

Taking Attorney-Client Communications (and Therefore Clients) Seriously

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Introduction

Seldom, very seldom, does complete truth belong to any human disclosure; seldom can it happen that something is not a little disguised, or a little mistaken.

Jane Austen, *Emma* (1815)

COMMUNICATIONS BETWEEN CLIENTS and attorneys are the cornerstone of the attorney-client relationship. Because the vast majority of civil and criminal trials settle and plea-bargain, respectively,¹ many clients never actually enter the courtroom, interact with a judge or a jury, or meet the opposing party or its attorney.² Consequently, for a good number of Americans, communicating with their own law-

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1. See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (offering empirical support to the fact that the vast majority of civil suits settle); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994). Indeed, Prof. Clermont concludes that "settlement is . . . much more important than actual litigation. . . . [A]s settlement has blossomed, the civil trial has all but disappeared recently, without any clear single cause. The percentage of filed federal cases that see trial is now dropping toward 1.5%, and state trials too have dropped off." KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* 415 (2005). Similarly, a majority of criminal prosecutions end in plea-bargain. See U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 419, 423 (Ann L. Pastore & Kathleen Maguire eds., 1999); see also F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 189 (2002).

2. Similarly, many business transactions and negotiations are handled to a significant extent by lawyers; the clients often meet only for the ceremonial closing.

yers will constitute most, if not all, of their exposure to law and the legal system. Communications between clients and their own attorneys thus become the main arena in which clients gain any experience with lawyers and the law.³

Conceptually, the attorney-client relationship is an agency relationship in which a lawyer-agent serves the interests of a client-principal.⁴ Communications are the mechanism by which the client controls the agency relationship, informs the attorney about his goals and objectives, and provides the lawyer with necessary and relevant information about the representation. Successful representation requires effective communications, without which the attorney-agent cannot know, understand, or represent the client's goals.⁵

Given the inherent importance of attorney-client communications, it is surprising that little case law and few ethics opinions directly explore this core issue. Instead, communications often make a guest appearance as an afterthought or a tack-on to other, more "important" issues addressed in a case. Moreover, there are hardly any academic studies of communications.⁶ Equally surprising is the little attention historically given to communications in the legal profes-

3. The unfortunate fact that failure to communicate is one of most common areas about which clients complain year after year is evidence of the importance of communications to the client. *See, e.g.*, Diane M. Ellis, *A Decade of Diversion: Empirical Evidence that Alternative Discipline is Working for Arizona Lawyers*, 52 EMORY L.J. 1221, 1269 (2003). *See* Am. Bar Ass'n, Survey on Lawyer Discipline Systems, <http://www.abanet.org/cpr/discipline/sold/home.html> (last visited Feb. 4, 2008) for a comprehensive statistical survey of lawyer discipline systems.

4. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Ch. 2, Introductory Note (2000) ("The subject of this Chapter is, from one point of view, derived from the law of agency. It concerns a voluntary arrangement in which an agent, a lawyer, agrees to work for the benefit of a principal, a client."); *see also* Dunkley v. Shoemate, 515 S.E.2d 442, 444 (N.C. 1999) ("North Carolina law has long recognized that an attorney-client relationship is based upon principles of agency . . ."); *In re* Estate of Maslowski, 561 N.E.2d 1183, 1186 (Ill. App. Ct. 1990) ("The law of principal and agent is generally applicable to the relation of attorney and client."); State *ex rel.* A.M.T. v. Weinstein, 411 S.W.2d 267, 272 (Mo. Ct. App. 1967) ("The rules of law applicable to principal and agent control the relation between an attorney and his clients."); Schwarz v. May Dep't Stores, 360 S.W.2d 336, 338 (Mo. Ct. App. 1962) ("[T]he relation between attorney and client is highly fiduciary in its nature and in a limited and dignified sense it is essentially that of principal and agent.").

5. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2007); *see infra* notes 36-46 and accompanying text.

6. The legal ethics list-serve posted a comprehensive list of current legal ethics casebooks. Posting of John Steele, legalethics-bounces@plists.washlaw.edu, to <http://lists.washlaw.edu/mailman/listinfo/legalethics> (Oct. 20, 2006) (on file with author). Whereas confidentiality and conflicts of interest, for example, are consistently explored at length, a majority of the casebooks have little to no in-depth coverage of communications. *But see* DOUGLAS ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974).

sion's codes of professional conduct. Prior to 1983, the Canons and subsequently American Bar Association Model Code of Professional Conduct featured no attorney-client communications rule.⁷ The American Bar Association Model Rules of Professional Conduct ("Rules") promulgated a fairly cryptic communications rule,⁸ which was somewhat expanded in 2003.⁹

At first glance, however, it seems that the Rules, and the legal profession, are moving in the right direction of focusing on and requiring that more attention be given to communications between attorneys and clients. Generally, the Rules are perceived as having adopted a new client-centered approach compared with the Model Code.¹⁰ With regard to communications, current Rule 1.4¹¹ is the most detailed communications rule ever contained in codes of professional conduct. The Ethics 2000 reform also introduced a new de-

7. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 164 (1986) ("The 1969 Code failed to address attorney-client communications, which remained unaddressed until the ABA promulgated the 1983 Model Rules."). Canon 8 of the American Bar Association Canon of Professional Ethics stated in relevant part that "A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon" MODEL CODE OF PROF'L RESPONSIBILITY Canon 8 (1908). The Model Code did contain two "ethical considerations" dealing with some aspects of communications. See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1969) ("A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations."); *id.* at EC 9-2 ("In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client.").

8. The Rule stated:

- (a) A Lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

MODEL RULES OF PROF'L CONDUCT R. 1.4 (1983).

9. *Id.* at R. 1.4 (2007). In 1997, the ABA established the Ethics 2000 Commission, charging it with comprehensively reviewing the Rules. One of the primary reasons behind the decision to revisit the Rules was the growing disparity in state ethics codes. Another reason was the emergence of new issues raised by the influence that technological developments were having on the delivery of legal services. The ABA House of Delegates adopted the proposed changes in late 2002. See E. Norman Veasey, Chair's Introduction at the American Bar Association's Commission on Evaluation of the Rules of Prof'l Conduct ("Ethics 2000") (Aug. 2002), available at http://www.abanet.org/cpr/mrpc/e2k_chair_intro.html.

10. Jason Kilborn, *Who's in Charge Here?: Putting Clients in Their Place*, 37 GA. L. REV. 1, 39 (2002) ("The Model Rules signaled a definite shift in the mindset of the late twentieth century legal profession toward client empowerment"); see also Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006).

11. MODEL RULES OF PROF'L CONDUCT R. 1.4.

manding concept of informed consent¹² and expanded Rule 1.13,¹³ which deals with communications with an organizational client.¹⁴

This Article argues that the Rules still need significant improvement and should adopt a materiality-based communications rule that would ensure that clients receive all information a reasonable client would consider relevant to making decisions regarding the attorney-client relationship. Part I establishes that the communications regime orchestrated by the Rules, while purporting to be client-centered, is in fact intentionally designed to create a one-way street. This design systematically channels information in the attorney-client relationship in the lawyer's direction, while often leaving the client in the dark. Part II proves that this asymmetric distribution of information in the attorney-client relationship is without good reason from the client's point of view. It is instead grounded in the lawyer's self-interest and in a paternalistic approach that fails to take communications, and therefore clients, seriously. Part III proposes a new communications regime that takes clients seriously by mandating disclosure of all material information to clients.

12. *Id.* at R. 1.0(e) cmts. 6, 7; *see, e.g.*, Jay Katz, *Informed Consent-A Fairy Tale? Law's Vision*, 39 U. PITT. L. REV. 137 (1977); Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984); Gary A. Munneke & Theresa E. Loscalzo, *The Lawyer's Duty to Keep Clients Informed: Establishing a Standard of Care in Professional Liability Actions*, 9 PACE L. REV. 391 (1989); Cornelius J. Peck, *A New Tort Liability for Lack of Informed Consent in Legal Matters*, 44 LA. L. REV. 1289 (1984); Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE. L.J. 899 (1994); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) [hereinafter Spiegel, *Lawyering and Client Decisionmaking*]; Mark Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decisionmaking and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003 [hereinafter Spiegel, *The New Model Rules*]; Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 318 (1987).

13. MODEL RULES OF PROF'L CONDUCT R. 1.13.

14. *Id.* Rule 1.13 followed Section 307 of the Sarbanes-Oxley Act of 2002 ("Act"), which set minimum standards for attorneys appearing and practicing before the Securities and Exchange Commission ("SEC"). Pub. L. No. 107-204, § 307, 116 Stat. 745 (2002) (codified as amended at 15 U.S.C. § 7245 (2002)). The Act required attorneys who represent issuers to report violations of securities law or fiduciary duties by the issuer "up-the-ladder" to the highest corporate authority within the client-issuer. *Id.* The SEC, pursuant to the Act, promulgated implementing rules. *See* SEC Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205 (2002).

I. The Asymmetric Distribution of Information in the Attorney-Client Relationship

The attorney-client relationship is commonly described as an agency relationship.¹⁵ The client-principal is in charge of the relationship and has ultimate authority over determining the objectives of the representation.¹⁶ The lawyer-agent is an advisor regarding the ends and a facilitator regarding the means by which the client-established goals are to be pursued.¹⁷ The lawyer-agent is neither legally liable nor morally accountable for the goals and consequences of the representation.¹⁸ This account of the attorney-client relationship features both the client and the attorney in a very favorable light: first, the client is presented as an autonomous individual acting reasonably on an informed basis and empowered to control his own destiny; second, the lawyer is portrayed as providing a socially valuable service and, conveniently, fulfilling a role that mandates that she be non-accountable for the consequences she helps bring about.¹⁹

15. See *supra* note 4 and accompanying text.

16. MODEL RULES OF PROF'L CONDUCT R. 1.2(a). Rule 1.2(a) states that "a lawyer shall abide by a client's decisions concerning the objectives of representation." *Id.* Comment [1] of Rule 1.2, exploring the allocation of authority between client and lawyer, provides that "[p]aragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." *Id.* at R. 1.2 cmt. 1.

17. *Id.* at R. 1.2(a). In relevant part, the Rule states: "[A] lawyer . . . shall consult with the client as to the means by which [the client's objectives] are to be pursued." *Id.*

18. *Id.* at R. 1.2(b). The Rule states: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." *Id.* Comment [5] further clarifies that "[l]egal representation should not be denied to people . . . whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities." *Id.* at R. 1.2 cmt. 5. Murray Schwartz coined the term the "principle of non-accountability" to mean that lawyers are not morally accountable for the client's choice of ends and means. See Murray Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 672-75 (1978). Nathan Crystal argues even more forcefully that pursuant to the principle of non-accountability lawyers are "neither legally, professionally, nor morally accountable for the means used or the ends achieved." NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY 620 (1996); see also DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 148-74 (1988) (criticizing the principle of non-accountability for protecting lawyers from moral culpability for their clients' conduct); DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 19-64 (2007).

19. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (arguing that lawyers' non-accountable, even amoral, role is desirable because it serves clients' autonomy and "first-class citizenship"); see also STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 45 (1984) ("[T]he adversary process assigns each participant a single function . . . Counsel is to act as a zealous advocate. . . . [W]hen each actor performs only a single function the dispute before the court will be resolved in the fairest and most efficient way," thus providing a

Although empowering for clients and self-serving for lawyers, this tale of a dominant client and a helpful attorney is not an accurate depiction of many attorney-client relationships. Providing a legal description of the attorney-client relationship as an agency relationship does not in reality render the client a powerful principal and does not reduce the lawyer to a mere obedient agent. To the contrary, many attorney-client relationships feature a powerful lawyer who dominates the relationship and paternalistically instructs her vulnerable client regarding his own best interests, and a submissive client who often defers to his attorney regarding both the means and the objectives of the relationship.²⁰ The “one size fits all” approach evident in Rule 1.2, according to which all clients are uniformly treated as powerful principals and lawyers as serving agents, ignores the reality of different contexts and varying relationships in which some clients are quite vulnerable and some attorneys quite powerful.²¹

Heinz & Laumann’s seminal empirical studies are instructive in exploring whether agency language can be applied to practice realities.²² These studies found that lawyers work in two distinct hemispheres, individual and corporate.²³ The agency analysis, depicting an authoritative principal-client and a servient agent-attorney, seems to better fit the corporate sphere, where corporate clients tend to be more sophisticated and powerful vis-à-vis their attorneys. The agency analysis does not fit as well in the individual sphere, where individual clients tend to be less informed and more likely to defer to their lawyers.²⁴

justification for both lawyers’ role and their non-accountability for the consequences of their conduct pursuant to such a role). *But see* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 (criticizing the autonomy-based defense of lawyers’ role-morality and the principle of non-accountability).

20. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 19 (1975).

21. *See* David B. Wilkins, *Everyday Practice is the Troubling Case*, in *EVERYDAY PRACTICES AND TROUBLE CASES* 68, 70–75 (Austin Sarat ed., 1998) [hereinafter Wilkins, *Everyday Practice*]; *see also* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990) [hereinafter Wilkins, *Legal Realism for Lawyers*].

22. JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982); JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005).

23. HEINZ & LAUMANN, *supra* note 22, at 37–54; HEINZ ET AL., *supra* note 22, at 29–47.

24. The fact that the corporate sphere better fits the agency assumptions about the allocation of authority within the attorney-client relationship is both surprising and ironic. It is surprising because in the corporate sphere the paradigmatic attorney is often a large law firm whereas in the individual sphere the typical attorney is a solo practitioner. And yet, the seemingly less powerful solo practitioner often has more power vis-à-vis her individual client, than the large corporate law firm has vis-à-vis its corporate client. Consequently,

Within the individual sphere, the imbalance rendering the attorney more powerful than the client is, in part, a reflection of the relative identities and characteristics of the parties, as well as social and professional status disparities between them. Relative to her client, the lawyer tends to hale from a high socio-economic background, benefits from at least seven years of college and graduate education, and enjoys high social, cultural, and financial status.²⁵ Conversely, the client, at least in the individual sphere and relative to his attorney, tends to be of a lower socio-economic, cultural, and educational background.²⁶ Furthermore, whereas the lawyer enters the relationship to do her job—providing legal services²⁷—the client enters it to pursue important values and interests. Perhaps most tellingly, the disparity within the relationship is a consequence of the circumstances under which it is created: a client comes to see an attorney when he faces a problem and when he needs help. Notwithstanding the fact that the details of

while one might expect clients in the individual sphere to be more powerful vis-à-vis their lawyers, they are, after all, dealing with solo practitioners and not with large law firms; it is instead often corporate clients who are able to act as powerful principals, vis-à-vis their corporate attorneys. The insight is ironic because the agency assumptions and the non-accountability principle that follows are justified in terms of enhancing client autonomy. To the extent that corporate clients are more likely to be in a position to meaningfully occupy the role of principals, one might wonder how such clients exercise and benefit from individually-based notions of autonomy. See Steven L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 CONN. INSUR. L.J. 27, 45 (1997) (noting that “less elite lawyers” representing individual clients are likely to be powerful vis-à-vis their “less powerful clients” and that such clients are in need of protection).

The gap between the agency language depicting the client as a powerful principal and practice realities, at least in the individual sphere, in which the client is often in a weak position in relation to his attorney, however, should not be a ground for dismissing the agency assumptions and the non-accountability principle that follows it. Arguably, the agency language is meant to be normative, not descriptive. It states the ideal of treating all clients as principals, and to the extent that in reality clients are not in such a position, it states the standard to be pursued. Importantly, the Rules are based on the assumption that some clients are vulnerable vis-à-vis their lawyers and in need of protection, the very protection purportedly granted them in the Rules. See generally *LAWYERS' IDEALS/LAWYERS' PRACTICES—TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* (Robert L. Nelson et al. eds., 1992).

25. See, e.g., HEINZ & LAUMANN, *supra* note 22, at 37–54, 127–75. de Tocqueville's observation, nearly two centuries ago that America has no aristocracy but for members of the legal profession rings true today as it did in the nineteenth century. See ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 278–80 (Alfred A. Knopf ed., Everyman's Library 1994) (1835).

26. HEINZ & LAUMANN, *supra* note 22, at 37–54, 127–75.

27. In contrast, Charles Fried provides an account of the lawyer not as a service provider performing a job, but rather as her client's friend. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

the client's ordeal will often be embarrassing, the client will have to discuss them in detail with a stranger, the attorney.

Given that the power inequity within the relationship is the result of these "natural" factors inherent to an attorney-client relationship,²⁸ one would expect the Rules to work towards closing the gap and empowering clients to allow them to live up to the principal ideal envisioned in the agency language. In actuality, however, these Rules—the very same Rules that posit the client as a dominant principal and the lawyer as a facilitating agent—instead put in place an apparatus that is meant to transfer power in the relationship from clients to attorneys. Moreover, the pro-lawyer imbalance in the attorney-client relationship is, in part, a result brought about by the Rules. Specifically, the Rules make lawyers the locus of information in the relationship, creating a pro-lawyer disparity in the attorney-client relationship.²⁹ The Rules design information within the attorney-client relationship to flow along a one-way street, from the client to the attorney. The Rules thus systematically create an asymmetric distribution of information within the relationship, which ensures the lawyer's dominant role vis-à-vis the client.

The following sections explore the asymmetric distribution of information in the attorney-client relationship. Section A explores the initial distribution of information between attorney and client, offering a typology of the various facts that constitute the body of information within the attorney-client relationship. Section B details how the Rules encourage the transfer of all relevant information from clients

28. The factors are only natural to a degree. The identity of the paradigmatic attorney is, of course, socially construed. Lawyers tend to hail from a high socio-economic background in part because private legal education is prohibitively expensive. Lawyers benefit from years of education because most states require a law degree as a condition precedent for the practice of law, and they enjoy high status because in our legalistic culture lawyers are often perceived as the high-priests of a civic religion. See Robert W. Gordon, "The Ideal and the Actual in the Law": *Fantasies and Practices of New York City Lawyers, 1879–1910*, in THE NEW HIGH PRIESTS—LAWYERS IN POST-CIVIL WAR AMERICA 51, 61 (Gerard W. Gawalt ed., 1984). Similarly, the design of the relationship is a product of social and cultural construction. Law is spoken and practiced in a non-native language. Legalese is an acquired skill that intends to exclude non-lawyers from speaking and practicing law. See generally DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE—REFORMING THE LEGAL PROFESSION (2000) for a provocative detailed account of a possible parallel legal universe, which will not be as foreign and alienating to clients.

29. The common reference to the relationship as the attorney-client relationship, rather than the client-attorney relationship, seems to imply that primary ownership of the relationship, and authority over it, vests with the lawyer. See generally MILNER S. BALL, LYING DOWN TOGETHER: LAW, METAPHOR AND THEOLOGY (1985) (discussing the powerful role of semantics and rhetoric in legal scholarship).

to attorneys. Section C establishes that the Rules discourage lawyers from sharing all relevant information with their clients.

A. Information Within the Attorney-Client Relationship: A New Proposed Typology

At the commencement of an attorney-client relationship, the client typically possesses all or most of the relevant facts regarding the matter and the lawyer typically possesses all or most of the knowledge about the law. Of course, some clients who are repeat-players³⁰ and regular consumers of legal information might possess some relevant legal knowledge.³¹ Similarly, some specialized lawyers with experience in particular industries might possess some relevant factual information, but clients will naturally possess more complete and accurate facts regarding the particulars of their specific matters. Inherently, therefore, information in the attorney-client relationship is distributed asymmetrically—lawyers possess most of the legal knowledge and clients possess most of the facts.

If the goal of the Rules was to ensure effective representation and to empower clients by installing them as powerful principals within the relationship, one would expect the communication Rules to ensure the effective exchange of these rather distinct types of information between attorneys and clients. Specifically, one would expect the Rules to put in place a communication apparatus pursuant to which clients would share with their attorneys all relevant facts about the matter, and lawyers would communicate to their clients all relevant legal knowledge applicable to the matter. Such an exchange would allow clients to exercise their authority over the relationship and determine its goals and objectives on an informed basis, while allowing attorneys to effectively represent their clients.

The communication Rules, however, institute an altogether different apparatus—one that is aimed not at closing the “inherent” asymmetry of information that typically exists in attorney-client relationships, but rather at widening the asymmetry and ensuring the lawyer’s dominance over the client within the relationship. To

30. Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–114 (1974).

31. The standard assumption regarding professionals, however, is that they possess a body of esoteric knowledge, vis-à-vis their lay clients, which makes their services valuable. TALCOTT PARSONS, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY* 33, 35–37 (rev. ed. 1954); see also Wasserstrom, *supra* note 20, at 1–4 (identifying esoteric knowledge as a characteristic of professionalism).

understand the Rules' asymmetric architecture, one must abandon the simplistic distinction between facts and law and instead study the universe of information within the attorney-client relationship as consisting of three categories: "representation-specific" facts, "meta" facts, and "set-up" facts.³²

"Representation-specific" facts denote all information relating directly to the attorney-client relationship. They include facts about the underlying events giving rise to the matter, which the client will normally possess, and legal knowledge applicable to the matter, which the attorney will normally possess. In addition, they include quasi-legal information, such as enforcement policies of the law, and non-legal facts such as information about the relevant industry, which either attorney or client may possess.

"Meta" facts denote all background and personal information regarding the client and the lawyer. Meta facts regarding a client include facets of his identity, such as race, gender, ethnicity, socio-economic status, culture, religion, and sexual-orientation. Meta information also includes his level of comprehension and sophistication, ability to perform under pressure, and responsiveness to legal advice.³³ Meta information regarding an individual attorney includes where she went to college and law school, how many times she took the bar exam before passing it, her experience and expertise, reputation, whether she has ever been disciplined or found liable for malpractice, whether she carries malpractice liability coverage, how the attorney plans on exercising her professional judgment and discretion in revealing confidential client information, as well as personal information about the lawyer.³⁴

"Set-up" facts denote information relating to the structure of the relationship between the attorney and the client itself, rather than to its substance. For instance, set-up facts include information about forming, maintaining, and dissolving the relationship, resolving disputes should they arise, and the extent of post-termination duties.

32. To be sure, the author's proposed typology—representation-specific, meta, and set-up facts—replaces the common distinction between facts and law, which is based upon the identity of the person possessing the information (i.e., the client knows the facts, the attorney knows the law), with a characterization based upon the nature of the information in question. *See Maute, supra* note 12, at 1115 (offering a typology based on representation context, decision type, client identity, and timing).

33. Meta facts regarding an entity client would include information about its governance structure and culture, relationships within the entity, as well as information about the industry and business competitors.

34. Meta facts regarding a law firm would include information about its size, organization, culture, and reputation.

Moreover, set-up facts include information relating to the client's ability to pay legal fees, as well as information about the fee structure and resolution of fee disputes relating to the attorney-client relationship.³⁵

This typology of information within the attorney-client relationship illuminates how the Rules design a communications regime that is intentionally a one-way street, systematically biased against clients and in favor of lawyers. As demonstrated below, by regulating the flow of information from clients to lawyers, the Rules foster a "tell all" attitude encouraging clients to disclose all three types of facts—representation-specific, meta, and set-up—to their attorneys. In regulating the flow of information from lawyers to clients, however, the Rules do not provide lawyers similar incentives. Lawyers are only encouraged to reveal to clients limited representation-specific and set-up facts, and generally no meta facts. Consequently, the Rules fail to close the inherent asymmetric gap in information between lawyers and clients. The Rules also aggravate the asymmetry by systematically channeling information from clients to lawyers and making it less likely that clients will be able to occupy the role of informed principals in the attorney-client relationship.

