely technical nature "is made by a client inexperienced in legal matters, . . . the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations." As stated in the comment, there is no direct counterpart to Rule 2.1 in the disciplinary rules of the Model Code. Ethical consideration 7-8 of the Model Code does provide that the advice of a lawyer need not be confined to purely legal considerations, and that the advice should concern the possible effect of each legal alternative.

The preamble to the recently adopted Model Rules attempts to forestall the imposition of malpractice liability because of a failure to comply with a rule. It provides:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

The attempt will almost certainly fail in light of the generally accepted proposition that members of a profession are under an obligation to those served to exercise at least the normal skills, ability, and competence of that profession.13
A valuable and recently published article contains the prediction, here endorsed, that requiring informed consent will have a growing and beneficial significance on the practice of law. Although, as stated above, recent suits for legal malpractice seldom are based upon a claimed inadequacy of advice or lack of informed consent, there are indications that such suits may increase in frequency. Statistics concerning legal malpractice reveal that in 1982, while slightly less than ten percent of legal malpractice claims were based on a failure to inform, errors of that type gave rise to the highest percentage of claims of all categories. The recent development of law school courses in interviewing and counseling encouraged by the American Bar Association, and the development of moot competitions between law school teams on problems of interviewing and counseling will fix those skills as part of the expected and required competence for practice in the profession. The law school courses and the moot competitions give emphasis to an attorney's responsibility for obtaining an understanding of the total problem of a client, not merely the legal aspects of that problem, and giving, or arranging for, appropriate advice.

14. Martyn, Informed Consent in the Practice of Law, 48 GEO. WASH. L. REV. 307 (1980). This article is highly recommended. It contains an historical account of the principle of informed consent in legal malpractice, a discussion of the philosophical basis for requiring informed consent, and an assessment of the beneficial effects which will result from imposition of the requirement. It is hoped that this article may supplement it by a different and perhaps more detailed consideration of how application of the standards of informed consent developed for the medical profession will affect the practice of law.

15. See Liability Update, supra note 4, at 78, table 9.


17. The client counseling competition was conceived and developed by Professor Louis M. Brown of the University of Southern California Law Center. It was originally called the Mock Law Office Competition. It began on an interscholastic level in 1969, and competitions have been held every year since then. Information concerning the competition may be obtained from the ABA Law Student Division, 1155 East 60th Street, Chicago, Illinois, 60637.

18. See, e.g., ABA LAW STUDENT DIVISION, 1982 CLIENT COUNSELING COMPETITION: RULES, STANDARDS FOR JUDGING, & FEE SCHEDULE 10-11. The 1982 Standards for Judging the Client Counseling Competition include the following:

7. Fact gathering should result in a clear formulation of the client's problem. Did this occur? Or did the lawyers rush prematurely to legal concepts before they knew the facts? Were the concepts formulated in terms of consequences to the client as well as in terms of legal concepts?

9. Part of this [the lawyer-client relationship is a working relationship] is an impression that the lawyer sees the client as a special person—not like everyone
The American propensity for litigation has been the subject of frequent comment. In the United States, relationships which might be expected to be governed solely by mutual respect, trust, and confidence have been subjected to regulation by law. For example, American society has rejected an in loco parentis relationship for regulation of many aspects of the relationship between students and educational institutions and has abandoned a considerable portion of the immunity to tort suits formerly recognized as applicable to tort claims between spouses and parents and children. The relationship of attorney and client could not be more sacrosanct. Indeed, the tremendous increase in the ratio of lawyers to total population and the expansion of areas of activity in which legal advice is required almost guarantee a greater willingness of lawyers to engage in malpractice litigation against one another. More importantly, the recently developed standards by which the performance of physicians is judged has created a tension with standards applied to lawyers which is almost certain to be intolerable, particularly since the higher standard imposed upon physicians has been produced by the legal profession and judges who came from that profession.

