JUST INJUSTICE

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"Existing institutions and language already carve the world and already express and recreate attitudes about what counts as a difference, and who or what is the relevant point of comparison."[1]

"For Black women as well as Black men, it is axiomatic that if we do not define ourselves for ourselves, we will be defined by others—for their use and to our detriment."[2]

INTRODUCTION

Groups assembled by race, ethnicity, gender, and other immutable characteristics frequently come together to challenge laws and court rulings which ignore these inseparable characteristics and artificially treat people as if they are on equal footing. By the very nature of the legal industry, clients and attorneys rarely approach each other on equal footing. The attorney's legal expertise usually sets him apart from the client.[3]

The effect of this unequal footing impacts more on the client of a different race, gender or class than the attorney. The promulgators of the Model Rules of Professional Conduct fail to consider adequately the impact of these differences upon the client when granting the attorney discretion. As a result, the Model Rules of Professional Conduct fail to provide sufficient safeguards to protect client decision-making in these contexts.

This paper examines the attorney-client relationship and the oscillating balance of control between them during the course of the relationship . The attorney-client relationship is premised upon the paradigm of agent and principal. Consequently, the rules governing the attorney-client relationship and the assignment of duties reflects the basic doctrines of agency law. Mazor, examining the origins of this relationship, states:

> At its earliest stage, before a professional lawyer class had developed, the attorney was . . . a steward or a bailiff. Having received the benefit of the extension of his legal personality through an attorney, the principal (not yet a client) had to bear the new risk of his attorney's error or misconduct.[4]

Today, the American Bar Association's Model Rules of Professional Conduct (hereinafter Model Rules) provide guidelines regarding appropriate attorney behavior.[5] The Model Rules ostensibly specify the duties of both the

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1. Minow, *The Supreme Court 1986 Term—Forward: Justice Engendered*, 101 HARV. L. REV. 10, 15 (1987).

2. A. LORDE, *Scratching the Surface: Some Notes on Barriers to Women*, in SISTER OUTSIDER 45, 45 (1984).

3. *See* Ellmann, *Clinical Education: Lawyers and Clients*, 34 UCLA L. REV. 717, 718 (1987).

4. Mazor, *Power and Responsibility in the Attorney-Client Relation*, 20 STAN. L. REV. 1120, 1121 (1968).

5. Prior to 1970 the courts utilized the ABA Canons of Professional Ethics. *See* United States v. Standard Oil Co., 136 F. Supp. 345, 353 (S.D.N.Y. 1955), as an example of the standard to evaluate attorney behavior. Courts have shown a willingness to turn to the Model Code of Professional Responsibility and the Model Rules of Professional Conduct. *See, e.g.*, General Motors Corp. v. City

attorney and client; however, they allow the attorney discretion to make decisions about the case which might impinge upon the client's realm of control.[6] The discretion allowed by the Model Rules may be particularly problematic when the attorney is a White male from a high socio-ecnomic level and the client is a woman of color from a lower socio-economic level.[7]

The task of this paper is to observe the attorney-client relationship vis-a-vis the Model Rules and a hypothetical based on an episode of NBC's *L.A. Law*. I argue that the amount of attorney discretion granted by the Model Rules permits the attorney to make decisions based upon racist, sexist, or classist assumptions. This discretion and the assumptions that attorneys have about their clients lead to the disempowerment of the client.[8]

In Part I, I present a hypothetical in which a White male attorney represents a Black female client from a lower socio-economic background. I set forth the issues of control that arise in this situation.

Part II of the paper discusses the Model Rules of Professional Conduct relevant to the hypothetical situation. In particular, I will address two questions. First, did the attorney in the hypothetical overstep the boundaries set forth in the Model Rules? Second, in what ways do these rules allow for the disempowerment of the client?

In Parts III and IV, I re-analyze the hypothetical in light of considerations of race, gender and class and argue that the Model Rules fail to provide safeguards against the abuse of attorney discretion in situations where the client and attorney are separated by relations of societal subordination.

In Part V I will raise possible solutions to the situation.

I. HYPOTHETICAL

A White male police officer monitoring a crack house enters the house on a drug raid. While searching the house for suspects, the officer opens the door

of New York, 501 F.2d 639, 649 n.18 (2d Cir. 1974); Nix v. Whiteside, 475 U.S. 157, 166–76 (1986) as guidelines for attorney conduct.

6. Where the client is of a similar socio-economic status as the lawyer, the client will be better able to maintain the balance of control. *See* Ellmann, *supra* note 3.

> Clients who enjoy economic leverage over their attorneys, clients whose own expertise rivals their lawyers' knowledge, and even, perhaps, clients who are simply so unusually aggressive as to command their lawyers' close attention, may well enjoy legal services that are finely tuned to the clients' own definition of their objectives.

Id. at 745. *Contra*, Morris, *Clinical Education: Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyer's and Clients*, 34 UCLA L. REV. 781, 785 (1987); *see also* Ellmann, *Manipulation by Client and Context: A Response to Professor Morris*, 34 UCLA L. REV. 1003 (1987).

7. Attorneys bring to bear their legal expertise and familiarity with the court to the client. Where the client is a woman from a lower socio-economic background the attorney will bring knowledge spawned by drastically different experiences than his client. In addition, "[o]ften social status and economic class will also give lawyers a standing to which both lawyer and client may feel deference is due." Ellmann, *supra* note 3, at 718. This paper will look at the Model Rules as they affect the attorney-client relationship when the client is an African American woman from a lower socio-economic stratum than the White male attorney.

8. The attorney's use of power, whether or not it is consciously used, impinges upon the client's ability to make or adhere to a decision. As Ellmann points out, "[c]ertainly lawyers commonly possess at least a modicum of power, if power is broadly defined . . . if only through the persuasive impact of their arguments, to make their clients more disposed to act (or not act) in particular ways . . ." Ellmann, *supra* note 3, at 719 citing Bayles, *A Concept of Coercion*, in NOMOS XIV: COERCION 16, 27 (J. Pennock & J. Chapman eds. 1972).

to a room and sees someone pointing an object at him. The officer fires his weapon several times, emptying the chamber. Once the smoke clears, the officer realizes that he has shot and mortally wounded a young toddler pointing an object at him. The child dies in his mother's arms as they await the ambulance.

The mother, a Black woman, is represented by Attorney X, a socially-conscious, sensitive young White male attorney from a large, prestigious law firm. Attorney X realizes the woman potentially has an excellent suit against the police department and believes she should file a suit. Attorney X tells the woman she has a potentially large and lucrative suit against the police department and urges that she file a million dollar lawsuit. The attorney tells her that he believes he can get a very good settlement offer if she files the suit. The woman has been informed that the District Attorney could press criminal charges against her for criminal drug activity. This would result in the loss of welfare benefits and custody of her children. She informs Attorney X that she wishes to have the charges against her dropped, her benefits maintained, and retain the custody of her children. The woman makes it clear that she does not wish to pursue the suit or the settlement.

When Attorney X meets with the District Attorney, he claims that the woman is going to bring a multi-million dollar lawsuit against the police department. He also points out that the District Attorney does not have much of a case against the woman and that it would be in the department's best interest to drop the charges and settle out of court. The two White males haggle about the amount of the settlement, and eventually decide that the city will pay the woman a quarter of a million dollars. Attorney X accepts the settlement offer. Attorney X believes he has achieved the goals of his client: the charges against his client will be dropped; she will not serve any time in jail; her benefits will not be jeopardized; and most importantly, she will not lose custody of her children.