B. Regulation of Information Flow from Clients to Attorneys—The "Tell All" Regime

No rule directly regulates the transmission of information from a client to a lawyer, in part because the Rules are aimed at lawyers, not at clients.³⁶ Rule 1.6,³⁷ however, which deals with confidentiality, implicitly regulates such communications. Rule 1.6(a) states generally

35. This typology of facts depends on the particular circumstances in which they arise. In other words, the three categories of facts are fluid in the sense that a particular fact may, over time, change its "type." For instance, the way an attorney may exercise her discretion as to whether and when to reveal confidential client information pursuant to Rule 1.6, or whether an attorney carries malpractice coverage, are generally meta facts. If an attorney, however, in the context of representing a client is actually contemplating revealing confidential information or if a client is about to file a malpractice claim against her attorney, both facts become representation-specific. Similarly, a set-up fact, such as the circumstances under which an attorney might reasonably raise her fees during the representation, might become a representation-specific fact if an attorney is actually thinking about raising her fees.

36. Some lawyers do provide clients with a "Client Bill of Rights" which specifies the client's rights and duties and offers guidance regarding appropriate client conduct. At least two states, New York and Colorado, require or encourage lawyers to provide clients with a Client Bill of Rights at the outset of the representation. See Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1367 (1995) (discussing the benefits of requiring lawyers to provide a Client Bill of Rights).

37. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007).

that all information relating to the representation is confidential and cannot be disclosed without the client's informed consent.³⁸ The Comment to Rule 1.6 explains that confidentiality is essential to ensure complete and effective communication between attorney and client, without which the lawyer is unable to effectively represent the client.³⁹ The doctrine of confidentiality encourages clients to reveal all facts to lawyers by ensuring clients that whatever they disclose will be protected.

Importantly, Rule 1.6(a)'s "information relating to the representation" is construed broadly to extend protection to representation-specific, meta, and set-up facts. Rule 1.6 is, by design, very broad in terms of both its scope and the extent of the protection it offers. It covers all information relating to the representation, as well as information that, while not in and of itself confidential, might reasonably lead to the revelation of confidential information.⁴⁰ The protection it grants confidential information is complete—once information is deemed confidential, a lawyer cannot reveal it unless an applicable exception applies.⁴¹

The broad scope of confidentiality is evidenced by the narrow exceptions to it. The only mandatory exception to confidentiality is embodied in Rule 3.3(b).⁴² Otherwise, the exceptions to confidentiality are all permissive⁴³ and frowned upon by the bar. This near fetish of confidentiality⁴⁴ has been the subject of a substantial body of scholarship and bitter battles between supporters and critics of the doctrine.⁴⁵ For purposes of this Article, suffice it to simply note that one

38. *Id.* at R. 1.6(a).

39. *Id.* at R. 1.6 cmt. 2.

40. *Id.* at cmt. 4.

41. See generally Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 203–07 (2007) (exploring the broad scope and extent of protection extended by Rule 1.6).

42. MODEL RULES OF PROF'L CONDUCT R. 3.3(b). Only Rule 3.3(b), dealing with candor toward the tribunal, constitutes a true mandatory exception to confidentiality, stating that "a lawyer . . . shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal," if the client commits perjury. *Id.* Rule 3.3(a)(3) also requires the taking of "remedial measures" but a lawyer may avoid the need to disclose confidential information by refusing to offer false evidence. *Id.* at R. 3.3(a)(3).

43. Rules 1.6(b) and 1.13(c) use the word "may" to grant attorneys the discretion to reveal confidential information. *Id.* at R. 1.6(b), 1.13(c). Rule 4.1(b) mandates disclosure of material facts to third parties in some circumstances unless the information is confidential. *Id.* at R. 4.1(b).

44. William H. Simon, *The Confidentiality Fetish*, ATLANTIC MONTHLY, Dec. 2004, at 113–16.

45. See, e.g., Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998) (denouncing confidentiality as a doctrine mainly serving the interests of lawyers and the

important outcome of broad confidentiality is that it implicitly encourages a client to “tell all” to his attorney. By casting the net of confidentiality so broadly and extending confidential information broad protection, Rule 1.6 encourages the client to reveal all information within his possession to his attorney. To be sure, the broad construction of confidentiality covers representation-specific, meta, and set-up facts because all fall within the category of “information relating to the representation.”⁴⁶

C. Regulation of Information Flow from Attorneys to Clients— The “Say as Little as Necessary” Regime

Rule 1.2⁴⁷ sets the stage for communications by affirming the relational roles of the client as the ultimate decision-maker and the attorney as the agent. It states that the client is solely responsible for determining the objectives of the relationship.⁴⁸ The lawyer, in consultation with the client, is responsible for the means by which the goals are to be pursued.⁴⁹ The Rule then makes an explicit reference to Rule 1.4 as the venue for regulating communications consistent with the allocation of authority pursuant to Rule 1.2.⁵⁰

The allocation of authority envisioned by the Rules, rendering the client the decision-maker within the relationship, might create an expectation of a broad communications rule directing all relevant types of information—representation-specific, meta, and set-up facts—from attorney to client. Rule 1.4, however, in large part actually only covers representation-specific facts.⁵¹

legal profession). *But see* Lawrence J. Fox, *It Takes More Than Cheek to Lose Our Way*, 77 *ST. JOHN'S L. REV.* 277 (2003) (offering a fierce defense of a broad confidentiality rule).

46. MODEL RULES OF PROF'L CONDUCT R. 1.6(a). To be clear, the author's proposed definition of representation-specific facts is narrower than Rule 1.6's construction of “information relating to the representation.” *See supra* note 32 and accompanying text.

47. MODEL RULES OF PROF'L CONDUCT R. 1.2.

48. *Id.* at R. 1.2(a) cmt. 1.

49. *Id.* at R. 1.2(a).

50. “[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, *as required by Rule 1.4*, shall consult with the client as to the means by which they are to be pursued.” *Id.* (emphasis added). Comment [1] adds:

The decisions specified in paragraph (a), such as whether to settle a civil matter, *must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions.* With respect to the means by which the client's objectives are to be pursued, *the lawyer shall consult with the client as required by Rule 1.4(a)(2)* and may take such action as is impliedly authorized to carry out the representation.

Id. at R. 1.2 cmt. 1 (emphasis added).

51. *Id.* at R. 1.4.

In proving that Rule 1.4 is generally silent regarding meta and set-up facts, one needs to distinguish between subsections (a)(1) and (a)(5), which generally do not deal with meta and set-up facts; subsections (a)(2) and (a)(4), which could be plausibly read to deal with meta facts; and subsections (a)(3) and (b), which could be plausibly read to regulate meta and set-up facts.⁵² These latter subsections, however, should not be construed as such.

1. Subsections 1.4(a)(1) and 1.4(a)(5)

Subsection 1.4(a)(1) mandates communicating with the client when his informed consent is required.⁵³ Informed consent is required by the Rules about a dozen times, generally in circumstances regarding representation-specific facts.⁵⁴ Rule 1.5⁵⁵ is the only instance in which informed consent is required regarding set-up facts relating to contingency fees and fee division.⁵⁶ No Rule requires informed consent with regard to meta facts.

Subsection 1.4(a)(5) deals with representation-specific facts and does not apply to meta or set-up facts.⁵⁷ A client may expect assistance that is “not permitted by the Rules or other law” in either one of two situations: (1) when the client does not know the assistance is in violation of the Rules or other law, or (2) when the client knows of the potential violation but nonetheless seeks the lawyer’s assistance. Ei-

52. Rule 1.4 reads:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Id.

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

54. Informed consent is commonly invoked in the Rules either in connection with waiving confidentiality, *see id.* at R. 1.6(a), 1.8(b), 1.18; or in connection with waiving conflicts of interest, *see id.* at R. 1.7(b)(4), 1.8(a)(3), 1.8(f)(1), 1.8(g), 1.9(a)(b), 1.11(a)(2), 1.11(d)(2), 1.12(a).

55. *Id.* at R. 1.5.

56. *Id.* at R. 1.5(c), (e).

57. *Id.* at R. 1.4(a)(5).

ther way, Rule 1.2(d) forbids the lawyer from providing the client with such assistance,⁵⁸ and subsection 1.4(a)(5) complements Rule 1.2(d) by instructing the lawyer to advise the client of such limitations.⁵⁹ Importantly, subsection 1.4(a)(5) only mandates communication “when the lawyer knows that the client expects assistance.”⁶⁰ Lawyers will typically have such actual knowledge with regard to specific client expectations, which would render the facts in question representation-specific.

2. Subsections 1.4(a)(2) and 1.4(a)(4)

Reading subsections 1.4(a)(2) and 1.4(a)(4) to cover anything more than representation-specific facts is implausible. Subsection 1.4(a)(2), like subsection 1.4(a)(5), complements Rule 1.2(a).⁶¹ Rule 1.2(a) draws the classic distinction between the goals and objectives of the relationship, and the means by which those goals and objectives are to be pursued.⁶² Rule 1.2(a) vests authority over the former solely in the client and shared authority over the latter in both the lawyer and the client.⁶³ Subsection 1.4(a)(2) complements Rule 1.2(a) by instructing the lawyer to consult with the client regarding their shared authority over the means by which the client’s objectives are to be pursued.⁶⁴

It might seem, however, that subsection 1.4(a)(2) could also apply to meta facts: whether a lawyer carries malpractice liability coverage, or explains to her client the circumstances under which she may decide to exercise her discretion and disclose confidential information pursuant to an exception, constitutes the means, or the background means, of pursuing the client’s objectives. The Comments to Rules 1.4 and 1.2 demonstrate why such a broad construction of “means” would be implausible. Comment [3] to Rule 1.4 gives as an

58. *Id.* at R. 1.2(d).

59. *Id.* at R. 1.4(a)(5).

60. *Id.*

61. *See id.* at R. 1.4(a)(2).

62. Maute, *supra* note 12, at 1052 (describing the allocation of authority as a “joint venture” in which “the client is principal with presumptive authority over the objectives of representation and the lawyer is principal with presumptive authority over the means by which those objectives are pursued”); Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 12, at 50; Strauss, *supra* note 12, at 318 (stating that the traditional allocation of decision-making authority vests decisions about “ends” in clients and decisions about “means” in attorneys).

63. *See* MODEL RULES OF PROF’L CONDUCT R. 1.2(a).

64. *Id.* at R. 1.4(a)(2).

example of “means,” decisions that must be made during a trial.⁶⁵ Comment [2] to Rule 1.2 gives the examples of “technical, legal and tactical matters.”⁶⁶ The Comments thus clarify that “means” are to be construed in direct relation to the ends of the representation and do not include background considerations such as the availability of malpractice insurance and the lawyer’s general exercise of discretion regarding confidentiality.⁶⁷

Subsection 1.4(a)(4) regarding clients’ “reasonable requests for information” is not meant to cover meta facts, but rather to ensure the prompt responsiveness to clients’ reasonable inquires about representation-specific facts.⁶⁸ Indeed, the focus of subsection 1.4(a)(4) is on diligence, that is, the timing, as opposed to the content, of the response.⁶⁹

Subsection 1.4(a)(4), however, could trigger discussion of meta facts if the client directly asks the lawyer about such information. For example, at the outset of the representation the client may ask the lawyer whether she passed the bar exam on the first try or whether she carries malpractice liability coverage. Arguably, even if asked directly about meta facts, the lawyer need not respond on the ground that the request is unreasonable and does not concern the relationship. Comment [4] to Rule 1.4 states in relevant part: “When a client makes a *reasonable request for information*, however, paragraph (a)(4) requires prompt compliance with the request”⁷⁰ The Comment thus suggests that the subject matter of subsection 1.4(a)(4) is limited to reasonable requests. An attorney might argue that whether she passed the bar exam on the first attempt is simply not related to and does not concern the relationship and, therefore, such a request is unreasonable and need not be responded to.⁷¹

Notably, even if one interprets the subsection to mean that an attorney must disclose meta facts when the client explicitly requests such information, it does not address the issue of whether the attor-

65. *Id.* at R. 1.4 cmt. 3.