Informed Consent and the Medical Profession

The analogy between the medical profession and the legal profession with respect to the requirement of consent for undertakings and procedures

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22. Id. § 895G.
was weak if not totally lacking, so long as the liability of physicians for failure to obtain consent rested on a theory of battery. An operation or procedure for which the patient had not given consent was an unpermitted and hence socially offensive touching even if it did not result in harm. It was therefore a battery.\textsuperscript{23} Comparable touching constitutes no part of the practice of law. The battery theory has a continued vitality for physicians in cases in which operations are performed upon the wrong limb\textsuperscript{24} or in which an experimental drug is administered without explanation that it is experimental.\textsuperscript{25} But new and complex medical procedures, diagnostic devices and techniques, and drugs and medicines, which both give new cures and pose new and unexpected hazards, are not matters with which the ordinary patient is familiar. Indeed, the development has created a highly specialized medical profession which is itself not familiar with the benefits and risks to be anticipated in those procedures. This specialization of the profession establishes the inadequacy of determining whether a patient has without explanation consented to a particular treatment on the basis of the common understanding of reasonable, prudent patients. Moreover, continued use of the battery theory for recovery could upon some occasions produce an unjustifiable liability.\textsuperscript{26}

Concern for human dignity and the right of an individual to control what is to happen to his or her body led to recognition of a duty of physicians to obtain informed consent to use of diagnostic devices, medical devices, medical procedures, or medication. The first cases imposed a duty measured by the standards or practices of the profession with respect to disclosure to patients of risks of proposed treatment.\textsuperscript{27} These decisions were criticized as an unwarranted abdication to the medical profession of responsibility and of the individual’s right to make a choice.\textsuperscript{28} The

\textsuperscript{23} The classic case is Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905), in which the defendant physician, having obtained permission to perform an operation on plaintiff’s right ear, discovered after plaintiff was under anesthesia that her left ear was in a more serious condition and performed an operation upon it. The physician was held liable for a battery even though the operation was performed skillfully and was successful.

\textsuperscript{24} Moos v. United States, 118 F. Supp. 275 (D. Minn. 1954), aff’d, 225 F.2d 705 (8th Cir. 1955).

\textsuperscript{25} Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978). The earlier analogy of the Mink case was Commonwealth v. Stratton, 114 Mass. 303 (1873), in which an overly zealous male suitor injected a sickening substance, believed to be an aphrodisiac, into some figs which he gave to the object of his lust if not affection.

\textsuperscript{26} See McCoid, The Care Required of Medical Practitioners, 12 Vand. L. Rev. 549 (1959); McCoid, A Reappraisal of Liability for Unauthorized Medical Treatment, 41 Minn. L. Rev. 381, 422-34 (1957).


\textsuperscript{28} 2 F. Harper & F. James, The Law of Torts § 17.1 n.15, comment, at 60-61 (Supp. 1968).
District of Columbia Circuit Court of Appeals led the way with an alternate formula in its decision in *Canterbury v. Spence.* In that decision the court of appeals ruled that, while expert medical testimony would be required to establish the risks associated with procedures beyond the knowledge of a layman, the issue of whether a risk should have been disclosed was to be determined by the standard of the reasonable, prudent person in the position of the patient. Thus, what risks must be disclosed is not governed by the custom of the medical profession, except in those cases in which expert testimony establishes that such disclosure would be detrimental to the patient. The latest decisions of a majority of state supreme courts may suggest that the majority rule still is to accept the custom of the profession for determining what risks must be disclosed, but the power of *Canterbury v. Spence* appears to be so great that that rule is not long to be the majority rule.

According to *Canterbury* and cases following it, a physician also has the duty of disclosing alternative courses of procedure and the risks associated with those procedures. The Washington court has added to the duty by ruling that upon discovery of an abnormality a physician must disclose its existence, the diagnostic techniques for determining the significance of the abnormality, and the risks associated with the use of those techniques. In a similar vein, the California Supreme Court has held that liability may be imposed for failure to explain the risks of refusing to take a diagnostic test.

According to *Canterbury,* the determination of whether there will be liability for a treatment the risks of which were not adequately disclosed will turn upon whether a reasonable, prudent patient in the position of the plaintiff would have agreed to the proposed treatment if the risks had been disclosed. The question is not whether the plaintiff patient would have consented. Liability thus does not turn upon the hazards of a post-event determination of what would have been the plaintiff's subjective state of mind concerning the treatment pursued if he or she had been properly informed.

30. Id. at 787.
31. Id. at 789. Disclosure likewise would not be required for an unconscious person in an emergency or for a mentally incompetent person. Id. at 788.
36. 464 F.2d at 791.
A major consequence of these developments in the law concerning informed consent for the medical profession is that liability may be imposed for a harmful result even though there was no negligence other than the failure to make the required disclosure. Cases have not yet made it certain whether the *Canterbury* liability is limited to harmful results within the undisclosed risks, but proximate cause considerations generally associated with negligence liability strongly suggest that it should be so limited.\(^3\) The battery analogy, however, would permit recovery even though the harmful result was not an undisclosed risk.