This hypothetical raises issues which go to the core of legal ethics. The principal professional responsibility issue is whether Attorney X exceeded his role as attorney by tacitly ignoring the wishes of his client and pursuing a settlement or whether he was merely being a zealous advocate and pursuing the client's best interests. Issues of race, gender and class also arise. Was Attorney X really a hero in the hypothetical or do his actions—ignoring the edicts of his client, a low income, under-educated Black woman—reveal racist, sexist or classist undertones? Would Attorney X have acted the same way with a White male corporate client?[9]

II. Model Rules of Professional Conduct

The precursor to both the Model Rules and the Model Code of Professional Responsibility (hereinafter "Model Code") is the American Bar Associ-

9. Ellmann's observations regarding clients of a similar socioeconomic background indicate the client would have been treated differently if she were economically superior to the attorney. Yet, even this assertion fails to recognize the pervasive nature of racism and sexism. Ellmann ignores the extent to which these other factors influence the attorney's interactions with the client. *See* Ellmann, *supra* note 3.

ation Canons of Professional Ethics, which was adopted in 1908.[10] The Model Code was adopted in 1981 to replace the ABA Canons of Professional Ethics. The Model Rules were adopted in 1983 as a further refinement of the Model Code. The difference between the two codes is that the Model Rules more clearly address the attorney's role as an advisor.[11]

The canons and rules governing the attorney-client relationship are premised upon the agent and principal relationship.[12] Under these rules the attorney, as the agent of the client, exercises actual, apparent and inherent authority.[13] Courts will hold the client responsible for attorney's actions.[14] Moreover, courts are willing to hold the client responsible for the attorney's mistakes.[15] This outcome has been criticized as unfair to the client who is unable to control her attorney.[16]

A. *Prescriptives of the Model Rules*

The ABA Model Rules and Model Code provide rules which may be mandatory, permissive, or aspirational in their force.[17] Thus, the rules are both a framework and policing tool for the legal system. They supplement the "larger legal context" of case law, court rules, and statutes, and provide flexible constraints upon members of the legal community.[18] Moreover, the rules provide standards for attorney self-governance and a regulatory procedure for sanctioning attorneys.[19]

Rule 1.2 sets forth the scope of representation to which the attorney should adhere. The attorney is required to follow the client's decisions concerning the goals and objectives of the suit.[20] The lawyer is also required to

10. MODEL CODE OF PROFESSIONAL RESPONSIBILITY PREAMBLE n.1 (1981) [hereinafter MODEL CODE].

11. Peck, *Ruminations on Tort Law: A Symposium in Honor of Wex Malone; A New Tort Liability for Lack of Informed Consent in Legal Matters*, 44 LA. L. REV. 1289, 1290 (1984).

12. *See* RESTATEMENT (SECOND) OF AGENCY, §§ 12, 27, 8A (1958).

13. *Id.*

14. Courts have held a client responsible for her attorney's decisions where it does not constitute ineffective assistance of counsel, even where the client objects to the action. For example, in Winters v. Cook, 489 F.2d 174 (5th Cir. 1973), counsel validly waived the challenge to the jury's racial composition and did not have to inform his client, the defendant of all constitutional rights.

15. *See, e.g.*, Link v. Wabash Railroad, 370 U.S. 626 (1962); Cine Forty-Second Street Theatre v. Allied Artists Pictures, 602 F.2d 1062 (2d Cir. 1979); *but cf.*, Evitts v. Lucey, 469 U.S 387 *reh'g denied*, 470 U.S. 1065 (1985) (Criminal clients are bound only where the attorney's error does not constitute ineffective assistance of counsel).

16. *See* Note, *The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for Their Attorneys' Procedural Errors*, 1988 DUKE L.J. 733 (1988).

17. The force of the Model Rules and Model Code is laid out in their preambles. Since the focus of this Article is the Model Rules, their force will be presumed throughout the Article. The Model Rules' Preamble states:

> Some of the Rules are imperatives . . . [t]hese define proper conduct for purposes of professional discipline. Others . . . are permissive and define areas under the Rules in which the lawyer has professional discretion . . . . Other Rules define the nature of relationships . . . and are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.

MODEL RULES OF PROFESSIONAL CONDUCT Scope (1983) [hereinafter MODEL RULES].

18. *Id.*

19. It should be noted that "[f]ailure to comply with an obligation [permissive rule] or prohibition [mandatory rule] . . . [provides] a basis for invoking the disciplinary process . . .' [which] should not give rise to a cause of action nor . . . create any presumption that a legal duty has been breached." *Id.*

20. The Model Rules mandate the following:

defer to the client's authority regarding settlement offers and pleas, in whether to waive a jury trial, and whether the client will take the stand in criminal cases.[21] In addition, the attorney should consult with the client regarding the tactics utilized in the suit where there is a question regarding expenses incurred or concern for a third party. Moreover, the comment following Model Rule 1.2 states:

> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client has a right to consult with the lawyer about the means to be used in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.[22]

Finally, Model Rules 1.2 through 1.4 establish that the attorney shall be a zealous advocate for the client and keep the client informed as to the status of the case.[23] The attorney's behavior is further prescribed by criminal law. He is prohibited from encouraging or assisting a client to engage in "conduct that the lawyer knows is criminal or fraudulent. . . ."[24]

There is no exact counterpart to Model Rule 1.2(a) in the Disciplinary Rules of the Model Code. Under the Model Code the client was granted substantially similar rights to direct the course of the suit.[25] The Model Rules generally outline acceptable attorney conduct, but do not describe impermissible attorney conduct.[26]

> A lawyer *shall* abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Id. Rule 1.2a (emphasis added).

21. *Id.*

22. *Id.* Rule 1.2 comment.

23. *Id.* Rules 1.2–1.4; *See* Peck, *supra* note 11, at 1290. In addition, the Model Rules advocate greater client control than the Model Code. *See* Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decisionmaking and the Role of Rules in Structuring the Lawyer-Client Relationship*, 1980 AM. B. FOUND. RES. J. 1003.

24. MODEL RULES, *supra* note 17, Rule 1.2(d).

25. The client's rights to direct the course of the suit are specified in the ethical considerations of the Model Code. EC 7-7 stated:

> "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client . . . ." EC 7-8 stated that "[i]n the final analysis, however, the decision whether to forego legally available objective or methods because of nonlegal factors is ultimately for the client. . . ."

Id. Rule 1.2 MODEL CODE COMPARISON.

26. *Id.*; *see* Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1 (1988).

> Quality-of-services critics point out that lawyers' autonomy has a dark side: independence is not an unambiguous good. The dark side is revealed most clearly in the practices of lawyers who deal with clients less informed or of lower status than themselves — lawyers who preempt virtually all of the decision-making authority, keep information to themselves,

Both the Model Rules and the Model Code contain language which grants the attorney discretion to circumvent the client's edicts.[27] Rule 2.1 obliges the attorney to "exercise independent professional judgment." By the very nature of the language in the provision, exercising such judgment is mandatory. However, Model Rule 2.1 does not explicitly enumerate the situations in which such action is proper.

Another example of attorney discretion is where an attorney is requested to engage in behavior that he finds objectionable, but not illegal. Both the Model Rules[28] and the Model Code provide that the attorney may withdraw so long as it does no harm to the client's cause of action.[29] The Model Rules provide the attorney with ample flexibility to remove himself for reasons outside of client misconduct.[30] Consequently, the attorney has the freedom to leave the case when he strongly disagrees with the client's objectives or conduct. The attorney is not obligated to stay with the client until the completion of the suit.

The Model Rules mirror Model Code Disciplinary Rules 7-101(B)(1)-(2) in that they permit the attorney to circumvent the client's request that the attorney raise all possible legal arguments. The Model Rules indicate that an attorney can "exercise his professional judgment to waive or fail to assert a right or position of his client" and can "[r]efuse to aide or participate in conduct that he believes to be unlawful, even though there is support for an argument that the conduct is legal."[31] Ultimately, the attorney has almost complete control over the tactics to be utilized in the case.[32]

Though the Model Rules attempt to be more succinct than the Model Code in delineating the areas within the purview of the client, there are too many areas under the rules where the attorney can ignore the wishes of his client and utilize legal arguments that he considers best. Clearly, these rules

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> don't spread a full range of choices before their client or heavily bias the choices they do present, don't tell clients what is happening in their cases, patronize their clients and view them as over-emotional and dumb laypeople who can't possibly know what legal options will serve them best, or presume that they know what's in their clients' best interests . . ."

Id. at 68.

27. *See* MODEL RULES, *supra* note 17, Rule 2.1 (The attorney may exercise independent professional judgment and render candid advice.). *See also id.* Rule 1.4 comment (The attorney may withhold information from the client "when the client would be likely to react imprudently to an immediate communication.").

28. "[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client . . . ." *Id.* Rule 1.16(b) (1983).

29. [a] lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because: (1) [h]is client: (a) [i]nsists upon presenting a claim or defense that is not warranted under existing law. . .(b) [p]ersonally seeks to pursue an illegal course of conduct, (c) [i]nsists that the lawyer pursue a course of conduct that is illegal . . .(d) [b]y othe conduct renders it unreasonably difficult for the lawyer to carry out his employment . . .

MODEL CODE, *supra* note 10, DR 2-110 (C).

30. *See* MODEL RULES, *supra* note 17, Rule 1.16(b).