66. *Id.* at R. 1.2 cmt. 2.

67. Indeed, even if meta facts, such as the availability of malpractice insurance, are tangentially related to the means by which the client’s objectives are to be pursued, it is precisely that tangential nature of the information that would fail to meet the “reasonably consult” requirement of subsection 1.4(a)(2).

68. MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(4).

69. Comment [4], for example, states in relevant part that “[c]lient telephone calls should be promptly returned or acknowledged.” *Id.* at R. 1.4 cmt. 4.

70. *Id.* (emphasis added).

71. Of course, an attorney may not lie to the client about meta facts, and, practically speaking, failure to respond to the client’s query may cause the client some pause.

ney must disclose such information when the client does not request it.⁷² Subsection 1.4(a)(4) clearly does not mandate nor encourage disclosure of meta facts to clients.

3. Subsection 1.4(a)(3)

Subsection 1.4(a)(3), which requires the lawyer to keep the client reasonably informed as to the status of the matter,⁷³ could plausibly be read to mandate communication of meta and set-up facts because information such as whether an attorney carries malpractice insurance coverage may be construed as being included in the meaning of “matter.” Comment [3], however, seems to construe the “status of the matter” narrowly, whereby “matter” means the specific subject matter of the representation.⁷⁴ The Comment gives the example of “significant developments affecting the timing or substance of the representation.”⁷⁵ It is hard to see how information about whether the attorney passed the bar exam on the first try might affect the “timing or substance” of the representation. Moreover, the Comment refers to “significant developments.”⁷⁶ Whether the attorney passed the bar exam or whether she carried malpractice coverage at the inception of the relationship are static facts, not “developments” per Comment [3].

Some meta facts, however, can in some circumstances constitute “significant developments” per subsection 1.4(a)(3). For example, the fact of an attorney’s falling out of malpractice coverage during the representation could affect the substance of the relationship, because the attorney, now without coverage, might prefer more conservative avenues of representation less likely to result in malpractice lawsuits. Similarly, the fact of a new disciplinary investigation launched against an attorney can constitute a significant development if it restricts the ability of the attorney to represent a client.

Subsection 1.4(a)(3) covers meta facts only when circumstances render the information specific with regard to the particulars of the representation. That is, subsection 1.4(a)(3) makes disclosure to clients mandatory if and when the information stops being generic meta information and becomes representation-specific information.⁷⁷ The key issue is thus not how broadly the word “matter” is to be construed,

72. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(4).

73. *Id.* at R. 1.4(a)(3).

74. *Id.* at R. 1.4 cmt. 3.

75. *Id.*

76. *Id.*

77. *See supra* note 35.

but rather the nature of the information involved. Even if disclosure of meta facts could be forced under Rule 1.4(a), the communications rule certainly does not encourage a free flow of information from lawyers to their clients.

4. Subsection 1.4(b)

Subsection 1.4(b) governs how an attorney provides clients with adequate explanations. The subsection plausibly regulates more than representation-specific facts because meta facts seem “reasonably necessary to permit the client to make informed decisions regarding the representation.”⁷⁸ For example, whether an attorney carries malpractice liability coverage may influence a potential client’s decision as to whether or not to retain the attorney.⁷⁹ Similarly, information about pending disciplinary complaints and malpractice lawsuits against the attorney may allow the client to draw an inference about the lawyer’s competence and qualifications, and thus impact his decision whether to hire the lawyer.

Note, however, that subsection 1.4(b) does not require the lawyer to explain *information* or *facts* “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁸⁰ Subsection 1.4(b) instead reads: “A lawyer shall explain a *matter* to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁸¹ The Comments, as we have seen above in exploring subsection 1.4(a)(3), also construe a “matter” narrowly to include a settlement or a plea offer, the decision to waive jury trial, and whether the client will testify.⁸²

The combined effect of subsection 1.4(b) requiring an explanation only about a “matter,” and only “regarding the representation,” is to limit the scope of subsection 1.4(b) to representation-specific, as opposed to meta, facts. Moreover, even if meta facts can be forced upon the reading of a “matter,” it is hard to see how the fact of malpractice insurance coverage, for instance, is a “matter” “reasonably

78. MODEL RULES OF PROF’L CONDUCT R. 1.4(b).

79. Nicole D. Mignone, *The Emperor’s New Clothes?: Cloaking Client Protection Under the New Model Court Rule on Insurance Disclosure*, 36 ST. MARY’S L.J. 1069, 1093 (2005) (“An informed choice provides a client with sufficient ‘information to make an intelligent choice’ For some clients, knowing an attorney’s malpractice insurance coverage, in addition to other factors, could influence the ultimate decision to hire that attorney.” (internal citation omitted)).

80. MODEL RULES OF PROF’L CONDUCT R. 1.4(b).

81. *Id.* (emphasis added).

82. *Id.* at R. 1.4 cmt. 2.

necessary” to permit the client to make informed decisions about the representation.⁸³ Comment [5] states: “The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation”⁸⁴ This suggests that subsection 1.4(b) does not cover meta facts. Meta information, such as the lawyer’s decision as to whether or not to carry coverage, does not concern the specific objectives of the representation.

Comment [5] further notes that the guiding principle in assessing the extent of explanation an attorney needs to provide is fulfilling “reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of the representation.”⁸⁵ The question thus becomes whether a client has a reasonable expectation to know certain meta facts such as whether a lawyer carries malpractice coverage. The demanding elements of subsection 1.4(b) limit the reasonable expectations of clients and shift the burden onto the client to require information rather than encourage the attorney to provide it forthright.

In conclusion, Rule 1.4 regulates mostly representation-specific facts and minimally addresses meta and set-up information. Rule 1.4’s near-exclusive regulation of representation-specific facts and failure to encourage a free flow of information from attorney to client marks a very different approach than that of Rule 1.6, which reflects a “tell all” approach promoting extensive communications from client to attorney.⁸⁶

Information transfer from attorney to client is regulated not only by Rule 1.4, the so-called communications rule, but also by Rules 1.13,⁸⁷ 1.16,⁸⁸ 1.18,⁸⁹ and 7.1–7.6,⁹⁰ as well as all Rules requiring informed consent. One approach to exploring these communications rules is along the timeline of the relationship. Rules 1.18 and 7.1–7.6 regulate communications at the outset or pre-relationship phase.⁹¹ Rules 1.5,⁹² 1.13,⁹³ 1.15,⁹⁴ and the Rules requiring informed consent

83. *Id.* at R. 1.4(b).

84. *Id.* at R. 1.4 cmt. 5.

85. *Id.*

86. *See id.* at R. 1.6.

87. *Id.* at R. 1.13.

88. *Id.* at R. 1.16.

89. *Id.* at R. 1.18.

90. *Id.* at R. 7.1–7.6.

91. *See id.* at R. 1.18, 7.1–7.6.

92. *Id.* at R. 1.5.

93. *Id.* at R. 1.13.

regulate communications during the life of the relationship.⁹⁵ Rule 1.16 regulates communications at the post-relationship phase.⁹⁶ Exploring the communication content of these Rules, however, using the author's proposed typology of information within the attorney-client relationship—representation-specific, meta, and set-up facts—will further demonstrate that the Rules, as a whole, only require lawyers to communicate a small subset of information to their clients, mostly representation-specific facts.⁹⁷

5. Rule 1.13: Communicating with an Organizational Client

Rule 1.13 triggers an attorney's duties to report up when the lawyer knows that a constituency of the organization-client engages in illegal conduct "in a matter related to the representation."⁹⁸ By definition then, Rule 1.13 deals with representation-specific facts. Read together with Rule 1.4, the Rules' regulation of communications from attorneys to clients during the life of the relationship deals almost exclusively with representation-specific facts and generally does not require nor encourage the disclosure to clients of meta and set-up facts.

6. Rule 1.18 and Rules 7.1–7.6: Communications at the Outset of the Attorney-Client Relationship

With regard to communications from clients to attorneys in the pre-relationship phase, Rule 1.18 simply extends Rule 1.6's invitation to prospective clients to "tell all" and share information with their prospective attorneys by extending the confidentiality protection to the discussions.⁹⁹

94. *Id.* at R. 1.15.

95. *See id.* at R. 1.5, 1.13, 1.15.

96. *See id.* at R. 1.16.

97. To an extent, exploring the communications content of these Rules along a timeline mirrors the author's analysis because meta and set-up facts will often be communicated at the pre-relationship stage, representation-specific facts during the life of the relationship, and some set-up facts during the post-relationship phase. The typology of representation-specific, meta, and set-up facts, however, does not completely parallel the distinctions between pre-, ongoing, and post-relationship information. For example, while a great deal of meta information is relevant to the pre-relationship stage (e.g., whether an attorney carries malpractice liability coverage, passed the bar exam on the first try, or was previously disciplined), meta information can apply to the ongoing relationship stage (e.g., whether an attorney falls out of coverage during the relationship or new disciplinary investigations are being pursued). In any event, the author's proposed typology demonstrates that the Rules set in place an apparatus that limits communications from attorneys to clients.

98. MODEL RULES OF PROF'L CONDUCT R. 1.13(b).

99. *Id.* at R. 1.18(b).

The 7.1–7.6 cluster of Rules deals mostly with representation-specific facts, ignoring meta and set-up facts. For example, Rule 7.1, dealing with communications concerning a lawyer’s services, prohibits false or misleading statements about the lawyer or the lawyer’s services.¹⁰⁰ The Comments clarify that Rule 7.1 covers all communications about the lawyer’s services¹⁰¹ and that even an otherwise truthful statement will be deemed misleading “if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading.”¹⁰² Interestingly, because Rule 7.1 covers all communications regarding the lawyer’s services, it covers meta facts, and thus the Comment opens the door to mandating disclosure of meta facts that are necessary to avoid materially misleading a client.¹⁰³

If a lawyer chooses to communicate meta information to a client, Rule 7.1 mandates that the communication be accurate.¹⁰⁴ For example, if an attorney chooses to communicate information about her bar examination, it must be accurate. An attorney cannot represent that she passed the bar exam on the first attempt if she did not. Similarly, if a lawyer decides to reveal information about the extent of her malpractice coverage, the statements must be accurate. But must a lawyer disclose such meta facts to a prospective client? While the Comment states that omitting a fact necessary to make a communication not misleading constitutes a false statement, it stops short of affirmatively requiring disclosure of relevant material meta facts.¹⁰⁵ In other words, if a lawyer decides to include a meta fact in her communications, then she cannot omit misleading facts related to it. Rule 7.1, however, simply does not require the lawyer to reveal such facts, even if they may be relevant to the client.¹⁰⁶

One can arguably read Rule 7.1 broadly to suggest that if a lawyer represents that she is competent to represent a client and omits that she failed the bar exam the first time she took it, or that she does not carry malpractice coverage, she is violating, if not the letter of the Rule, then its spirit. Omitting such meta facts materially misleads the

100. *Id.* at R. 7.1 (“A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”).

101. *Id.* at cmt. 1.

102. *Id.* at cmt. 2.

103. Mignone, *supra* note 79, at 1111 (“[An] attorney ‘shall not make a false or misleading communication about the qualifications . . . of any lawyer . . .’ Moreover, the rules recognize that statements can be misleading if they omit relevant information.”).

104. MODEL RULES OF PROF’L CONDUCT R. 7.1.

105. *Id.* at cmt. 2.