There are, of course, differences between the medical profession and the legal profession which caution against automatically assuming that a standard appropriate for judging the performance of one profession is appropriate for judging the performance of another profession. However, upon comparison and evaluation of the need for and the purposes which can be served by providing information, the balance appears to weigh more heavily in favor of requiring disclosure by lawyers than requiring disclosure by physicians. An argument against requiring disclosure by lawyers is that law is not an exact science. It abounds with areas of technical intricacy and is complicated by numerous and varying interrelationships with other areas, sometimes referred to as “the seamless web of the law.” Complicated and technical as it is, however, law is probably no further from the understanding of lay persons than the function of the nervous system or the various organs and glands of the body and the reaction of the body to various treatments and drugs. Indeed, law is probably closer to that common understanding. Medicine is built upon the advanced study in the sciences of biology, chemistry, and physics, which are not a part of the ordinary education. Rules of law have been adopted, however, for the governance of human conduct and relationships, hopefully with a view toward making them understandable by and acceptable to those who are to be governed. A medical problem has a simplicity in that practically all persons have the same desire for a sound body and good health. On the other hand, legal questions frequently present what different persons consider to be overriding moral or ethical questions to which they would give different answers. How to achieve that state of a sound body and good health is usually the only question presented to a physician. Legal problems presented to lawyers are frequently inextricably connected with non-legal problems ranging from economic to life style and values. The solution of legal problems frequently involves making accurate predictions concerning the expectable reactions of other persons to a solution proposed. The client will frequently have a greater understanding of the personalities and value structures of those persons than the lawyer consulted. The client therefore can contribute more

to producing a sound legal solution to a problem than a patient can contribute to development of a treatment for an injury or illness, which can frequently be diagnosed by physical examination of the patient alone. The concern for human dignity and integrity which led to imposition of a standard of informed consent for the medical profession weighs at least as heavily when consideration is given to how legal advice may affect relations with a person’s family, friends, and work associates, his finances and hence physical well-being, or even his freedom.

**Application of Medical Standards of Informed Consent to the Legal Profession**

The major treatise on legal malpractice begins its treatment of the litigation of legal malpractice cases with a discussion of the selection of the legal theory of the claim, posing the problem as one of choosing between the theory of negligence or the theory of contract. The negligence which may give rise to liability is the failure to exercise the ordinary skill and knowledge of the profession, and not failure to make disclosure that would provide the basis for the informed consent of the client. Elsewhere, after referring to a recent decision of a California court of appeals which rejected an argument that there was a duty to inform a client that a proposition of law was unsettled, the authors argue for protection of judgmental decisions which give an attorney freedom to err with confidence. The opinion of the California court states that “as a matter of policy, an attorney should not be required to compromise or attenuate an otherwise sound exercise of informed judgment with added advice concerning the unsettled nature of relevant legal principles.” In short, while physicians are obligated to discuss the risks and uncertainties of a procedure to which

38. R. MALLON & V. LEVIT, supra note 1, § 653, at 802.
39. Id. § 654, at 804.
40. Id. § 214, at 308.
41. Davis v. Damrell, 119 Cal. App. 3d 883, 889, 174 Cal. Rptr. 257, 261 (1981). The defendant attorney had advised his client that she had no community property interest in her husband’s military benefits, without informing her that the conclusion was based on an unsettled proposition of law. By the time of the decision in the malpractice suit the California Supreme Court had ruled otherwise. In re Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, cert. denied, 419 U.S. 825 (1974). Subsequently the United States Supreme Court ruled that community property interests did not exist in military pensions, contrary to the California Supreme Court. McCarty v. McCarty, 453 U.S. 210 (1981). Congress responded to the McCarty decision by enacting the Former Spouse’s Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (codified as amended at 10 U.S.C. § 1408(c)(1) (1983)), which permits a state court to deal with a military pension in a manner consistent with state law. See In re Marriage of Sarles, 143 Cal. App. 3d 24, 191 Cal. Rptr. 514 (Ct. App. 1983), giving retrospective effect to the federal statute. Why a client should not be informed of such uncertainty was not explained by the California court. Advice cannot be considered “candid,” as the authors of the treatise desire, if such a known uncertainty is not revealed. As a practical matter, a wife is probably much better qualified
in their sound professional judgment a patient should submit, lawyers have no such obligation.