31. MODEL CODE, *supra* note 10, DR 7-101(B)(1) & (2). *See also* MODEL RULES, *supra* note 17, Rule 1.3 comment. "However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued." *Id.*

32. Since the tactics used in the suit and the objectives of the suit are interrelated, the attorney ultimately has control over both tactics and the goals of the suit. *See* Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 101–02 (1979).

undercut the client's control over the suit.[33] In some cases, attorney discretion can be quite detrimental to the client, particularly where a defendant is facing long term imprisonment or the death penalty and the attorney refuses to raise all non-frivolous claims.[34]

The attorney's expertise and the flexibility of the rules act in concert to place the attorney in the position of determining the issues of the case, the items to be researched and pursued, and ultimately the objectives to be obtained. The attorney can decide to ignore certain client positions without justification. Thus, on one hand the Model Code and Model Rules confer decision-making power to the client and claim to grant deference to the client's wishes. Yet, on the other hand, there are rules established which take away client autonomy.

B. *Apportionment of Duties*

The Model Rules' apportionment of duties between the attorney and the client creates a team atmosphere in which the attorney and the client have specific roles and duties.[35] In this position, the attorney balances the dual role of tactician and implementer.[36]

The initial interview between the attorney and the client provides the foundation for the type of relationship the attorney and the client will have throughout the litigation process. During the initial interview and subsequent meetings, the client must relate facets of the dispute and all pertinent information to the attorney. In response, the attorney must inform the client of the legal remedies, if any, which are available.[37] In addition, the clients must find out if the attorney has the time and competence to handle the case.[38] The attorney, on the other hand must take this time to assess both the legal[39] and economic value of the case in light of his own workload. It is within this framework that the attorney and the client enter into a relationship and must build a team that will address the legal problems before them.

In the hypothetical, Attorney X and the client approached the pending suit as the Model Rules envisage. The woman expressed the goals she wished to achieve and the attorney set about implementing tactics to achieve those ends.[40] The client addressed settlement determinations and exercised her op-

33. The Supreme Court decisions in the 1980's "accorded the attorney almost plenary power to bind the defendant, both in cases of overt lawyer-client disagreement and in cases where counsel had 'waived' a client's rights without his approval or even knowledge, often by heedlessness rather than tactics." (footnotes omitted) Berger, *Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 11-12 (1986).

34. *See* Jones v. Barnes, 463 U.S. 745 (1983); Miller v. J.C. Keeney, 882 F.2d 1428 (9th Cir. 1989) (No constitutional duty to raise all non-frivolous claims).

35. *See* MODEL RULES, *supra* note 17, Rule 1.2 comment; *see also* Ellmann, *supra* note 3.

36. "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client . . ." MODEL RULES, *supra* note 17, Preamble.

37. *See id.* Rule 1.4(b). (The attorney shall "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

38. Model Rule 1.3 provides that a lawyer must act diligently and promptly regarding the matter. Moreover, Model Rule 1.4(a) provides that the attorney must keep the client informed about the status of the case. *Id.* Rules 1.3, 1.4.

39. *See id.* Rule 1.3 comment.

40. *See id.* Rule 1.2(a) & comment.

tion to preclude pursuit of monetary damages or a settlement offer.[41] The attorney consulted with the client to determine the goals and the most effective means to achieve the client's goals.[42]

The approach, as outlined above, empowered the client to exercise control of the destiny of her case and, in some small sense, her life. Moreover, this approach took a significant amount of pressure off the attorney to make the right decision. The client was able to witness the process that enabled them to arrive at a decision. The principle question is whether under the Model Rules the attorney overstepped the boundaries of his role by failing to communicate the settlement[43] and by offering and accepting that settlement without express authorization[44] from his client.[45]

The Model Rules are premised upon the agency principles. As such, the attorney should be bound to follow the edicts of his client despite the discretionary provisions of the Model Rules. Though an attorney may counsel his client as to viable alternatives, it is ultimately the client's prerogative to determine the goals of the suit and the attorney's responsibility to determine the steps that will reach that goal.

Neither the Model Rules nor the Model Code directly address the scenario where the attorney secures a windfall for his client against the client's wishes. The Model Rules seem geared to the situation where the attorney fails to follow any of the instructions set forth by the client. Rule 1.2, however, mandates that the attorney shall abide by the client's decision regarding an offer of settlement of a matter. Accordingly there is a strong argument to be made that acceptance of the settlement without the client's consent is a violation of the Model Rules. Acceptance of a settlement without the consent of the client would seem to be a subversion of representation.[46] Moreover, the attorney should be required to obtain the client's consent because the client can be bound by the attorney's actions, even when the attorney acts without the client's consent.[47]

The Model Rules allow the attorney discretion in advancing non-frivolous claims. It does not specifically address the situation where the attorney advances a non-frivolous claim and the client receives an unwanted windfall. Arguably, where the client is unable to prove damages in a malpractice suit, the attorney's behavior will go unchecked.[48]

Since Attorney X achieved the goals set out by the client, his failure to follow the client's wishes regarding settlement might not give rise to a malpractice suit or the commencement of disciplinary procedures under the Model Rules. It is unlikely the attorney would be found in violation of the Model Rules because of the amount of discretion allowed the attorney in the legal process. Arguably, Attorney X's pursuit of the settlement was nothing

41. *Id.* Rule 1.2(a).
42. *Id.* Rule 1.2 comment.
43. *Id.* Rule 1.4(a).
44. *See* RESTATEMENT (SECOND) OF AGENCY, § 27 (1958).
45. MODEL RULES, *supra* note 17, Rule 1.2(a).
46. *See id.* Rule 1.2 comment.
47. *See* Link v. Wabash Railroad, 370 U.S. 626 (1962).
48. *See* Spiegel, *supra* note 32, at 51. *See generally*, Martyn, *Informed Consent and the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980) (instructive discussion of both the legal and philosophical concepts underlying informed consent as applied to the legal field).

more than a tactic to achieve the other objectives of the client. Thus, the attorney would not be subject to discipline nor would he be found in violation of the Model Rules.

These points reveal a serious flaw in the premises underlying the approach of the Model Rules to the attorney-client relationship and the objectives/tactics dichotomy. Depending upon the purpose of the action, the action may be categorized as either an objective or a tactic. Consequently, when the objective and tactic converge into one, the attorney has a direct vehicle for encroachment upon the client's decision-making territory.[49]

These rules clearly attempt to protect the autonomy of both the attorney and the client. Since the rules are promulgated by the legal industry as standards governing both lawyers' and clients' behavior and expectations, there is a bias toward the attorney's professional opinion and discretion. The preamble to the Model Rules stipulates that a violation of the Model Rules does not necessarily give rise to a cause of action; it merely sets the disciplinary process in motion.[50] The failure of the Model Rules to create a presumption of breach of a legal duty for violations of the Model Rules manifests the ABA's privileging of legal professionals over clients.

III. RACE, SEX, OR CLASS

A. *Process of Disempowerment*

In the hypothetical, Attorney X disobeys the client's instructions and secures a settlement from the city. If the attorney was outraged by the police department's behavior and wished to vindicate his client, he could have chosen other means of punishing the department. The attorney could have pursued other punitive measures such as: 1) an official apology from both the officer who shot the child and the police department; 2) a full scale investigation of the officer and the police department's practices and policies surrounding surveillance of drug houses; or 3) the investigation, suspension or dismissal of the officer. Instead, Attorney X, in exercising his discretion chose to pursue the one alternative his client had foreclosed.

The attorney's action could be characterized as an abuse of discretion because it was directly contrary to one of the client's objectives in the case. The attorney subverted his client's decision-making authority on the objective. The Model Rules, however, provide no adequate safeguards for scenarios such as these where there is a possibility that an attorney might exercise his discretion based upon his personal values.

The attorney's use of his discretion in the hypothetical, in effect, disempowers[51] the client in the decision-making process. This action falls short of an outright refusal to follow instructions, and incorporates the attorney manipulating or forcing the client to accept an outcome. Subtle attempts to coerce or manipulate the client into changing her mind demonstrate the attor-

49. *See* Spiegel, *supra* note 32, at 101–02; Patterson, *An Inquiry into the Nature of Legal Ethics*, 1 GEO. J. OF LEGAL ETHICS 43, 65–66 (1987).

50. *See* MODEL RULES, *supra* note 17, Scope.