106. *Id.* at R. 7.1.

client regarding the lawyer's qualifications and competence. Rule 1.1¹⁰⁷ on competence, however, does not support such a broad construction. It defines competence more narrowly to include legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation,¹⁰⁸ and does not extend to general qualifications. Once again, if an attorney decides to reveal meta facts she must be truthful, but Rule 7.1 does not affirmatively require disclosure of meta facts.

7. Rule 1.16: Communications After the Termination of the Relationship

Finally, Rule 1.16, governing communications from attorneys to clients during the unwinding of the relationship, generally addresses representation-specific facts. For example, it mandates the attorney return the file to the client.¹⁰⁹ The Rule also addresses some set-up facts, requiring the lawyer to give her client reasonable notice of the termination of the representation.¹¹⁰ Overall, Rule 1.16's approach is consistent with the general apparatus promulgated by the Rules: mandating communication of some, but not all, representation-specific facts and mostly ignoring meta and set-up facts.

8. The Overall Approach of the Rules to Attorney-Client Communications

The representation-specific, meta, and set-up typology of information conclusively demonstrates that the Rules put in place a system that perpetrates, facilitates, and supports the asymmetric distribution of information within the attorney-client relationship. The communications rules encourage clients to "tell all" to their attorneys by extending the broad protection of confidentiality in Rules 1.6 and 1.18 to information flowing from clients to attorneys. The very same communications rules, however, only mandate that lawyers communicate to their clients a subset of representation-specific facts and generally leave decisions regarding disclosure of meta and set-up facts to attorneys' professional discretion.

To be clear, far from constituting a mere academic insight, the asymmetric characteristic of the communications regime orchestrated by the Rules has important practical consequences. It belittles, even

107. *Id.* at R. 1.1.

108. *Id.*

109. *Id.* at R. 1.16(d).

110. *Id.*

obscures, the need to communicate to clients important meta and set-up facts. Should a lawyer communicate to a client that she is currently suffering from drug or substance abuse, or marital difficulties that could possibly affect the quality of the representation? Should she disclose to her client that there are pending malpractice lawsuits or disciplinary proceedings accusing her of wrongdoing, or that she settled such proceedings in the past? Should an attorney reveal to her client significant mistakes she has committed in representing her client even if they did not result in significant harm to the client? Or disclose mistakes that may give rise to a malpractice cause of action against her? Should she explain to her client whether she carries malpractice liability coverage and the consequences of the policy for the client or alert the client if and when she falls out of coverage during the relationship? Should a lawyer give her client a “Miranda warning”—explaining that the recently revised Rules’ new exceptions grant her the discretion to reveal her client’s confidential information, that is, that anything the client confidentially reveals to her may be disclosed and used against him later? Should a lawyer communicate to her client whether she failed the bar exam on the first try or whether she was granted special accommodations in law school for a learning disability? Should she explain that her retainer agreement mandates arbitration in case a controversy develops regarding the relationship?

These important questions of meta and set-up facts are not regulated by the Rules’ one-way communications regime. Worse, by failing to even address these facts, let alone require their disclosure in some circumstances, the Rules seem to imply that these meta and set-up facts need not be communicated to clients at all. Stated differently, the communications regime implemented by the Rules obscures these issues and thus decreases the probability of a meaningful discussion about whether and under what circumstances such meta and set-up facts ought to be communicated to clients.

II. Why Do the Rules Form an Asymmetric Informational Exchange Between Attorneys and Clients?

The idea of an informed client-principal exercising authority over decision-making in the relationship, as well as the practical importance of communications to the success of the representation, create an expectation of meaningful communications between attorneys and clients. The asymmetric communications regime orchestrated by the Rules seems inconsistent with such an expectation and lays the burden of justifying it on the legal profession. In other words, a commu-

nications regime that contradicts the fundamental allocation of authority in the relationship can only survive critical scrutiny if it can be justified on the ground that it serves clients' interests or for other compelling reasons.¹¹¹

A. Justifiable Asymmetry

The information asymmetry brought about and reflected in the Rules is arguably justified in terms of the overall purpose and nature of the attorney-client relationship. A client who is not familiar with the relevant law does not know what facts are relevant to his case. The client is thus inherently poorly situated to draw the line between relevant and irrelevant information.¹¹² The Rules therefore encourage and protect complete client disclosure of all "information relating to the representation."¹¹³ A lawyer, on the other hand, once provided with facts about the matter, is entirely capable of assessing what law applies and can thus make an informed decision about what legal knowledge to explain to the client.¹¹⁴ The parties' asymmetric abilities to assess the relevance of information arguably explain why the Rules encourage the client to reveal all to his lawyer, but only guide the lawyer to reveal some relevant information to her client.

111. Generally, according to the social bargain theory of professionalism, the public and the profession strike a bargain in which the public grants the profession a monopoly over the provision of services. The profession, in return, promulgates and enforces rules of conduct that are meant to ensure the quality of professional services. *See* Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941 (1963); PARSONS, *supra* note 31, at 35–37. Consequently, the profession has the burden to prove that specific Rules in fact ensure the quality of legal services and serve the interests of clients. *See* Wald, *supra* note 41, at 240–42.

112. Pursuant to the social bargain theory it is quite difficult for lay customers, even *ex post*, to evaluate the quality of professional services they receive because such services are the product of esoteric knowledge they usually do not possess. Wald, *supra* note 41, at 240.

113. MODEL RULES OF PROF'L CONDUCT R. 1.6(a); *see also supra* notes 36–46 and accompanying text.

114. The assumption that lawyers master an esoteric body of knowledge—the law—which allows them to exercise professional judgment to the benefit of clients is a fundamental aspect of professionalism. *See* Wasserstrom, *supra* note 20, at 1–4 (discussing the essential characteristics of professionalism: esoteric knowledge, formal education, elevated status, self-regulation, monopoly over the provision of professional services, role-morality, and public service); *see also* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed., 1984); MAGALI S. LARSON, THE RISE OF PROFESSIONALISM (1977); ANDREW ABBOTT, THE SYSTEMS OF PROFESSIONS (1988). The exercise of professional judgment, skill, and practical wisdom is a key feature of esoteric knowledge. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 20–23 (1993) (exploring the notion of lawyers' "practical wisdom" in detail and bemoaning its demise).

In addition, communications serve different functions for the attorney and client. For the attorney, communication is a mere tool allowing the lawyer to effectively perform her job and represent the client's interests.¹¹⁵ For many clients, however, communication with lawyers serves, in addition to this important yet narrow function, as a vehicle of empowerment and vindication.¹¹⁶ Telling one's story to a sympathetic advocate is part of standing up for one's rights.¹¹⁷ The different functions of communication thus arguably help explain why the Rules encourage a client to reveal all while justifying an attorney's selective communications with the client.

Next, the Rules' limited approach to mandating communications from lawyers to clients is possibly justified in terms of allowing lawyers room to exercise professional judgment and discretion. The Rules only set a floor of mandatory communications from attorney to client with the understanding that lawyers will regularly exercise their discretion and communicate freely with the clients above and beyond the mandatory floor.¹¹⁸

Finally, asymmetric communications between attorney and client seem both practical and efficient. Clients incur the cost of the relationship; specifically, the cost of both their own time and of lawyers' time communicating. It is in the clients' best interests that lawyers be economic and efficient in their communications. Indeed, some clients simply do not want too much information and instead take the approach that the lawyer is the expert and should tell them what to do.¹¹⁹ Moreover, whereas a client usually is facing one lawyer, an attor-

115. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2; *see also supra* note 27 and accompanying text.

116. *See, e.g.,* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1473-74 (2005) (arguing that the quality of attorney-client communications impacts a client's expressive empowerment or silencing).

117. *See, e.g.,* Bernard P. Perlmutter, *George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 595 (2005); Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 285, 313 (2007) (arguing that the ability to tell one's own story has an empowering effect on the teller and a humanizing effect on the listener).

118. The Rules stress the role of discretion and the importance of the exercise of professional judgment as constitutive features of effective lawyers. "In the nature of law practice . . . [v]irtually all difficult ethical problems . . . must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules." MODEL RULES OF PROF'L CONDUCT Preamble cmt. 9.

119. *See, e.g.,* Jeanne L. Schroeder, *The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship*, 79 TEX. L. REV. 15, 68-69 (2000) (exploring the desire of clients to have lawyers tell them not only what the law is but also what to do consistent with their goals).

ney has many clients. It is not practical for an attorney to communicate all information to each and every client. For the client, the one legal matter he is involved in might be very important. The relative importance to the client explains why he might want and need to discuss the issue in great detail. For the lawyer, each matter is but one of many pending cases and the relative lack of importance of each matter justifies prudence in communicating about it.

Different abilities, different functions, and other practical considerations thus justify some features of the asymmetric distribution of information in the attorney-client relationship and the communications apparatus of the Rules. For example, these considerations persuasively account for the reasonableness requirements in Rule 1.4,¹²⁰ and for the Rules' divergent approach to communicating personal meta information between the parties. The Rules encourage clients to reveal personal meta information to their attorneys but fail to provide similar incentives to attorneys to reveal personal meta information to clients, unless the personal information relates to the ability of the lawyer to effectively represent the client. In that case, Rules 1.4(a)(2), 1.4(a)(3), and 1.16 might require disclosure.¹²¹

While these considerations support asymmetric communications rules conceptually, they fail to justify some of the particular choices made by the Rules. The justifications clearly support the proposition that clients should communicate more to lawyers than attorneys should communicate to clients, but they do not help in drawing the specific lines of communications manifested in the Rules. Specifically, the Rules' consistent failure to regulate the communication of meta and set-up facts to clients is not well supported by these propositions. For example, it is not self-explanatory why the Rules do not require lawyers to disclose to clients information regarding their qualifications and other meta facts, such as how the lawyer plans to exercise her discretion regarding exceptions to confidentiality, or whether the lawyer carries malpractice liability coverage. Some of these meta facts might be important to the client in making an informed decision

120. Rule 1.4 limits the scope of mandated communications from attorney to client by requiring only "reasonable" communications four different times, in subsections 1.4(a)(2), (a)(3), (a)(4), and (b). MODEL RULES OF PROF'L CONDUCT R. 1.4.

121. Rule 1.16(a)(2) states that an attorney must withdraw from representing a client if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." *Id.* at R. 1.16(a)(2). Presumably, circumstances in the attorney's personal life might cause her to withdraw, in which case Rules 1.16(d), 1.4(a)(2), and 1.4(a)(3) require prompt notice to and communications with the client. *Id.* at R. 1.4(a)(2), 1.4(a)(3), 1.16(a)(2), 1.16(d).

about whether to retain the attorney and how to effectively pursue the goals of the relationship. However, as we have seen, the Rules generally fail to require disclosure of meta facts to clients.

Similarly, the asymmetry in the regulation of set-up information is puzzling. While the Rules encourage clients to reveal all to their lawyers,¹²² they fail to require that attorneys provide clients with a written notice of the fee agreement or to require that lawyers communicate to their clients their own malpractice.¹²³

B. Paternalism

“That the practice of law is rife with paternalism should come as no surprise to anyone.”¹²⁴ Based on an elevated professional and social status, lawyers have traditionally exercised significant control over their clients’ decision-making processes.¹²⁵ Richard Wasserstrom argues that such domination naturally fosters paternalism.¹²⁶ Arguably then, paternalism helps explain the one-way communications regime orchestrated by the Rules.

A paternalistic approach to attorney-client communications does not necessarily amount to usurping the client’s role as the ultimate decision-maker within the relationship. Instead, it justifies an asymmetric communication apparatus¹²⁷ by suggesting that clients are not

122. The Rules, however, do carve out an exception to confidentiality which allows lawyers to reveal client confidential information in some circumstances involving fee disputes. *Id.* at R. 1.6(b)(5) cmt. 11.