Under current standards clients must be informed of settlement offers in dispute resolutions,\(^2\) but mere information that an offer has been made is not sufficient to permit an informed decision by the client of whether to accept the settlement proposal. An attorney handling a case on a fixed contingent fee may have a conflict of interest with the client if an offer is made prior to his investment of time for legal research and the development of evidentiary aspects of the case.\(^3\) By itself, such a potential conflict suggests the inadequacy of communication of no more than a professional judgment that an offer should be accepted. Information about the amounts fixed in recent jury verdicts for similar claims, the possibilities of a defense verdict, the length of delay to be experienced if trial is required, the emotional stress expectable from delay and trial, difficulties of collecting larger sums from a less than fully insured defendant, the pressures upon the defendant and defendant's insurer, the significance and effect upon recoverable damages of the collateral source rule, the rule that generally no consideration is given to income taxes in computation of lost earning capacity, and the whole complex of irrationalities found in the law of damages should be explained if a client is to be able to make an informed judgment about a settlement offer.\(^4\)

Recognition that failure to obtain informed consent constitutes legal malpractice will drastically revise the current responsibilities of attorneys. A major portion of the reported law suits for legal malpractice appears to consist of cases which either were litigated or allegedly should have been litigated by defendant attorneys.\(^5\) In those cases there has been "a

\(^{42}\) R. MALLEN & V. LEVIT, supra note 1, § 580, at 726; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1979) (requires an attorney promptly to inform a client of a settlement offer).


\(^{44}\) A carefully conducted survey of claimants who received compensation from an automobile liability insurance company revealed that only twenty-eight percent of them expected immediately after the accident that they would be compensated for pain and suffering; only thirty-four percent of those who did not originally expect such compensation ultimately learned that it was recoverable as damages; and of those who originally did not know about damages for pain and suffering, only thirty-six percent of those claimants who retained lawyers (as compared with thirty-three percent of those who did not) learned that such damages could be covered. J. O'CONNELL & R. SIMON, PAYMENT FOR PAIN AND SUFFERING: WHO WANTS WHAT, WHEN & WHY? 20, 25 (1972).

\(^{45}\) See R. MALLEN & V. LEVIT, supra note 1, §§ 656-675

According to an ABA study in 1982, 9.7% of the legal malpractice claims involved a failure to calendar, 7.9% involved a planning error in choice of procedures, 7.5% involved a failure to file with no deadline, 6.1% involved a failure to know a deadline, 3.4% involved a failure to react to a calendar, and 3.2% involved malicious prosecution. Other categories of claims involved litigation, such as failure to know or properly apply law (8.3%), inadequate investigation (7.4%), or procrastination (4.5%). See LIABILITY UPDATE, supra note 4, at 78, table 9.
trial within a trial," in which the plaintiff has attempted to establish what would have occurred as a result of litigation if the defendant lawyer had exercised the ordinary skill and knowledge of the profession. This is an appropriate standard if malpractice consists only of a failure to exercise the ordinary legal skill and knowledge of members of the profession concerning the applicable legal rules, i.e., if expert estimates of the outcome of litigation govern the determination of whether there was malpractice. But if a requirement of obtaining informed consent is imposed upon the legal profession this standard will not be determinative. Thus, under Canterbury physicians do not escape liability because there was no proof of negligence in a treatment or procedure if the risks were not disclosed and their disclosure would have led a reasonable, prudent person in the position of the patient to reject the treatment or procedure which caused harm. The fact that the treatment or procedure was medically sound does not immunize a physician from liability for harmful consequences of the treatment or procedure. If a requirement of informed consent is applied to the legal profession, lawyers will be liable for non-negligent errors of judgment about undisclosed risks or possible gains which, if disclosed, would have led a reasonable, prudent client to litigate or forego litigation by rejecting or accepting a settlement offer.