51. Disempowerment, in this context, means the subversion of the client's ability to exercise her decision-making capacity without the interference of the attorney. Interference is defined as the attorney exerting power or influence over the client. Ellmann points out that lawyers are able to exert various kinds of power over a client. Ellmann, *supra* note 3, at 719.

ney exerting power over the client.[52] Disempowerment in this context would also include the attorney circumventing the edicts of the client by transforming the objective into a legal tactic.[53] Disempowerment in this context necessarily involves the privileging of the attorney's values and decisions over those of the client. Recognition of the interplay between values and decision-making is important to the success of a plan that respects client input. Choice is a matter of values and includes the client being afforded the opportunity to reconsider her personal wants and values. The lawyer's role is not to compel such decision-making but only to facilitate or encourage it from the client.[54]

The following subsections examine the potential for the attorney's racist, sexist and classist sentiments to enter the decision-making process. Biases on the part of the client's attorney may place a woman of color from a lower economic stratum at an extreme disadvantage in the decision-making process. Specifically, a person facing these impediments must overcome the attorney's presumptions in order to get the attorney to value her decision-making capacity. These presumptions might include: the belief that the client needs to be taken care of; the belief that the client does not know what she is doing; the belief that the client is not intelligent enough to assess her options; or similar beliefs which might cause the attorney to place less faith in the client to make appropriate decisions.

B. *Effects of Racism*

One of the most problematic aspects of the Model Rules is that they fail to accurately gauge the pervasive nature of societal problems such as racism. Audre Lorde defines racism as the belief in the inherent superiority of one race over all others and thereby the right of the superior race to dominate.[55] The underlying assumption throughout this paper is that the attorney is unconsciously acting out or acting upon his internal prejudices. Lawrence states, "[a] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.[56] Similarly, the Model Rules appear to disregard completely the origins and nature of racism and its subtle messages.[57] This complete disregard of racism poses severe problems for people of color interacting with members of the legal community because racist thought undercuts the decision-making ability of people of color.

The historical origins of racism in this country can be traced back to the slave trade. At that time, slavery, racism and the legal system were conjoined to construct a belief and enforcement system which would exonerate an economically profitable institution—slavery. Slavery could only survive in a system that rationalized domination and was supported by laws and customs that

52. John Kenneth Galbraith examines power wielding tools which are utilized to deprive an individual of the ability to formulate a decision on his or her own. J. GALBRAITH, THE ANATOMY OF POWER, 5–6 (1983).

53. Spiegel, *supra* note 32, at 102–03.

54. Ellmann, *supra* note 3, at 758–61 citing Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 468, 470.

55. A. LORDE, *supra* note 2, at 45.

56. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

57. *See* Davis, *Law As Microaggression*, 98 YALE L.J. 1559, 1560–61 (1989).

assured control of the slaves.[58] To justify the subjugation of a people, the dominant society found it necessary to portray Africans as unintelligent and subhuman. Slave women were sexually assaulted with impunity; the legal community's response was to define Black women as chattel, a commercial good with little constitutional protection.[59]

The misperception that African-Americans are less intelligent than Whites persists today due to the persistence of racism and stereotypes in which Blacks are commonly thought to be incompetent—or dangerous, or musical, or highly sexed.[60] Many people find it easier to rely on generalizations instead of making individual judgments.[61] As Lawrence states in reflecting on the persistence of racism,

> "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings about nonwhites. . . . At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which our beliefs affect our actions.[62]

If the attorney fails to recognize that he harbors cultural biases against certain members of society, he will be less inclined to question conflicts between his and the client's decisions. He will assume that the conflicts represent a difference of opinion. Racism, however, is problematic because it is ingrained in the culture. Thus, the attorney might be unaware of his own racist tendencies. He might be unaware of the process that has caused him to eliminate the facts that do not conform with his rationalization.[63] He might even believe that his client is unable to appreciate the ramifications of the problem or is unable to come up with an adequate solution.[64] It might not occur to the attorney that the problem lies, not with the client's decision, but with the attorney's basis for making the decision. The attorney might not know or might refuse to accept that his thinking might be premised upon a stereotyped view of his client.[65]

An attorney from a different socio-economic group, race or gender might fail to recognize that he and his client operate within different value systems. The attorney might devalue the client's voice and choices for reasons unrelated to the current litigation process. "Familiar cultural images and long-established legal norms construct the subjectivity and speech of socially subordinated persons as inherently inferior to the speech and personhood of dominant groups."[66] Privileging one voice of reason, the attorney's, necessarily involves the subordination of the other voice, the client's.

Racism presents itself in both overt and covert actions. Racism has evolved into a more invidious and subtle form which the White majority has a

58. *Id.* at 1563.
59. *Id. See generally*, D. BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980).
60. Davis, *supra* note 56, at 1562.
61. *Id.*
62. Lawrence, *supra* note 55, at 322.
63. *Id.* at 339.
64. *See* Gordon, *supra* note 26, at 68–69.
65. *See* Lawrence, *supra* note 55, at 339.
66. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFFALO L. REV.1, 4 (1990).

harder time recognizing. Case studies have shown that a person who holds stereotyped views about a "target" will perceive and interpret past events in the "target's" life and present action in ways that support, bolster, and validate the stereotyped beliefs.[67]

The Model Rules fail to address this issue or provide guidelines to prevent the use of these external factors. Consequently, the Rules promulgated to protect the client ultimately provide an outlet for the expression of impermissible criteria in the legal process. The discretionary provisions of the Model Rules permit the incorporation of unconscious prejudices into the decision-making process. Thus, racism manifests itself as an instrument for disempowerment vis-a-vis the Model Rules.

Once the client perceives herself as disempowered she might display a subservient attitude and respond to the attorney in a compliant manner. The attorney who misreads a client's actions and cannot understand the client's response unconsciously reinterprets these responses via his own stereotypical biases regarding the client. When the attorney supplants his own values for his client's, he robs the client of her decision-making power. The attorney might be completely unaware of his overreaching.

The attorney's failure to understand the basis for his client's compliant attitude[68] manifests a failure on the part of the attorney to recognize the power of his education, language, and familiarity with the court system. Such attributes of the attorney act as deterrents to clients' attempts to exercise their decision-making capacity and act as tools for disempowerment.

C. *Effects of Sexism*

Female clients of all races confront difficulties exercising their decision-making autonomy due to the persistence and pervasiveness of sexism in the legal system.[69] Audre Lorde defines sexism as the belief in the superiority of one sex and thereby the right of that sex to dominate.[70] The attorney's evaluation of the clients's decision entails the female clients being measured against a White male standard[71] which fails to consider the idiosyncracies of her race or gender. Similar to the case of racism, presumptions are made about the individual based upon stereotypes and internal biases regarding women.[72]

Sexism involves the privileging of one gender and all its characteristics over the other gender. Differences in speech patterns[73] and problem solving[74]

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67. Lawrence, *supra* note 55, at 339.

68. Williams observed the frustration of fellow attorneys in the public defender's office who were dissatisfied with their clients' attitudes and states:

> In my experience, most non-corporate clients look to lawyers almost as gods. They were frightened, pleading, dependent . . . trusting only for the specific purpose of getting help (because they had no choice) and distrustful in a global sense (again because they most often had no choice).

Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 403 (1987).

69. *See, e.g.*, White, *supra* note 65.

70. A. LORDE, *supra* note 2, at 45.

71. *See* C. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32 (1987).

72. Sexism and racism are learned behaviors picked up by children. *See* R. BOTTIGHEIMER, GRIMMS' BAD GIRLS & BOLD BOYS: THE MORAL AND SOCIAL VISION OF THE TALES (1987), for a general discussion of the presence of sexism in children's literature.

73. White, *supra* note 65, at 6–7.

become impediments for the unprivileged gender when measured against a White male standard which ignores these differences.[75] This White male standard recognizes objective, rational decision-making as the only legitimate paradigm.[76] Anything deviating from this standard is devalued. When these biases come into play in the attorney-client relationship, the woman's decision-making capacity is underestimated by the attorney. The attorney fails to recognize the salient characteristics of his client's voice. The client's speech and voice can have a significant impact upon how she will be perceived by the attorney. Not infrequently she will be thought if as having an inferior or deviant capacity for thinking because of her speech patterns.[77] The discretionary provisions of the Model Rules fail to provide safeguards which would preserve the client's voice.[78] Thus, the woman's ability to exercise decision-making autonomy is undercut and the woman is effectively disempowered.

The discretionary provisions of the Model Rules leave the client vulnerable to the gender biases of the representing attorney. As is the case with racism, sexism does not disappear when the client has an attorney of the same race or gender. Sexism is so pervasive in our society and has played such a dominant role in the development of our history and culture that it inevitably affects our ideas, attitudes, and beliefs.[79] If the attorney believes that his client is unable to make certain determinations, he will make them for his client.[80]

The potential for disempowerment increases when the client is both a person of color and a woman. The maturation process of most Americans incorporates literature which degrades Blacks,[81] women[82] and Black women.[83] Moreover, mass media panders to the negative images of the Black woman. Television programs depict the Black woman as a whining, nagging, bitter woman[84] or oversexed being.[85] The media also perpetuates the mythical figure of the African-American woman as the ever-enduring matriarch[86] figure or an amazon.[87] Mainstream education fails to correct these stereotypes or accu-

74. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U.L. REV. 1141, 1143 (1985).