123. Rule 1.5(b) states in relevant part that “The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably in writing*” *Id.* at R. 1.5(b) (emphasis added). Only New Jersey and New York require that attorneys communicate with clients about their own malpractice. See Nancy J. Moore, *Implications of Circle Chevrolet for Attorney Malpractice and Attorney Ethics*, 28 RUTGERS L.J. 57, 70–78 (1996) on the duty of an attorney to advise a client that he might have a malpractice claim against that attorney.

124. David Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. REV. 454, 460 (1981).

125. See Kilborn, *supra* note 10, at 6 (offering a summary of lawyers’ exercise of power over clients through the ages).

126. Wasserstrom, *supra* note 20, at 19. Criticisms of the legal profession’s paternalistic approach to clients led, beginning in the mid 1960s, to the emergence of a new client-centered approach. Client-centered lawyering allocates clients, rather than attorneys, primary authority over decision-making within the relationship. See Maute, *supra* note 12, at 1053–60; Spiegel, *The New Model Rules*, *supra* note 12, at 1003; Strauss, *supra* note 12, at 336–39; see also DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); MURRAY T. BLOOM, *THE TROUBLE WITH LAWYERS* (1968).

127. Luban defines a paternalistic structure as “a social arrangement that makes it especially likely that paternalistic actions will be performed whether or not they are justified.” Luban, *supra* note 124, at 460.

well positioned to evaluate certain types of information, are likely to misconstrue certain facts, and therefore act in ways that are inconsistent with their own best interests.¹²⁸ For example, a paternalistic approach might suggest that lawyers need not share with clients whether they passed the bar exam on the first attempt or whether they carry malpractice coverage because clients are likely to exaggerate the importance of these objectively insignificant facts and consequently make decisions contradictory to their own interests.

Following David Luban's paradigm, one might argue that a lawyer might override a client's "want" for additional information regarding the attorney in the name of promoting the client's interests in effective representation.¹²⁹ The lawyer may take this position on the ground that additional information regarding, for example, meta facts about the lawyer is irrelevant given the client's interests. Providing additional information nonetheless is likely to cause the client to terminate the relationship or otherwise act in ways inconsistent with the client's interests.¹³⁰ The lawyer imputes to the client the end of choosing a qualified and effective attorney and ignores the client's desire for more information that is inconsistent with the pursuit of the imputed goal.

Luban's analysis, however, does not support a paternalistic approach to attorney-client communications. Paternalism, according to Luban, may be justified when one knows and understands the values and interests of another¹³¹ and overrides them when one reasonably believes that the other is about to act impulsively and violate his own interests.¹³² An application of the argument in the context of attorney-client communications suggests that an attorney may override her client's desire to have more information if the lawyer knows and understands the client's goals. This element of paternalistic conduct is presumably satisfied by Rule 1.6, which encourages clients to "share

128. See Wald, *supra* note 41, at 240.

129. Luban, *supra* note 124, at 473–74.

130. The Rules are no stranger to instances where disclosure of information to clients is postponed on the ground that it may cause the client to act in imprudent ways. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 7 (2007) (allowing a lawyer to delay sharing information with the client when the client would be likely to react imprudently to an immediate communication).

131. Luban, *supra* note 124, at 473.

132. *Id.* It should be noted that the Model Rules take a much harsher approach regarding lawyers' paternalism. Rule 1.2, vesting the ultimate decision-making authority in the client, essentially rejects all instances of paternalism, with the exception of Rule 1.14, which allows a lawyer to act in the client's best interests only when the client suffers from diminished capacity. MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.14.

all” and thus places lawyers in a position to know and understand clients’ values, interests, and wants.¹³³

Luban’s analysis, however, also requires that the client will act impulsively and violate his own interests as a condition for paternalistic intervention. There is simply no reason to paternalistically and systematically fail to share meta and set-up facts with clients. Even if there is a risk that clients may misunderstand meta and set-up facts and will proceed to act impulsively, lawyers can address the concern by effectively explaining the information, per Rule 1.4(b), or explaining why the information is irrelevant given the decision facing the client.¹³⁴

C. Guild Advantage

The Rules are drafted by and serve at least in part, the interests of, the legal profession.¹³⁵ A “tell all” communications policy governing client-to-lawyer communications protected by confidentiality gives lawyers a competitive advantage over other professionals and service providers who cannot offer such a protection to their clients.¹³⁶ A corresponding communication duty from lawyers to clients would be ineffective and costly for lawyers. Thus, a cynical critique would suggest that the one-way communications regime adopted by the Rules promotes the interests of lawyers in having a comparative advantage over other service providers, without imposing on them the added cost of more demanding communications with clients.

This cynical explanation is similar to the paternalistic account in that lawyers limit their communications with clients. The cynical view, however, lacks the ideological conviction of paternalism. It does not

133. See MODEL RULES OF PROF’L CONDUCT R. 1.6.

134. Even in instances in which paternalism can justify asymmetric distribution of information in the relationship, it does suffer from three significant flaws. First, neither the profession nor clients have asserted or accepted the paternalism justification in the context of attorney-client communications. Second, paternalism resulting in withholding from clients meta and set-up facts about the qualifications of the attorney raises serious concerns about the attorney’s competence and the legitimacy of her role. Finally, such paternalism flies in the face of the principle of non-accountability. Indeed, if lawyers were to openly engage in paternalistic decision-making on behalf of their clients, they should be legally liable and morally accountable for the objectives and consequences of the relationship. See *supra* notes 15–19 and accompanying text.

135. See RICHARD L. ABEL, *AMERICAN LAWYERS* 142–57 (1989) for critical analysis of the Rules as means of pursuing the interests of the legal profession. See generally ABBOTT, *supra* note 114; LARSON, *supra* note 114. But see Eli Wald, *An Unlikely Knight in Economic Armor: “Law and Economics” in Defense of Professional Ideals*, 31 SETON HALL L. REV. 1042 (2001) (offering a utilitarian defense of professional ideology and the Rules).

136. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 185–211 (1999); Fischel, *supra* note 45, at 4.

assume that lawyers are better at making decisions for their clients than the clients themselves, and therefore need not communicate with clients; nor does it suggest that lawyers are trying to act in the best interests of clients. Instead, it simply admits that it is inefficient and contrary to lawyers' interests to comprehensively communicate with their clients in detail regarding meta and set-up facts, and implies that the communications regime orchestrated by the Rules reflects the interests of the legal profession.

Comment [12] to the Preamble states: "The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."¹³⁷ Thus, the justification for the communications regime implemented by the Rules must be grounded in the public interest. The public interest, defined in Comment [1], consists of the interests of clients, the legal system, and society in the quality of justice.¹³⁸ Indeed, the Rules are explicitly a part of the public protection scheme: "The Rules of Professional Conduct are intended not only to establish ethical standards for members of the bar, but are also designed to protect the public."¹³⁹

While a one-way communications apparatus limiting the communication duties of lawyers to their clients may serve the interest of lawyers and the legal profession, it fails as a justification. A justification consistent with Comment [12], the ideal of clients as principals, and the principle of effective attorney-client communications must be grounded in the best interests of clients. To the extent that the Rules' communications regime is not explained in terms of the public interest or the interests of clients, but rather by the interests of lawyers and the legal profession, the explanation may be revealing but it fails to sufficiently justify the Rules.

137. MODEL RULES OF PROF'L CONDUCT Preamble cmt. 12.

138. *Id.* at cmt. 1.

139. *Ames v. State Bar of Cal.*, 506 P.2d 625, 629 (Cal. 1973) (internal citations omitted). Failure to self-regulate accordingly may lead to increased legal malpractice actions, judicially imposed sanctions, and government regulation of the profession. See Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1686 (1994).

III. Leveling the Communications Playing Field

A. Agency Relationship, the Ideology of Client Autonomy, and Lawyer Non-Accountability

Rule 1.4 consistently and repeatedly mandates communication to ensure informed client participation in the representation. Comment [1] to Rule 1.4 explicitly states: “Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.”¹⁴⁰ Comment [5] states: “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”¹⁴¹ By emphasizing client participation in the relationship, Rule 1.4 implements the agency ideal of a client-principal and justifies the lawyer’s non-accountability principle that follows.¹⁴²

A true commitment to the attorney-client relationship as an agency relationship in which a lawyer-agent serves a client-principal is inconsistent with an asymmetric communications regime. Living up to the agency ideal of installing clients as principals within the relationship and allowing lawyers to escape moral accountability for the services they render as agents requires that lawyers and the legal profession take attorney-client communications seriously and mandate disclosure of meta and set-up facts to clients. Indeed, the principle of non-accountability makes sense only to the extent that it is true that clients alone control the objectives of the relationship and co-control the means. Clients, however, do not control the objectives of the relationship and therefore cannot be responsible for the goals of the relationship, unless they are informed about, fully participate in, dominate, and control the relationship. In other words, in order to legitimately sustain its commitment to the principle of lawyer non-accountability the Rules must adopt a more demanding communications regime. In such a regime, lawyers would provide clients with more information—meta and set-up facts—and consequently treat clients as the true principals of the attorney-client relationship.¹⁴³

140. MODEL RULES OF PROF’L CONDUCT R. 1.4 cmt. 1.

141. *Id.* at cmt. 5.

142. *See supra* notes 15–21 and accompanying text.

143. One should note that even in an alternative model of the attorney-client relationship abandoning the non-accountability principle—one in which the lawyer would be liable and accountable alongside her client for the objectives and consequences of the relationship—communications still should be taken seriously. *See, e.g.*, WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1988); William H. Simon, *Ethical*

B. In Search of a New Communications Rule: Jane Austen, Attorney's Civil Liability, and the Duty of "Absolute and Perfect Candor"

One way to correct for the asymmetric informational exchange between attorneys and clients is to adopt an "absolute and complete" communications rule that would mirror the tell all approach of Rule 1.6, guaranteeing a free flow of information from lawyers to clients.¹⁴⁴ Jane Austen's quote from *Emma*,¹⁴⁵ however, serves as a cautionary tale against such a broad communications rule, reminding us that such an "absolute and complete" communication is conceptually not feasible. No human is capable of complete disclosure, and holding lawyers to such a standard would be both impractical and imprudent.

Vincent Johnson's excellent critical study of the fiduciary duty of "absolute and perfect candor"¹⁴⁶ further discredits the "absolute and complete" communications rule.¹⁴⁷ Johnson finds that "[t]here is little, if anything, in case law to suggest that, in a case not governed by a specific rule mandating disclosure, non-negligent failure to furnish information to a client will give rise to civil liability."¹⁴⁸ The communications obligations of attorneys to clients can be described instead by the rule of negligence: an attorney must act reasonably in providing information to her client.¹⁴⁹ Johnson concludes that the more demanding

Discretion in Lawyering, 101 HARV. L. REV. 1083 (1998) (outlining a theory of ethical discretion in lawyer decision-making). If clients are to be held liable and accountable for the objectives and consequences of the relationship, and if clients' autonomy is to be taken seriously, they must have authority over the relationship. Authority requires informed participation which in turn requires effective communications from attorney to client.

144. Such an "absolute and complete" communications rule might read:

Rule 1.4: Absolute and Complete Communications

A Lawyer shall:

- (a) promptly inform the client of any information relating to the representation.
- (b) explain information to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

145. JANE AUSTEN, *EMMA* 392 (Oxford University Press ed. 2003) (1815).

146. Vincent R. Johnson, "Absolute and Perfect Candor" to Clients, 34 ST. MARY'S L.J. 737 (2003).

147. To be sure, Johnson studied lawyers' fiduciary obligations as a basis for civil liability as opposed to disciplinary rules of professional conduct. *Id.* at 742-44. On the relationship between civil liability and rules of professional conduct, see MODEL RULES OF PROF'L CONDUCT Preamble cmt. 20 (2007). Johnson's analysis is nonetheless instructive in demonstrating the shortcomings of an overly broad communications duty.