The question of liability is, of course, different from the question of damages. In medical cases the plaintiff usually is able to establish harm by proof of the physical condition which resulted from the treatment or procedure. In cases of legal malpractice in dispute resolution, a plaintiff will have to prove what his position would have been if he had not consented to the course of action pursued. Upon occasion this may require proof of what would have resulted if litigation had been pursued to judgment. On other occasions proof that a settlement offer made would have been accepted by an informed, reasonable, prudent client will establish that position. On still other occasions the client should be able to establish what that position would have been if the defendant attorney had pursued settlement opportunities to which a reasonable, prudent client would have given approval in lieu of accepting the risks of litigation which proved to be unsuccessful. Proof of what would have occurred if litigation had been pursued to judgment or that there were real settlement opportunities will require the expert testimony of attorneys familiar with trial and settlement of such disputes. However, a lawyer will not escape liability with respect to settlements on the basis that he had made a non-negligent error of judgment about the outcome of litigation.46

Abandonment of an exclusive standard of sound professional judgment about the results of litigation is appropriate when it is considered that most cases are not litigated to judgment, but are instead settled.47

46. See R. Mallen & V. Levit, supra note 1, § 580, at 724-25.
47. See Bridgman, supra note 9, at 234-36. A Michigan study of automobile accident costs and payments indicated that trial was begun in only five percent of the cases, with
If most of the cases handled by lawyers are settled, it would be preferable to determine what should have resulted if negotiations for settlement had been conducted in accordance with settlement standards of the profession rather than what would have happened in the unlikely event the case had gone to trial.\(^4\)

Imposition of liability for the worth of the claim rather than a requirement of proof of what would have happened in a trial would be consistent with a recent decision of the Washington Supreme Court in a medical malpractice case.\(^4\) The suit was brought for the wrongful death of a patient who had less than a fifty percent chance of survival at the time of a negligent diagnosis and treatment. The court did not bar recovery because plaintiff could not prove that the patient would have survived if properly treated. Instead it permitted a recovery based on the reduction of the patient’s possibility of survival, and did so even though that reduction was less than half of the patient’s remaining chance of survival. The court’s decision was supported by a major law review article urging such a treatment for similar cases.\(^5\)

Imposition of a requirement that lawyers obtain informed consent of clients to courses of action which they advise will probably have an even greater effect with respect to what is required of lawyers in activities other than litigation. Much of the advice which lawyers give is relied upon by clients who pursue courses of action which may give rise to disputes. The risks that impending changes in law will give rise to disputes are matters about which a reasonable, prudent client would want to be advised. For settlements frequently negotiated in the course of trial before judgment. A. Conard, J. Morgan, R. Pratt, C. Voltz & R. Bombaugh, Automobile Accident Costs and Payments, 184, 241-42 (1967). Studies of automobile accident cases in New York indicated that only eight percent of the auto accident cases were processed to trial, that most of those cases were settled during trial, and that less than two percent of the claims made were controlled by a court adjudication. Franklin, Chanin & Mark, Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation, 61 Colum. L. Rev. 1, 10 (1961); Rosenberg & Sovern, Delay and the Dynamics of Personal Injury Litigation, 59 Colum. L. Rev. 1115, 1124 (1959).

48. Expert testimony concerning settlement value has been accepted in a few cases under the current standards of liability. See R. Mallen & V. Levit, supra note 1, § 666, at 845-47. A carefully performed study of 60 settled cases in the First Department of the New York courts used an evaluation panel of three lawyers and two insurance adjusters. Intercorrelations among the panelists as to settlement value ranged from a high of .83 to a low of .65. In only 10 of the 60 cases was the actual recovery less than one-half of the panel’s mean estimate of value; in two cases the actual recovery was only 20% of the panel’s mean. The data suggests that expert testimony would be reliable in establishing what was such inadequate representation in settlement as to constitute malpractice. See D. Rosenthal, supra note 43, at 203-05, tables A-4, A-5.


50. King, Causation, Valuation, and Chance in Personal Injury Torts Involving Pre-existing Conditions and Future Consequences, 90 Yale L.J. 1353 (1981); see also Note, supra note 9, at 679-81.
example, the latest and fairly recent decision of a state supreme court may have reaffirmed the employment-at-will doctrine as a part of the law of that state, but an employer considering termination of an employee, particularly a highly paid employee, would want to know of the erosion of the employment-at-will doctrine which is currently occurring.\(^5\) An employer with a unionized work force considering the possibility of subcontracting work, or transferring operations to an unorganized plant, would expect to be advised not only of the state of the law previously developed by the National Labor Relations Board but also of the possibility of different treatment by an NLRB reconstituted by appointments of the current President\(^5\) and the probable judicial reaction on review of that treatment. A landlord client who sought review of a standard form lease with disclaimers of liability would probably expect advice going beyond the apparent current validity of disclaimers\(^5\) and would expect a warning about potential liability to tenants for criminal acts of third persons intruding on the premises.\(^4\) Clients will expect their lawyers to advise them about the changes expectable from a creative judiciary or a changed administration. From whom else could they obtain advice so important to the planning of business ventures or their personal lives?