75. *Id.*

76. 'Male' voice rationality is the traditional notion of logical thought with which we are all familiar but not necessarily comfortable. This rationality values reason over passion, objectivity over subjectivity, and scientific clarity over interdependent relativity. It reasons by deduction and linear logic and perceives and conceives social reality as a set of hierarchically ordered rules, equations, and normative truths. It resolves conflict by abstraction, detachment, and formulas of objective certainty.

Id. (Footnote omitted).

77. White, *supra* note 65, at 6 n.9.

78. *See* MODEL RULES, *supra* note 17, Rule 2.1.

79. Lawrence, *supra* note 55, at 322.

80. The attorney has a number of provisions which directly or indirectly grant him the discretion to make decisions for his client. *See, e.g.*, MODEL RULES, *supra* note 17, Rule 1.4 comment (the lawyer may withhold information from the client when client is likely to act imprudently); *Id.* Rule 2.1 (the lawyer shall exercise independent professional judgment); *Id.* Rule 3.1 (the attorney does not have to defend an issue unless there is a basis for doing so).

81. *See* Lawrence, *supra* note 55, at 317–18 (Lawrence relates the use of *Little Black Sambo* in his kindergarten class, and its appearance in his daughter's pre-school class.).

82. *See* R. BOTTIGHEIMER, *supra* note 71.

83. *See* B. CHRISTIAN, BLACK FEMINIST CRITICISM 2 (1985).

84. *See, e.g.*, B. HOOKS, AIN'T I A WOMAN? BLACK WOMEN AND FEMINISM, 65–67 (1981).

85. *Id.* at 83–85.

86. *Id.* at 82–83.

87. *Id.* at 52, 62–63.

rately relate the history and contributions of African-American women to society.[88] Societal conditions cause a majority of Americans to harbor misconceptions about Blacks and women in general, and Black women in particular.

Black women are also potential targets of racism and sexism from members of their own race or gender. Society fails to recognize the potential for racism or sexism from groups who have been the victim of some form of discrimination.[89] In light of all the negative stereotypes, it is no small wonder Black women may be vulnerable to overreaching by attorneys based upon race and gender.

Black women have historically dealt with the dual burden of being a woman of color. This dual burden has led to the phenomenon of Black women being visible for the purposes of scapegoating[90] and invisible[91] for the purposes of legal recognition. Black women found their particular concerns were unnoticed. Society felt Black women's issues would be addressed through both the civil rights movement and the women's movement. Instead, women of color found that neither forum addressed their specific concerns.[92] Courts and legislatures experienced difficulties addressing the composite effects of Black women's "Blackness" and "womanness" in trying to fashion Title VII discrimination laws. The invisibility of Black women occurred because society used two salient characteristics—race and gender—to define these women. Society never realized that the composite constituted as unique an individual as the individual components.

This invisibility manifests itself in the daily lives of women of color.[93] Black women of the 19th century were put to the choice of either supporting Black men or White women in their fight for suffrage. Either choice precluded Black women having voting rights.[94] During the civil rights and women's movements of the 1960's and 1970's African-American women and their issues were subordinate to those of White women and Black men.[95] Once again, their very being and concerns were rendered invisible. Instead of being embodied in both the civil right's and women's movement, Black wo-

88. *Id.* at 2, 159–96.

89. Hooks observes society's inability to acknowledge the existence of Black male patriarchy, *see id.* at 87–117, and White female racism, *id.* at 119–58. *See also* A. LORDE, *Sexism: An American Disease in Black Face*, in SISTER OUTSIDER, *supra* note 2, at 60–65 (examining sexism in the Black community); A. LORDE, *Age, Race, Class, and Sex: Women Defining Difference*, in SISTER OUTSIDER, *supra* note 2, at 114–23 (examining the feminist attempt to ignore differences amongst women).

90. *See* OFFICE OF POLICY PLANNING AND RESEARCH, U.S. DEP'T OF LABOR, THE CASE FOR NATIONAL ACTION—THE NEGRO FAMILY 29–34 (1965). (This report, referred to as the "Moynihan Report," alleged the matriarchal system within the Black community was to blame for the educational, economic and social decline of the Black community. This report advocated the reproduction of the White patriarchal system within the Black community as a remedy to the situation.)

91. A. LORDE, *Transformation of Silence*, in SISTER OUTSIDER, *supra* note 2, at 42.

92. Note, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457, 1461 (1989).

93. *See* Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 613 (1990) citing B. HOOKS, FEMINIST THEORY FROM MARGIN TO CENTER, 45 (1984).

94. *See* B. HOOKS, *supra* note 83, at 159–96.

95. *See* A. LORDE, *supra* note 2, at 45; *see also* B. HOOKS, *supra* note 83, at 119–58. *See generally* B. HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK (1989); Harris, *supra* note 92, for a more contemporary discussion of Black women and feminist discourse.

men's concerns were neglected by both movements.[96]

Women are obliged to respond to the power structure in a prescribed manner (i.e., through the court system). The very methods accepted by the power structure, however, also tend to disempower[97] the group they are supposed to serve.[98] Moreover, since Black women were excluded from the policymaking process, their voice and concerns are absent from the product.

The unique position that Black women occupy necessitates educating the attorney to deal with them as both women and women of color. In the current hypothetical it is not clear if the attorney acted as he did because of his client's gender or race. As an under-educated[99] African-American woman facing the judicial system[100] and the possibility of losing her children, the attorney's disregard of her decision manifests disrespect for her capacity to make decisions and reflects a veiled attempt at client disempowerment through manipulation.[101]

Clearly, the client's decision was measured against some unknown standard and found to be unacceptable, hence the attorney's pursuit of the settlement. In fashioning rules to protect clients, the Model Rules must recognize the heterogeneity of the population which it is addressing. It is incumbent upon the power structure to recognize the importance of these immutable characteristics and to fashion laws which reflect the heterogeneity in society. The responsibility to become informed about the impact of race and gender on clients' lives falls upon the ABA committee or any power structure that takes on the task of drafting policy that affects society. The burden to inform the power structure of inefficient policies has traditionally fallen upon those adversely affected by policies. "Black and Third World people are expected to educate White people as to our humanity. Women are expected to educate men. . . The oppressors maintain their position and evade responsibility for their own actions."[102] The immutable characteristics of particular groups require safeguards which prevent the incorporation of impermissible external factors into the attorney-client relationship.

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96. Recently Black female writers have begun to investigate issues pertinent to women of color. *See* B. HOOKS, *supra* note 94; A. DAVIS, WOMEN, CULTURE, AND POLITICS (1990); THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (C. Moraga and G. Anzaldua 2d ed. 1983); Harris, *supra* note 92.

97. *See, e.g.*, Gabel and Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983).

98. *See* THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR, *supra* note 95; A. DAVIS, *supra* note 95; CENTER FOR RACIAL EDUCATION, UNIVERSITY OF CALIFORNIA, BERKELEY, SMELL THIS (Spring 1990).

99. I choose to use the phrase "under-educated" as opposed to uneducated because the latter fails to recognize knowledge gained through life experiences. This form of education (that is, the development of street smarts), while it deviates from a standard definition of education, is no less valuable a tool than its widely recognized counterpart.

100. Historically, the judicial system has not played the role of protector in the lives of Black women. "Black women are two steps removed from the legal norm, which is not neutral but is White male." Scarborough, *supra* note 91, at 1469, citing Address by Professor Kimberle Crenshaw, Women and the Law: A Feminist Jurisprudence (Apr. 2, 1986).

101. *See* Ellmann, *supra* note 3, at 726–28.

102. A. LORDE, *Age, Race, Class, and Sex: Women Defining Difference*, in SISTER OUTSIDER, *supra* note 2, at 115.

D. *Effects of Classism*

Another factor which becomes a tool for disempowerment is classism. Audre Lorde defines classism as "the belief in the inherent superiority of one [class] over all others, and thereby, the right to dominance."[103] Classism is strongly intertwined with racism and sexism. As June Jordan states:

> [I]n the United States race and class are fixed correlatives . . . [R]ight now, our national income represents a severely declining percentage of what our White counterparts enjoy. What begs for programmatic and rapid recognition is the equally important correlation between gender and class. Most of the American poor, White and Black, are women.[104]

The combination of these practices pose significant barriers to client autonomy.