148. Johnson, *supra* note 146, at 775-76.

149. *Id.* at 775. Johnson points out that a negligence-based communications rule will be consistent with the Restatement, which states that "[a] lawyer who has acted with reasonable care is not liable in damages for breach of fiduciary duty." See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. d (2000) (noting that remedies such as disqualification, restitution, and injunctive relief may be available).

strict liability type of approach, setting “absolute and perfect candor” as the standard of communications, should be limited to circumstances where there is a conflict of interest between the attorney and her client, such as in the context of lawyer-client business transactions.¹⁵⁰

An “absolute and complete” duty would not constitute a desirable alternative to the Rules’ one-way communications regime. As we have seen, the Rules already require that lawyers communicate to clients most representation-specific information.¹⁵¹ Mandating communication of all representation-specific, meta, and set-up information would be both impractical and inefficient.¹⁵² Doing so would provide clients with too much information of little utility to them, and deny lawyers the ability to exercise professional discretion over the relationship—the very same ability for which clients often retain attorneys to begin with.¹⁵³

C. Materiality as the Appropriate Standard for Attorney-Client Communications

Because the attorney-client relationship is an agency relationship, the Rules of Professional Conduct derive from the law of agency.¹⁵⁴ The Restatement (Second) of Agency § 381¹⁵⁵ details the duty of an agent to give information to his principal:

Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.¹⁵⁶

The Restatement thus requires that the agent communicate any information to the principal that the principal would desire to have,

150. Johnson, *supra* note 146, at 775–76.

151. *See supra* Part I.C.

152. *See supra* Part II.A.

153. *See* Johnson, *supra* note 146, at 739. As Johnson persuasively argues,

If lawyers were required to be mere relayers of information and not permitted to exercise judgment in terms of what facts to convey to clients, the legal system would run far less smoothly than it does today. It has been impressively urged that the essence of good lawyering is the exercise of judgment.

Id.

154. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Ch. 2, Introductory Note (“The subject matter of this Chapter [entitled ‘The Client-Lawyer Relationship’] is, from one point of view, derived from the law of agency.”).

155. RESTATEMENT (SECOND) OF AGENCY § 381 (1958).

156. *Id.*

even if “not specifically instructed to do so.”¹⁵⁷ Courts have not only recognized attorneys as agents of principal-clients, but in fact have held that more is required of an attorney—an utmost duty to disclose information the client would consider important¹⁵⁸—thus lending support to a materiality-based standard of communications.

A materiality standard strikes an appropriate balance by ensuring that clients receive all important and relevant information a prudent and reasonable client would want to have before making decisions regarding the objectives of the representation. Just as “[t]he ‘materiality’ threshold therefore ‘plays a critical gatekeeper[’s] role’ by separating the essential information from the ‘less important that would be extraneous or irrelevant to investors,’”¹⁵⁹ so can a materiality-based communications rule play a critical gatekeeper role guaranteeing that clients receive essential information necessary for their informed participation in the relationship.

1. Materiality Defined

The Restatement (Second) of Torts defines a fact as material based on whether a reasonable person would attach importance to the fact misrepresented or omitted in determining his or her course of

157. *Id.* at cmt. a.

158. *See, e.g.*, *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978).

159. Yvonne Ching Ling Lee, *The Elusive Concept of “Materiality” Under U.S. Federal Securities Laws*, 40 WILLAMETTE L. REV. 661, 662 (2004) (internal citations omitted). Lee argues that the federal securities laws’ standard of materiality, centered upon the “mythical reasonable investor,” should be revised to reflect the information’s impact on market prices. *Id.* at 677–78. While the application of materiality in the securities context is outside the scope of this Article, note that some have argued that the concept of materiality is not elusive. Rather, “[t]he rule is clear; it is its application which is so difficult.” *See* Homer Kripke, *Rule 10b-5 Liability and “Material Facts”*, 46 N.Y.U. L. REV. 1061, 1069 (1971) (arguing that the Court intended to devise an ad-hoc, fact-specific materiality standard).

Lee’s provocative thesis has interesting implications for the study of materiality in the context of an attorney-client relationship. Her argument suggests that the standard for materiality should not be based on the “reasonable client” but instead be a function of the impact of the information in question. Lee’s insight, however, is not easily applicable in the attorney-client context. Unlike the market for securities, the notion of the market for legal services is not as intuitive. Specifically, whereas one might plausibly quantify the effects of information in the market for securities based on its impact on the price of securities, one cannot quantify communications from attorney to client based on the “price” of legal services because fees are not generally determined by market considerations of supply and demand. *See* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000). Consequently, the author of this Article will explore the traditional materiality standard of the “mythical reasonable investor” and apply it to mean the “reasonable client.”

action.¹⁶⁰ Materiality has been extensively explored in cases involving sections of the securities laws. Although the Securities Exchange Act of 1934¹⁶¹ fails to expressly define materiality, the Supreme Court construed materiality in the seminal case of *TSC Industries, Inc. v. Northway*,¹⁶² and then expressly adopted the *TSC Industries* materiality standard in *Basic, Inc. v. Levinson*.¹⁶³ In *TSC Industries*, the Court explained the general standard of materiality:

An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.¹⁶⁴

This materiality standard is particularly suited to governing communications in the attorney-client relationship. The client is the ultimate decision-maker in the relationship and is alone responsible for its objectives, akin to the position of a shareholder who is alone responsible for his investment decision. A lawyer must therefore reveal all information that a reasonable client would attach importance to in determining the objectives of the representation. Again, this is analogous to the duties of corporate insiders who must reveal to shareholders all material information regarding the investment decision. In other words, a fact is material for purposes of attorney-client communications if it would significantly alter the “total mix” of information a

160. See RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1977); see also Am. Law Inst., Federal Securities Code § 256 (a) (1973).

161. The Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–111 (2000)).

162. 426 U.S. 438 (1976). A TSC shareholder claimed that a proxy statement filed jointly by TSC and National, one of its shareholders and its acquirer, was incomplete and materially misleading in violation of the Securities Exchange Act because it failed to disclose facts relating to the degree of National’s control over TSC and the favorability of the terms of the proposal to TSC shareholders. *Id.* at 440–43. The Court reversed the grant of partial summary judgment for the shareholder and remanded for further proceedings consistent with its construction of materiality. *Id.* at 463–64.

163. 485 U.S. 224, 232, 249 (1988).

164. *TSC Indus.*, 426 U.S. at 449. “The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor.” *Id.* at 445.

reasonable client would want to know prior to making an informed decision regarding the relationship.

The Court rejected a broader alternative formulation adopted by the court of appeals, which defined a fact to be material if a shareholder might consider it important. The Court found that “the ‘might’ formulation is ‘too suggestive of mere possibility, however unlikely,’”¹⁶⁵ reasoning that in formulating a standard of materiality, the purpose is “to ensure disclosures by corporate management in order to enable the shareholders to make an informed choice.”¹⁶⁶ The Court stated:

Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good. The potential liability for a Rule 14a-9 violation can be great indeed, and if the standard of materiality is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management’s fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decision-making.¹⁶⁷

Similarly, a fact should not be deemed material simply because a client might consider it important. Such a broad definition of materiality may cause attorneys to simply bury clients in an avalanche of trivial information—a result that is hardly conducive to informed decision-making.

2. Materiality in the Attorney-Client Relationship

The Court’s analysis in *TSC Industries* is highly relevant to the construction of materiality in the context of an attorney-client relationship. Similar to the securities context, the purpose of communications between attorneys and clients is to ensure disclosure by attorneys to enable clients to make informed decisions about the relationship. And yet, “[t]he issue of materiality may be characterized as a mixed question of law and fact”¹⁶⁸ The law governing the attorney-client relationship is different from that of securities law, in that the potential liability and discipline for professional negligence tends to be, practically speaking, relatively low when compared with liability under

165. *Id.* at 449 (citing *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1302 (2d Cir. 1973) (Friendly, J.)).

166. *Id.* at 448.

167. *Id.* at 448–49.

168. *See TSC Indus.*, 426 U.S. at 450.

the securities statutes.¹⁶⁹ This suggests a lower threshold for disclosure in the legal context because lawyers will otherwise not over-disclose for fear of liability.

On the other hand, like managers, lawyers are hired by clients for their professional expertise and exercise of professional judgment.¹⁷⁰ Clients do not want to know all trivial information relating to the representation, only important information.¹⁷¹ Some information relating to the relationship can be of such dubious significance that insistence on its disclosure may accomplish more harm than good.

The Court further clarified that “[t]he determination requires delicate assessments of the inferences a ‘reasonable shareholder’ would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.”¹⁷² The determination of whether a particular fact is material is context-specific and depends on the nature of the relationship and the circumstances of the investor.

The application of the materiality standard is, by definition, context- and fact-specific and might be a daunting task. The Court in *Basic* acknowledged as much when it was called upon to apply its materiality standard to preliminary merger discussion.¹⁷³ The Court explained that where “the event is contingent or speculative in nature, it is difficult to ascertain whether the ‘reasonable investor’ would have considered the omitted information significant at the time. Merger negotiations, because of the ever-present possibility that the contem-

169. Wilkins, *Legal Realism for Lawyers*, *supra* note 21, at 503 (“The rules of professional conduct are chronically underenforced.”); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT’L L. 1117, 1127 (1999) (“Lawyer discipline in the United States has always been an embarrassment.”); Marshall J. Breger, *Should an Attorney be Required to Advise a Client of ADR Options?* 13 GEO. J. LEGAL ETHICS 427, 453 (2000) (“In practice, civility codes can cause confusion among the judiciary and the practicing bar, because it is not always clear when mandatory rules of professional conduct, as opposed to ‘aspirational’ statements of ideal conduct, are being applied.”).

170. See *supra* note 114 and accompanying text.

171. See *supra* note 119 and accompanying text.

172. See *TSC Indus.*, 426 U.S. at 450. The Court, however, also acknowledged that summary judgment may be appropriate when “the established omissions are ‘so obviously important to an investor, that reasonable minds cannot differ on the question of materiality.’” *Id.* (quoting *Johns Hopkins Univ. v. Hutton*, 422 F.2d 1124, 1129 (4th Cir. 1970)).

173. “The application of this materiality standard . . . is not self-evident.” *Basic, Inc. v. Levinson*, 485 U.S. 224, 232 (1988).

plated transaction will not be effectuated, fall into the latter category.”¹⁷⁴

The Court’s analysis is highly instructive regarding the application of materiality in the context of attorney-client communications. With regard to some information, namely representation-specific facts, the application of the materiality standards will be straightforward. One example of this is where the lawyer receives a settlement offer or a plea-bargain offer. Clearly a reasonable client would want to be informed of the offer so he can decide on an informed basis whether to accept or reject it.¹⁷⁵ Sometimes, however, the nature of the information will render the materiality determination difficult. The information might be contingent in nature or might be inherently ambiguous, as in malpractice insurance coverage. Unique attorney-client contexts might call for particular applications of materiality, exactly as unique securities situations led the Court to articulate a specifically-tailored account of materiality for preliminary merger discussions. Therefore, adopting a materiality-based communications standard does not automatically mean that lawyers would have to communicate to their clients all meta and set-up facts.¹⁷⁶ Adoption of such a standard, however, would entail fact-specific determinations regarding meta and set-up facts, exactly the kind of regulation missing from the asymmetric communications regime of the Rules which systematically ignores all such facts.

The Court’s analysis in *Basic* nevertheless provides important guidance as to how to construe materiality in unique contexts. In rejecting the Third Circuit’s “agreement-in-principle” test for materiality,¹⁷⁷ the Court expressly rejected its three rationales: (1) that a low threshold might cause management to overwhelm investors with excessive detail and trivial information; (2) that management must be allowed to do its job, i.e., to explore the possibility of a merger; and (3) that the test provides a bright-line rule for determining materiality.¹⁷⁸ The Court explained that the underlying consideration in assessing materiality is the significance of the information.

174. *Id.*

175. See MODEL RULES OF PROF’L CONDUCT R. 1.2 cmts. 1–2 (2007) (describing the allocation of authority between attorney and client).