Many clients come to lawyers without knowledge of which aspects of their problem present legal questions and which aspects present non-legal questions.\(^5\) They expect advice about what they should do to solve the entire problem, not merely the legal aspects of the problem. If aspects of their problem do not present legal questions, they will at least expect to be so advised and to receive advice about where they can obtain the required assistance for the non-legal aspects. Moreover, many clients are unfamiliar with legal procedures and the effect that pursuit of those procedures will have upon their lives. If a lawyer's obligation with respect to informed consent is to make full disclosure of all costs, risks, and benefits of a proposed course of action and alternative courses of action which would be considered relevant by the prudent client, a lawyer will be required to discuss more than technical legal aspects of a problem.

A provocative example may serve better to illustrate the requirement of disclosure in obtaining informed consent. Assume a case of the wrongful death of a child or spouse in which the sound, honest, and "candid"

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51. See Peck, supra note 19, at 29-31.
55. See D. ROSENTHAL, supra note 43, at 70-79.
professional judgment is that the possibility of establishing liability is around or slightly over sixty percent with substantial damages if liability is established. Will the lawyer have made the requisite disclosure to obtain informed consent for the filing and pursuit of a wrongful death action if nothing more than the expectable financial costs and a technical, legal appraisal of the case are discussed? Would not a reasonable, prudent, and obviously inexperienced client want to be advised of the expectable delay before the trial or settlement, of the time which will be spent in consultations and the taking of depositions? Would not a reasonable, prudent client want to be warned that the process will require frequent reconsideration over that extended period of time of exactly how the child or spouse died, of how the accident might have been avoided, of how unnecessary or fortuitous was the death? Would not that client want to be advised of the tension and frustration which will grow from uncertainty about whether the investment of emotional energy and time will be successful? And, if the result is a defense verdict, may that client not properly believe that, even if it had been a sound, professional judgment that there was a sixty percent chance that liability would be established, he or she was induced to undertake a course of conduct with enormous personal costs without information permitting an informed consent? In such a case an attorney's major protection will be the client's reluctance to again be subjected to the emotional trauma which accompanies litigation. But some such cases, or similar cases, will be brought by dissatisfied and affronted clients.

The major treatise on legal malpractice informs us that there are few decisions and no agreement concerning whether or when damages for mental distress, pain, suffering or injuries to health are recoverable as consequential damages for legal malpractice.\(^6\) Denial of such damages is understandable and predictable when the theory of liability is negligence in failing to exercise professional standards of judgment with respect to the outcome of litigation. Liability for negligent infliction of emotional distress is a recent development in tort law.\(^7\) In medical malpractice suits, liability for emotional distress falls easily within the "suffering" aspects of the pain and suffering damages which regularly accompany physical injuries. Emotional distress caused by legal malpractice will not have the physical injury to which compensating damages may be easily attached. The analogy to the medical profession's liability suggests, however, that such damages should be recoverable. Moreover, the recent recognition of

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56. R. MALLEN & V. LEVIT, supra note 1, § 310, at 362.
damages for outrageous conduct and even negligent misconduct suggests that liability for legal malpractice based on lack of informed consent will soon include liability for the emotional distress experienced in the course of conduct for which informed consent was not obtained.

There are other, less provocative examples of lawyer liability to a client who pursued a recommended course of conduct without informed consent to the risks involved and a comparison of the risks of alternative courses of conduct. Persons engaged in business transactions are generally considered as knowledgeable and informed about the transactions which they wish to have take place. There almost certainly is no empirical data concerning the matter, but I believe that even knowledgeable persons consult lawyers with considerable frequency about how a transaction should be accomplished, and receive advice based upon an unstated assumption of the lawyers that the major concern of the client is to avoid or minimize taxes. The tax avoidance advice is possibly not the risk avoidance advice which the client would have preferred to receive. If one of those risks eventuates and the risk was not disclosed, an informed consent standard would lead to liability of the lawyer.