A slight redefinition of classism is required to apply it to the hypothetical. In this context, classism involves the belief in the inherent superiority of one class over all others based on the educational[105] and economic advantages of the dominant class. This definition attempts to expose the foundation of classist thinking in the hypothetical. Based upon his level of formal and legal education Attorney X might believe that he is in a better position to evaluate his client's options. He might presume that his client is incapable of accurately assessing whether she should pursue the financial settlement or simply retain her benefits and custody of her children.

Classism fails to recognize that each class has access to a set of privileges which correspond to the amount of education and economic power available to individuals in that class. The privileges enjoyed by the members of that particular class will be shaped by each individual's economic reality. Members of different classes have different values, which have been shaped by their economic realities.[106] Individuals who have been members of various economic strata for a significant period of time will be able to recognize and empathize with the members of various economic classes. An individual who has been able to move amongst the different classes will be cognizant of the different values and beliefs existing in the different classes, which were shaped by a particular economic reality.[107]

Under both definitions of classism, the dominant class discounts and ignores the validity of non-dominant values and superimposes its own values and beliefs upon the other classes. Classists ignore the existence of different values and beliefs which are shaped by the economic realities of individuals outside the classists' particular classes. Attorney X's beliefs regarding what is best for his client have been shaped by his own economic reality and experiences. His values and beliefs might be inapplicable to his client's current situation.

The attorney might fail to recognize the validity of the client's decision

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103. *Id.*

104. J. JORDAN, *The Case for the Real Majority*, in ON CALL: POLITICAL ESSAYS 37 (1985).

105. The author presumes that formal education is valued more highly than experiential education in a classist system.

106. This author does not suggest that members of the same economic class necessarily will have the same values. The individual life experiences of each member of the class will have a significant impact on that individual's values.

107. *See* A. DAVIS, *supra* note 95, at 73–89, for a general look at the economic reality facing Black Women in the 1980's.

because he is approaching the decision-making process from a different perspective. Where these differences exist, one must ask whose perspective should control the decision-making process.

Once the case is settled, the attorney and client will return to their respective worlds. If the attorney's decision regarding the best result for the client fits only his and not the client's economic and educational experiences, then his solution might be inappropriate for the client. Ultimately this is the crux of the problem of classist evaluations. Classists artificially presume that decisions based upon one class' beliefs and experiences can fit into another class' value system. This presumption does not always hold true. The promulgators of the Model Rules failed to consider the impact of classism when granting attorneys almost unbridled discretion.

The attorney from a different economic, racial, and sexual background than the client will have a different perspective on problems and their solutions. He will not understand the basis for her decisions and might decide to exercise his discretion in order to protect his client. The Model Rules condone this paternalistic behavior by failing to proscribe the extent of attorney discretion.

A quick scan of the Model Rules indicates that an attorney acting with reasonable diligence and promptness in representing the client[108] may pursue a matter on behalf of a client despite client opposition, obstruction or personal inconvenience. In addition, the attorney has the discretion to forego pursuit of "every advantage that might be realized for a client."[109] Furthermore, the attorney may withhold information from a client "when the client would be likely to react *imprudently* to an immediate communication."[110]

Thus, Attorney X's pursuit of the settlement without the express authorization and knowledge of the client technically does not violate the Model Rules. Attorney X could advance these arguments and also could argue that his pursuit of the settlement was nothing more than a tactic to gain the client's objectives. Clearly, the Model Rules place a significant amount of power in the attorney's hands, which translates into taking power away from the client.

IV. HYPOTHETICAL REVISITED

Depending upon whether Attorney X's conduct is characterized as taking advantage of a tactic or usurping the client's decision-making powers, he might or might not be in violation of Model Rules 1.2 and 1.4. Attorney X's behavior appears to fall within the Model Rules' definition of acceptable conduct. His behavior, however, reflects the belief that 1) his value system is correct; 2) his value system can be universally applied; and 3) he knows what is best for his client. Such an assumption illustrates Spiegel's point that "[t]his 'judgment' that lawyers are superior decision-makers . . . reinforces the notion that lawyers know best, thereby giving legitimacy to lawyers who believe their job is to persuade their clients to accept judgments about settlement offers."[111]

108. MODEL RULES, *supra* note 17, Rule 1.3.

109. *Id.* Rule 1.3 comment.

110. *Id.* Rule 1.4 comment (emphasis added).

111. Spiegel, *supra* note 31, at 103 n. 259. *See also*, Gordon, *supra* note 26, at 68 "lawyers autonomy has a darkside. . .[they] patronize their clients and. . .presume that they know what's in their clients' best interests. . ." *Id.*

The rules offer no real protection to a client who is manipulated into accepting a settlement that she does not want. The problem arises where an attorney fails or refuses to act based upon an exercise of his discretion, and the client is unable to seek relief because she faces *res judicata*, or other procedural obstacles precluding further consideration of the proposition.[112]

If the client files a malpractice suit against the attorney, the court will review the tenability of the position advocated by the client with hindsight. Hindsight affords the court a much easier point of view than foresight. Since the attorney handling the case for the client is perceived as having the best ability to know whether the client's claim was an untenable position under the circumstances, reviewing courts in some jurisdictions have been unwilling to find the attorney liable for malpractice for failing to carry out the client's tactical instructions.[113] Consequently, both judicial pronouncements and the latitude granted by the Model Rules favor the attorney's decisions over those of the client and ultimately undercut the control the client has over the objectives of the suit.

The problems inherent in Attorney X's decision manifest themselves upon close analysis. In the hypothetical, Attorney X attempts to persuade the Black woman that she has a viable suit against the police department and that, for the good of her children, she should bring a suit against the city. Attorney X's attempt to change her mind through the utilization of a promise of compensation is a subtly veiled attack on the client's judgment and her ability to be a good mother. The attorney would argue further that it was highly probable that she would receive some monetary compensation. Therefore, it would be in the best interest of her children to accept the money. Thus, like any "good" mother, she should pursue the settlement to benefit her children.

In this case such a determination unnecessarily commingles legal and nonlegal manipulative advice. The attorney is required to bring to bear his legal experience and knowledge to apprise the client of available alternatives.[114] The Model Rules do not prohibit the attorney from offering nonlegal advice.[115] Clients, however, do not always want or need the nonlegal advice of

112. There are two lines of cases on this issue. The Supreme Court in Link v. Wabash Railroad, 370 U.S. 626 (1962) held that the attorney-client relationship was analogous to an agency-principal relationship, consequently, clients can be held accountable for their attorney's actions. *See* Note, *supra* note 16, at 740 (footnote omitted); "Most courts have reacted to these inconsistencies in one of two ways," they have either applied Link, or severely limited Link. *Id.* at 734 n.4. "[D]ifferent jurisdictions take very different approaches to apportioning sanctions between attorney and client." *Id.* at 737 n.27.

113. Spiegel, *supra* note 31, at 50–56. Another line of cases "requires the attorney to follow the client's instructions. . ." (footnote omitted) *Id.* at 50. Clients generally fail to prevail in the second line of cases where they cannot sufficiently prove causation or damages. (footnote omitted) *Id.* at 51. For a general discussion of malpractice law standards, *see id.* at 51–53.

114. Model Rule 2.1 states, "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." MODEL RULES, *supra* note 17, Rule 2.1. Arguably, the client, as the mother of young children may be more experienced in this area (attorney X is a bachelor). Consequently, the inexperienced attorney is attempting to make decisions for the client in an area in which the client is more knowledgeable.

115. Comment to Model Rules 2.1 provides that,

> 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. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.

Id. Rule 2.1 comment (emphasis added).

counsel.[116] In the hypothetical, the client considers the advantages of the settlement but decides to forego the settlement because she does not feel "lucky." It is not clear whether that statement was made in response to securing or retaining and maintaining the money. Attorney X, however, dismisses this concern as if it were inconsequential. Attorney X's attempts at persuasion diminish the woman's decision-making power, becoming a means of disempowerment[117] and a form of microaggression.[118] The law, when utilized in this manner becomes a tool for disempowerment.[119]

The attorney, because of his expertise and society's view of technocrats, might be able to force his client into accepting something that is perfectly reasonable, but which the client does not want. In this case, it is clear that the decision-making power has been wrested away from the client. In the case of Black women, this problem is even more acute since society has pejorative perceptions of them as individuals. Black women from a lower socioeconomic status face a higher probability of being coerced or tricked by their attorney into accepting a solution they do not want. This process occurs because the attorneys judging the decisions of these Black women come from a vastly different background and do not understand their complexities, including their value system or economic realities.