Professor Harrop Freeman, in his early and perceptive casebook on counselling, produced a case history which he entitled "The Frustrated President," which illustrates another possibility of lawyer liability to a client for lack of informed consent in a business transaction. The client was the developer and owner of a profitable small business which he decided to sell to a larger, acquiring company. His lawyers arranged the sale of his business, giving major attention to tax consequences. The contract provided that the client would have a position on the board of directors of the acquiring corporation, but it did not give him a position on the executive committee of that board. The client subsequently found his personal life frustrating as he watched his "brainchild" suffer and diminish while he was powerless to combat decisions made by a subgroup of the executive committee. His lawyers explained that it was not a function of lawyers to arrange management employment contracts, and, while sympathetic with the condition of their client, they apparently felt no responsibility for that condition. Their concern might well have been for their liability if the standard of the informed consent of a reasonably prudent client were used in judging the quality of the legal services provided.


59. See, e.g., Corrigal v. Ball & Dodd Funeral Home, 89 Wash. 2d 959, 577 P.2d 580 (1978); see also cases cited supra note 57.

Family law (specifically marriage dissolutions) is an area in which clients probably undergo much treatment by lawyers to which they have not given informed consent. For the most part clients coming to lawyers concerning a marriage dissolution are troubled, inexperienced, and unsophisticated. A battered wife will certainly need more than legal services and protection, and she will have been inadequately served if that is all she receives. Many persons undergoing "friendly" marriage dissolutions have no understanding that the dissolution will substitute a new set of problems for the existing set of problems without returning them to the state of freedom and enjoyment they had before marriage. Two persons do not live together as cheaply as one, but it certainly is not possible to maintain two households at the same economic level of enjoyment as one—a fact obvious to a lawyer with experience, but unconsidered by at least some clients. Income tax consequences of alimony as contrasted with a property settlement and child custody awards deserve discussion. The possibility of harassing interferences with visitation rights deserves consideration in framing a visitation program, and the client is probably much better qualified to pass upon the harassing tendencies of the opposing spouse. A lawyer who immediately undertakes to bring about a dissolution of a marriage without investigation of these and related questions and without exploration of the possibility of reconciliation has almost certainly propelled a client into a course of conduct without informed consent. Again, Professor Freeman has provided us with an archetypal example in his case history of "The Rabbi and the Horsewhip Lawyer." Damages may be difficult to prove, but once a requirement of informed consent has been established the standards for determining damages are likely to be developed in ensuing litigation.

Most criminal prosecutions terminate in a plea bargained result. This almost certainly means that most defendants in those cases have entered a plea on the advice of counsel that it was the preferred course to follow. Counsel who specialize in criminal law practice have an obvious self-interest in establishing themselves with prosecutors and judges as reliable predictors of the future behavior of clients—an interest which may not coincide with a client's desire to minimize the duration of an experience designed to deter future criminal conduct. This conflict is probably not discussed

62. See C. Peck, CASES AND MATERIALS ON NEGOTIATION 166 (2d ed. 1980).
63. H. Freeman & H. Weihofen, supra note 60, at 183. Other cases of inadequate counselling are set out in the pages following. See especially "Bovine and the Buxom Nurse." Id. at 203.
64. See generally H. Miller, W. McDonald & J. Cramer, PLEA BARGAINING IN THE UNITED STATES (1978).
65. See H. Freeman & H. Weihofen, supra note 60, 253-55 (containing the history of a case in which defense counsel advised a judge to "scare hell out of" his client, and then arranged for a suspended sentence, all without consulting the client).
with clients, and it is probably not immediately obvious to clients, which makes open and full discussion of the risks of alternative defense strategies and tactics of even greater importance. Is the certainty of a sentence following a guilty plea to a misdemeanor to be preferred to the risk of conviction of a felony in a trial? What are the prospects in a trial before a judge—before a jury? What are the prospects of affecting the sentencing process after conviction and what should be done to develop a favorable pre-sentencing report to the sentencing judge? Can a favorable pre-sentencing report be developed without full and informed participation of the defendant? Again, damages may be difficult to prove, but once a requirement of informed consent has been established the standards for determining damages are likely to be developed in the ensuing litigation. 66

Other situations involving potential liability for lack of informed consent can be suggested. For example, how often do counsel selected by an insurance company to represent an insured make full disclosure of the potential conflict of interest between the insured and the insurer and alert the insured to the events which could give rise to such a conflict? Should a physician be permitted to agree to a settlement favored by his insurer because he believes his practice is likely to suffer if a malpractice case goes to trial? 67 If no law requires a non-union employer to observe seniority in determining the order of layoff, should the client be alerted to the possibility that personnel problems will be created if that order of layoff appears to be governed by arbitrary considerations? Further, should the client be advised those problems may provide a basis for a successful union organizing campaign? Should an established artist who believes a major work has been copied by a younger artist be counselled that imitation is the highest form of flattery rather than receive only the appraisal of the possibilities of success in a suit for infringement of copyright which creates a reputation for jealous harassment of younger artists? Should matters of public relations and institutional reputation play as great a role as the law in a charitable institution's determination of whether or not to resist a challenge to the validity of a will making a substantial gift to the charity? 68 I am sure that lawyers familiar with specialized areas of law and particular businesses or activities could greatly lengthen the list of situations in which adequate counselling requires more than a discussion of only legal principles.