Attorney X, as a White male from a different socio-economic group than his Black client, is presumptuous to assume that he can decide the best result for the woman based on their brief association. Attorney X has no intimate knowledge of what it is like 1) being a woman; 2) being a Black woman; 3) having very little education and small children to raise; or 4) living on welfare in a ghetto.

Attorney X assumes that the values held in esteem in his world can be superimposed upon his client's world. This assumption ignores the economic and social realities of the client's world—realities of which he might be ignorant. Because of this assumption, and in spite of his potential underassessment of the situation and his limited knowledge, Attorney X determines that he will pursue the money for his client. This sort of behavior manifests the arrogance[120] of the dominant society's thinking[121] and its disregard of other value systems.

116. *See* Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 730–31 (1988) examining the phenomenon of corporate clients not wanting attorneys' nonlegal advice, citing De Butts, *The Client's View of the Lawyer's Proper Role*, 33 BUS. LAW. 1177 (1978).

117. The power of an attorney's suggestion to a client seems to increase with the widening distance between their socio-economic and educational status. As Patricia Williams observes, "[i]n my experience, most non-corporate clients looked to lawyers almost as gods. They were frightened, pleading , dependent (and resentful of their dependence), trusting only for the specific purpose of getting help (because they had no choice) and distrustful in a global sense (again, because they most often had no choice). Williams, *supra* note 67, at 403.

118. Davis defines the term "microaggressions" as " 'incessant, often gratuitous and subtle offenses' defined by Black mental health professionals," Davis, *supra* note 56, at 1560 citing C. PIERCE & W. PROFIT, HOMERACIAL BEHAVIOR IN THE U.S.A. 2–3 (1986).

119. For more detailed examples of the law as microaggression, *see, e.g., id.* at 1560–61, 1567–70.

120. Arrogance in this context may be defined in two ways: 1) as the daring boldness of Indiana Jones/James Bond characters which abound on the movie screen; or 2) as the presumptuousness of a patriarch who assumes he is thoroughly familiar with his subjects' values, beliefs, and needs.

121. This type of thinking advocates "calm" or "rational" decisions based upon their criteria, analysis of the situation, knowledge and set of values; all of which are supposedly sufficient to fit in all value systems. *See, e.g.,* Worden, *supra* note 73.

It is in this context that Attorney X determines he should pursue the settlement in spite of the client's wishes. Attorney X seems oblivious to the fact that he lacks sufficient understanding to make these decisions. He seems unaware that this decision is not a decision of strategy. Yet, the Model Rules give him the latitude to take these actions on behalf of the client under the guise of attorney discretion.

The argument can be made that Attorney X was being a zealous advocate and doing what all attorneys would do in getting the best settlement he could for his client. To do any less would be a breach of the codes governing professional responsibility, as well as the sixth amendment right to effective counsel. After all, everyone, and most certainly a poor person, could use a quarter of a million dollars. Moreover, Attorney X achieved what he believed were his client's most important objectives: the client's benefits were retained; she no longer faced incarceration; and her children remained in her custody. Arguably, his client is better situated now that she is a quarter of a million dollars richer. These objectives, however, were not the expressed objectives of the client. The client's acceptance of the objectives manifests the resultant disempowerment of the client by the attorney.

The problem with Attorney X's actions are multifold. First, his actions manifest assumptions about the value of money that might be true under his value system, but might not be true under the client's value system. Second, his actions manifest the presence of internal biases based upon race, class or gender. Attorney X's behavior implies that 1) he knows what is best for the woman; 2) she does not know what outcome would be best for herself; 3) she needs money and; 4) an enormous amount of money will make up for the loss of her son. At the root of Attorney X's actions is the presumption that money cures all ills.

Attorney X's securing of the settlement might bring a number of unanticipated problems to his client. As a woman on welfare, his client remains on welfare only so long as she remains within a certain economic bracket. She will almost assuredly exceed that bracket by receiving the lump sum or any large allotment of the settlement. Thus, she might lose all of her benefits. The money will not last forever. During this time, the woman will undoubtedly have to educate herself so she can both get a job to maintain her lifestyle, as well as educate herself to make wise financial decisions.

In addition, the woman did not appear to have a formal education. She might have difficulties handling such a large sum of money (i.e., paying taxes, investing, budgeting, and avoiding swindlers, greedy relatives and friends). Because of the size of the settlement, the client might have to move out of her neighborhood for her and her family's safety. Her neighborhood is an area that might be familiar and secure to her. She might have difficulties trying to find an area where she will not be the object of unwelcome attention due to her new found wealth. Moreover, a change in lifestyle might cost her whatever friends she currently has. Clearly, Attorney X did not consider these points when he bargained with the District Attorney over the amount of settlement.

Attorney X's judgment was based upon his values and experiences. Therefore, he failed to consider the client's present economic reality which might necessitate her refusing the settlement offer. Attorney X did not address this point because he had dismissed her decision as unacceptable.

It is clear from the hypothetical that Attorney X endeavored to use reason and persuasive skills to get his client to file a suit against the city. One could argue that he was looking after the interests of his client by bringing this possibility to her attention.[122] However, once his client rejected bringing a suit against the city, Attorney X attempted to manipulate his client and became a tool of disempowerment. At the heart of the matter, Attorney X should not have pursued the settlement money without the client's consent.

V. POSSIBLE SOLUTIONS

The core issue raised by the hypothetical is client autonomy and self-determination as it pertains to the decision-making process. The hypothetical reveals some of the limits of the Model Rules in protecting the client and her decisions from an overzealous attorney. In fact, the Model Rules exhibit not only insensitivity to this problem but also a strong bias toward the attorney's judgment.[123]

This section attempts to address these problems by articulating potential solutions. Briefly stated, possible solutions include: 1) informed consent; 2) mandatory education of both the public and the legal profession; and 3) informal incorporation of a "team player" approach into the legal profession in much the same way ethics has been incorporated into the legal system.

A. *Informed Consent*

One way to prevent an attorney from pursuing an objective that the client has not agreed upon or has rejected as unacceptable is the drafting of an agreement ("consent document") fully disclosing the legal problem, possible solutions and tactics, and the goals and objectives of the suit as decided by the attorney and the client. The consent document would also address the issue of settlement and acceptable amounts. The client would sign the document after all the information had been discussed. She would only sign the document if she agreed to the contents. The document would clearly state the areas under attorney discretion and those under the client's charge. A document of this nature would aid in ensuring that the client is fully informed of the parameters and limitations of her case, as well as her role in the suit. This procedure

122. Arguably, Attorney X could have informed his client that he would exercise his own discretion which would include going against her wishes on that particular issue. *See*, Lewis, *Shaffer's Suffering Client, Freedman's Suffering Lawyer*, 38 CATH. U.L. REV. 129, 131 (1988) (the attorney should disclose the moral limits of advocacy); *cf.*, Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U.L. REV. 319; *cf.*, Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U.L. REV. 331 (1987).

123. The issues raised in this paper fall under the rubric of legal hegemony. Time and space constraints dictate scant attention to this broad topic. *See* TERENCE JOHNSON, PROFESSIONS AND POWER (1982) (an examination of professions and their intercourse with power); Sarat & Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1664 (1989) (exploration of the components of legal hegemony and its formation); Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689 (1989) (examination of the interaction of the legal and popular culture in defining notions of justice).

For critical methods of approaching and subverting the hegemony of law, *see* Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982); Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U.L. REV. 195 (1987); Gabel and Harris, *supra* note 96.

would act as a brake system, stopping an overzealous attorney from overriding his client's wishes.

The consent document would ensure that the client has been briefed on the status of her case. She and the attorney would discuss potential tactics to be utilized throughout the case. If the client found any particular tactics objectionable she could have these points and her objection stated in the document. Any changes in the circumstances surrounding the case could be taken care of by a simple addendum to the agreement. The client would sign the agreement only after she had been fully briefed on her case and the ramifications of signing the document.

By following the procedure outlined above, both the client and the attorney in their distinctive roles would be working together toward the successful resolution of the client's problem. The client and the attorney would both be fully aware of the way the case is unfolding and what is expected of each party. The client would be in a better position to contact the attorney, effectively discuss the status of the case, and make informed decisions. The attorney's parameters would be clearly stated and he would have the requisite latitude to act without intruding on the client's authority. This procedure, in conjunction with the Model Rules, would aid in protecting client autonomy in the decision-making process.