If the legal profession is subjected to the same standards for informed

66. For a discussion of the problems of proving damages for legal malpractice in criminal proceedings, see New Developments, supra note 9, at 447-50.
67. A study of the effects of malpractice suits on the practices of 58 Connecticut physicians indicated that the effects were insignificant. Wycoff, The Effects of a Malpractice Suit upon Physicians in Connecticut, in 2 Torts and Medical Yearbook 862 (A. Auerbach & D. Belli eds. 1962).
68. See, e.g., C. Peck, supra note 62, at 25.
consent as the medical profession, there will be a loss of "efficiency" in the sense that lawyers will have to spend time with clients, discussing matters which are not technical legal subjects. Indeed, they will have to spend more time discussing and explaining technical legal matters with clients than they do at present. Given the complaints that legal services are already too expensive, it is the predictable recognition of an informed consent standard to be lamented?

Of course, the costs of medical care have likewise risen rapidly in recent years. It has been suggested with some frequency that the increased costs are due in substantial part to adoption of defensive medical procedures—procedures followed to forestall law suits rather than for the benefit of the patient. The time of physicians is very valuable, and time spent informing a patient of the risks of a proposed procedure, risks of alternative procedures, and the possible benefits of additional diagnostic tests certainly adds to the cost of medical services. Physicians complain that the information required is not understood by patients and that upon occasion it creates unnecessary anxiety, or induces a patient to refuse a required treatment. Indeed, it is understandable that physicians complain that the standards imposed upon them by the legal profession and the judiciary require them to give a patient the equivalent of a short course through medical school before treating that patient. As mentioned above, the judicial response has been that appropriate respect for human dignity and an individual's right to control what happens to his body justifies the expense. A similar response might suffice to answer the complaint that the costs of legal services will be raised.

The experience in the field of medicine suggests, however, that patients are delighted to receive the information, that they seldom refuse to undergo diagnostic procedures, and that they likewise are not deterred from undergoing dangerous surgery. A patient's understanding of the dangers of a diagnostic test or medical procedure may even reduce the frequency of malpractice suits for undesirable results, and hence the cost of medical care. Comparable favorable results are expectable for the legal profession. A carefully performed study of personal injury claims in the First Department of the New York courts indicated that actively participating clients received better settlements of their personal injury claims than did clients who conformed to the traditional passive role of the uninformed and inactive client (their lawyers also received higher con-

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72. See Martyn, supra note 14, at 341-42.
73. Id. at 342-43.
A Gallup poll of 1025 Canadian adults indicated that fifty percent of them most desired a lawyer who would explain the details of a case. A major complaint about the quality of legal services is that lawyers have failed to give clients an adequate explanation of the status of their case or problem and actions which the lawyer has taken and will take. Recognition of a requirement that lawyers obtain informed consent of clients to pursuit of a course of action will not only eliminate the complaints; it will improve the quality of the actual service. The service will also be better received and more appreciated because it is understood. Recognizing a duty of lawyers to obtain the informed consent of their clients will serve human dignity by permitting clients to exercise greater control over very important aspects of their lives.

The bud of a new tort here offered is no more than a bud. I believe it will bloom. The result will be an improvement in the quality of service provided society by the legal profession and a consequent and earned enhancement of the standing of the profession.

74. See D. Rosenthal, supra note 43, at 29-61 (particularly pages 57 and 61).
75. See Martyn, supra note 14, at 308 n.4.
76. In 1978 the American Bar Foundation study on the legal needs of the public found that 50% or more of the surveyed respondents agreed with the statement that lawyers are generally not good at keeping the clients informed of progress on their case and 30% or more agreed with the statement that lawyers do not care whether their clients understand what needs to be done and why. Link, Improving the Quality of Lawyers' Services to Clients, 65 A.B.A. J. 387, at 1A (1979).
77. See Martyn, supra note 14, at 340-43, 352-53.