Mark Spiegel advocates the use of informed consent as a way of insuring that the attorney does not pursue an objective upon which the client has not agreed.[124] Informed consent entails drafting a document outlining the goals and objectives of the suit as agreed upon by both the attorney and client.[125] Under Spiegel's model, the lawyer would have to disclose information surrounding the goals and objectives of the case but not the procedure and tactics.[126] I would advocate that the disclosure encompass both the objectives/goals and the tactics/procedures to be utilized to circumvent the blurring of the distinctions between the two arenas of decision-making.

Before the client signed the consent document, the attorney would have to explain the procedures and tactics as well as the objectives and goals of the case. An attorney might encounter a client who did not want to take the time and expense to learn all of this information. Therefore, the document could simply state that the client waived her right to be fully informed. Under a strict reading of the Model Rules, the attorney is obligated to discuss this and other information[127] with the client. Consequently, the client would receive the same amount of information with the addition of a consent document, which verifies in writing the agreement between the attorney and client. Clearly, this document would be protected by the attorney-client privilege and would be discoverable only upon the satisfaction of one of the few exceptions

124. *See* Spiegel, *supra* note 31.

125. Under an agency theory, the attorney would have to "disclose all material information to his client." *Id.* at 67, citing F. MECHEM, OUTLINES OF THE LAW OF AGENCY at § 541 (P. Mechem 4th ed. 1952).

126. Spiegel recognizes that this runs back into the problem of blurred distinctions between the two concepts. *Id.* at 68.

127. *See* MODEL RULES, *supra* note 17, Rule 1.2 (the lawyer shall abide by the client's decisions regarding the objectives of the case); *Id.* Rule 1.4 (attorney shall keep the client reasonably abreast of the case); *Id.* Rules 1.7–1.9 (the attorney shall withdraw or inform the client of potential conflict's of interest); *Id.* Rule 2.1 (the attorney in exercising independent judgement may advise client on related matters to the case).

to the privilege.[128]

The use of informed consent would protect a client from an overzealous attorney who takes it upon himself to pursue an objective that has not been discussed or that the client finds repugnant. Use of an informed consent procedure is not entirely foreign. In fact, the medical profession utilizes this procedure to assure that the client has assented to impending treatment. Use of this informed consent procedure in the attorney-client relationship would bring with it all the ramifications and legal entanglements informed consent brings in the medical profession. Most importantly, informed consent would afford the client a legal right to be informed and knowledgeable about her case. Fundamentally, the informed consent requirement recognizes the client's right[129] to exercise control over a significant aspect of her life.

In the hypothetical, Attorney X would not have been able to pursue the settlement money if the client had not stipulated this as one of the issues over which he could exercise discretion. Thus, the values of the client are not supplanted by the values of the attorney or the legal system.

B. *Education*

Another solution to the problem of attorney over-reaching is education of the public. Courses focused on the issue of client autonomy and self-determination, and the potential issues which might arise when dealing with clients of a different race, sex, or class could be taught in law schools in the same manner as the study of professional responsibility has been taught.

Efforts to raise sensitivity to different races, sexes, and classes could be duplicated on many different levels, including primary and secondary schools. Arguably, teaching a more inclusive and relevant history to children at a younger age would inculcate the lessons to be gained from this process. Such an approach would aid society as a whole, would foster an appreciation for and respect of different view points, and would foster a more inclusive sentiment in society as a whole.

Courses outlining the basic, fundamental rights of citizens, non-citizens, and other members of society for students at all levels would familiarize the public with the legal system, its language, and the people who help the system operate.[130] This added exposure would help remove the mystique surrounding the legal profession. Thus, more members of the public would be able to take a more active role in solving their own legal problems. Dissemination of information could help educate the public as to their rights and ostensibly make them better clients.

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128. *See* FED. R. EVID. 501; *See also* PROPOSED FED. R. EVID. 503.

129. The term right as used here ascribes, not to the constitutional classification of interests, but to the abstract freedoms inherent in our humanness. *See* Schultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219 (1985) for a discussion on the expansion of patients' interests under informed consent as it applies to the medical community.

130. Helen Kim advocates providing legal education for pro se litigants to give full force to the "right to be heard." *See* Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to be Heard*, 96 YALE L.J. 1641 (1987). I would argue that some basic form of legal education should be provided to the public at large. This is currently being done on a small scale with the "Street Law" programs that exist at some law schools. In this program the law student goes to local high schools and teaches the students basic legal doctrines. *See* Colino, *Street Law*, in STUDENT LAWYER 16 (May 1990).

In cases where the value system of the court or appropriate authorities reflect the value system of the attorney, it is less likely that the court will be able to appreciate the force of the client's plea for decision-making autonomy.[131] When the court is unable to appreciate the merits of the client's decision-making autonomy, the court system, firms, and lawyers, should have to be re-educated to handle a client's decisions more appropriately. Otherwise, it is likely that the court or a jury would find that the attorney acted within his purview and that there was no violation of the Rules, regardless of the merits or the client's preferences.

The result is that the value systems of others is accepted while the client's value system, which might not be a majority or understood view, is rejected. In the hypothetical, it is possible that a court—all White or all male—might not accept or understand the woman's reasons for not pursuing the settlement because its members, like Attorney X, have a different value system. Rejection of settlement money when you are on welfare might seem irrational and therefore untenable in a value system which values money and the power it brings.

The likelihood of disregarding or discrediting a client's objective increases in cases which involve ethical and moral decisions, such as abortion and euthanasia. In such cases, the distinction between attorney and client roles is more likely to become blurred, objectives are more likely to be defined as tactics and the attorney is more likely to overreach. This occurs specifically in the case of a client of a different race, sex, or economic class.

C. *Team Problem Solving*

The attorney and client should be working toward the same goal and interacting and communicating as team players, with each one shouldering some responsibility. Such an approach does not require that the client understand the law so much as it requires that she be aware of the legal ramifications of any actions taken. Working as a team also requires that the client play an active role in the litigation process and utilize the skills of the attorney to reach the goals set. In the end, such an approach leaves the decision-making power in the hands of the client and leads to empowerment. A key difference between the team approach and informed consent is that the attorney is not required to draft a document outlining the goals and tactics of the case.

The team work approach, though initiated at the onset of most suits, including the hypothetical, is not adhered to consistently by either the attorney or the client. The breakdown generally occurs when the attorney begins to make decisions concerning the overall goal of the suit. For example, the attorney might decide that the trial would be more trouble than it is worth and might strongly encourage the client to settle, even though settlement does not fit in with the overall objectives and goals that the client has set forth at the outset of representation. Conversely, the attorney might decide that going to trial and getting a jury verdict is financially more beneficial to the client than the client's desire to settle.

Model Rule 1.2 obligates the attorney to let the client choose the objec-

131. Recognition of the interplay between values and decision-making is key to the success of this proposition in its application. *See* Ellmann, *supra* note 3, at 760–61 citing Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 468.

tives of the case and control acceptance of settlement offers. Under a strict reading of the Model Rules Attorney X was in violation of Rule 1.2 by pursuing the settlement offer without consent. He went against a direct edict of the client regarding the objectives of the suit and the settlement offer.

Since the distinction between objectives and tactics tends to blur, Attorney X could raise the defense that he used the settlement as a tactic to prevent the District Attorney from pursuing the charge against the client and removing custody of the children. Accordingly, Attorney X achieved the other objectives of the client. It is highly unlikely that he would be disciplined for his actions. At best the client could bring a malpractice suit against him, but, it is doubtful that she would prevail unless she could show that she suffered a serious loss.

An examination of the Model Rules reveals that it fails to provide the client adequate shields against societal prejudices and their impact on the client's representation. The behavior of Attorney X manifests presumptions regarding the client which might have been based on her race, sex, or class. Attorney X's behavior also manifests a disregard for the client's autonomy, decision-making capacity, and value system. This type of paternalistic overreaching is reflective of a societal problem that manifests itself clearly in the attorney-client relationship.

The doctrine of informed consent applied to the legal community provides a supplement to the Model Rules and acts as a deterrent for attorney manipulation and coercion of clients. As applied, the client would be kept abreast of the objectives and strategies to be employed in the case. The client's values as expressed through the articulated objectives would remain intact. The potential for abuse of attorney discretion and overreaching will not automatically disappear; however, the client, under a tort theory of malpractice stands a better chance of recovery than is currently available.

CONCLUSION

The solutions advocated here will not solve the underlying societal problems caused by racism, sexism, classism, and the many other "isms" that affect our society. Those problems eventually must be addressed by society as a whole. In the long run, re-educating the legal community about its clients and educating the public regarding its rights might provide the impetus for society to resolve other societal ills. Re-education, in turn, might lead to a system which empowers the people it is supposed to serve.