176. See *supra* Part I.C.8 for a description of which facts fall within the categories of meta and set-up facts, respectively.

177. According to which, “preliminary merger discussions do not become material until ‘agreement-in-principle’ as to the price and structure of the transaction has been reached between the would-be merger partners.” *Basic*, 485 U.S. at 233.

178. *Id.* at 233–34.

While acknowledging the importance of not overwhelming investors with an abundance of trivial information, the Court cautioned against a “paternalistic withholding of accurate information” that attributes to investors “a child-like simplicity.”¹⁷⁹ The Court also acknowledged that the timing of communication might be a relevant factor in determining materiality.

Thus, applying the Court’s insight in the context of the attorney-client relationship suggests that Rule 1.4’s paternalistic exclusion of all meta and set-up facts¹⁸⁰ must be rejected as attributing to clients a “child-like simplicity.”¹⁸¹ Furthermore, the issue of when a lawyer communicates information is an altogether different question than whether the information is material and must be communicated.¹⁸² Finally, the Court explained why materiality defies a bright-line rule: “Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be over inclusive or under inclusive.”¹⁸³ The same rationale explains why no bright-line rule may define materiality in the context of attorney-client communications.

The Court addressed how materiality applies to information or events that are contingent or speculative in nature: “Under such circumstances, materiality ‘will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.’”¹⁸⁴ When contingent or speculative disclosure is at issue, the analysis is fact-specific.¹⁸⁵ Furthermore, the Court explained

Generally, in order to assess the probability that the event will occur, a factfinder will need to look to indicia of interest [B]y way of example . . . board resolutions, instructions to investment bankers, and actual negotiations between principals . . . may serve as indicia of interest. To assess the magnitude of the transaction to the issuer . . . a factfinder will need to consider such facts as the size of the two corporate entities and of the potential premiums over market values. No particular event or factor . . . need be either necessary or sufficient by itself¹⁸⁶

179. *Id.* at 234.

180. *See supra* notes 124–34 and accompanying text.

181. *Basic*, 485 U.S. at 234.

182. *Id.* at 234–35.

183. *Id.* at 236.

184. *Id.* at 238 (quoting *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968) (en banc)).

185. *See id.* at 239–40.

186. *Id.* at 239.

By analogy, different types of attorney-client relationships will call for different applications of the materiality standard in assessing the required scope of communications between attorneys and clients.¹⁸⁷

3. Materiality—The Next Generation

Borrowing the concept of materiality from the securities arena has the added benefit of a rich body of case law and scholarly work applying and assessing it. Margaret Sachs argues that in inefficient markets, “the least sophisticated investor” should be the lower threshold for materiality, replacing “the reasonable investor.”¹⁸⁸ In exchange for lowering the required level of materiality, the required level of scienter should be raised.¹⁸⁹ Sachs asserts that the “reasonable investor” standard “has an Achilles’ heel—its inability to address the fraud that deceives certain unsophisticated investors.”¹⁹⁰ Recent social developments—namely increased Internet fraud, increased telemarketing fraud, growing financial illiteracy, increased elderly investment, and increased immigrant investment¹⁹¹—expose the inability of the “reasonable investor” standard to protect this vulnerable and “unreasonable” underclass of investors.

187. Further insight can be gained from the Court’s analysis of the “puffery” and “bespeak” doctrines in securities law. With regard to puffery:

In particular, “projections and statements of optimism may trigger liability under federal securities laws.” But such statements may also fall under the protection of the so-called puffery defense or puffery doctrine. Under the puffery defense, statements that are too vague, promotional, or hyperbolic, constitute mere puffery and are therefore immaterial as a matter of law.

Peter H. Huang, *Moody Investing and the Supreme Court: Rethinking the Materiality of Information and the Reasonableness of Investors*, 13 SUP. CT. ECON. REV. 99, 113 (2005). Moreover, [t]he judicially created “bespeaks caution” doctrine protects optimistic forward-looking statements including forecasts, projections, and opinions from allegations of misrepresentation and omission when those statements are accompanied by meaningful cautionary language. Under the “bespeaks caution” doctrine, forward-looking statements accompanied by meaningful cautionary language are deemed to be immaterial. Courts have utilized the “bespeaks caution” doctrine to rule on the pleadings as a matter of law, usually by granting a motion to dismiss for failure to state a claim or a motion for summary judgment.

Id. at 122; see also Allan Horwich, *The Neglected Relationship of Materiality and Recklessness in Actions Under Rule 10b-5*, 55 BUS. LAW. 1023, 1031–32 (2000). Applied to the attorney-client communications context, the puffery and bespeak doctrines suggest that lawyers need not communicate to clients vague and optimistic forward-looking statements.

188. Margaret V. Sachs, *Materiality and Social Change: The Case for Replacing “The Reasonable Investor” with “The Least Sophisticated Investor” in Inefficient Markets*, 81 TUL. L. REV. 473, 481 (2006).

189. *Id.*

190. *Id.* at 476.

191. *Id.* at 492–95.

In the context of the attorney-client relationship, however, the “reasonable client” standard is appropriate and should not be replaced by a “least-sophisticated client” standard.¹⁹² The need for the adoption of the least-sophisticated investor standard arises from social developments that created an underclass of investors: “those trading in inefficient markets without an adviser,”¹⁹³ online and over-the-phone investors, as well as the elderly and immigrant investors. No such comparable underclass of clients exists warranting the adoption of the least sophisticated client standard. Indeed, the attorney-client relationship is inherently personal, a relationship not between strangers but between fiduciaries. While e-mail and telephone exchanges are common, no attorney-client relationship is limited to them. Furthermore, the Rules already impose a special duty on lawyers who represent clients with diminished capacity.¹⁹⁴ To the extent client underclasses exist, such as the elderly and minors,¹⁹⁵ they are afforded protection within the Rules and are not in need of a special communications standard akin to the least sophisticated client.

Peter Huang also challenges the reliance of materiality on the notion of the reasonable investor, arguing that in light of evidence suggesting the prevalence of “moody investing”—investing based not on reasonableness but rather on emotion¹⁹⁶—the definition of materiality should be revised. Huang argues that the materiality standard should be grounded not in a normative idealized type of “reasonable”

192. *Id.* at 503–04. “This fictional person is drawn from deception cases decided under the Fair Debt Collection Practices Act (FDCPA). Enacted in 1977, the FDCPA protects consumers from deception and other unscrupulous debt collection practices.” *Id.* at 503. Sachs further explains that courts have defined “the least sophisticated consumer,” the threshold for triggering the EDCPA, as

someone of “below average . . . intelligence” who lacks “even the sophistication of the average, everyday, common consumer” This individual is not totally lacking in cognitive capacity. He can, for example, be expected to know that an envelope marked “priority” is not necessarily of true urgency. Moreover, he should be aware of information appearing on the back of a letter, at least where he is specifically instructed to turn the page. On the other hand, he may assume that an attorney’s signature on a letter means that the attorney has personal familiarity with the facts of his case. He may infer from the phrase “once judgment is obtained” that a judgment against him cannot be avoided.

Id. at 503–04 (internal citations omitted).

193. *Id.* at 476.

194. MODEL RULES OF PROF’L CONDUCT R. 1.14 (2007).

195. *Id.* at cmt. 1 (identifying minors, the elderly, and those who suffer from diminished mental capacity as possibly falling within the definition of “clients with diminished capacity”).

196. Huang, *supra* note 187.

behavior but instead on a descriptive realistic depiction of actual behavior.¹⁹⁷ Thus,

Moody investing suggests a new definition for the materiality of information which focuses on the magnitude of the risky outcomes and on the degree or vividness of mental imagery. Such a reformulation of materiality suggests that an emotionally rich presentation of information can be material while a less emotionally vivid presentation of the same cognitive information can be immaterial. In other words, determinations of materiality would and should depend not just on the cognitive form and content of information, but also upon the affective form or presentation and emotional content of that information.¹⁹⁸

Huang's definition of materiality makes sense in the context of the attorney-client relationship because clients heavily rely on lawyers' presentation of information. The materiality of an attorney's communication should depend not only on the content of what the lawyer says, but also on how the lawyer presents it.¹⁹⁹ Unlike the reasonable investor—"someone who grasps market fundamentals"²⁰⁰ and can gauge the accuracy of information by objective market signals—a reasonable client will often lack any fundamental understanding of the subject matter of the representation and will be, to a greater extent, dependent on the presentation and content of the lawyer's communication.²⁰¹ Indeed, Huang persuasively argues that the identity of the speaker may be relevant in assessing materiality.²⁰² Applying Huang's insight to the attorney-client communications context suggests that

197. *Id.* at 111.

198. *Id.* at 112.

199. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 25–29 (1984).

[P]olitical judgments are virtually inescapable . . . [and] even such tactful and delicate counseling involves discretion, and every exercise of that discretion entails making 'political' decisions. For even if the lawyer wanted to, the lawyer simply could not neutrally, objectively, inform the client what the probable legal implications would be The very language and tone in which lawyers speak of the law to their clients is a local political action that subtly reinforces or subverts [the law].

Id. at 26–29. William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991) (noting that because it is hard to distinguish a judgment that a client's choice is autonomous from a judgment that a choice is in the client's best interests, a lawyer often cannot avoid influencing a client when advising about his best interests).

200. Sachs, *supra* note 188, at 485.

201. See *supra* notes 114, 199.

202. "[S]ecurities customers may be more trusting of and so more subject to *securities brokers* engaging in puffery to induce moody investing than securities customers are in danger of *securities issuers* engaging in puffery to induce moody investing." Huang, *supra* note 187, at 116 (emphasis added).

because clients are likely to be trusting of lawyers,²⁰³ and because lawyers cannot avoid influencing clients,²⁰⁴ a more rigorous standard of materiality should apply to communications between attorneys and clients.

Finally, David Hoffman finds empirical evidence that suggests that courts implicitly equate investors' reasonableness with economic rationality and unreasonableness with irrationality.²⁰⁵ He argues that behavioral law and economics establishes that investors do not act rationally,²⁰⁶ and thus concludes that courts are not using materiality to reflect actual investor conduct "but instead to change the behavior of . . . ordinary investors [who] . . . will have strong incentives to conform their conduct to that deemed reasonable by courts."²⁰⁷ Hoffman, thus, asserts that courts are imposing on shareholders a duty to be rational, rather than a duty to be reasonable.

In the context of the attorney-client relationship the risk of courts using materiality to collapse reasonableness into rationality is not as significant as it is in the securities context. Clients may certainly be reasonable, but may not be rational in the economic sense. For example, a client may choose to bring a claim for a declaratory judgment because he wishes to have his day in court and be heard, which may be reasonable even if the client seeks no monetary compensation and therefore, in a narrow sense, is being irrational. Nor should lawyers or courts paternalistically encourage clients to be rational as opposed to reasonable. Specifically, however, the doctrines by which courts equate reasonableness and rationality in the securities context—puffery, the "bespeaks" doctrine, zero price change, and truth on the market²⁰⁸—are not applicable to the attorney-client relationship. Thus, the use of materiality does not entail the risk of promoting clients' rationality at the expense of reasonableness.

4. A Proposed Materiality-Based Communications Rule

Taking clients seriously and pursuing the ideal of principal-clients who exercise informed decision-making authority regarding the objectives of the attorney-client relationship requires abandoning the Rules' asymmetric communications regime. Instead, the Rules should

203. See *supra* note 114.

204. Gordon, *supra* note 199.

205. David A. Hoffman, *The "Duty" to be a Rational Shareholder*, 90 MINN. L. REV. 537, 542 (2006).

206. *Id.* at 586–94.

207. *Id.*

208. *Id.* at 586–95.

adopt a materiality-based communications rule that would ensure that clients receive all information a reasonable client would consider relevant for his decision regarding the objectives of the relationship, that is, all facts that would be viewed by a reasonable client as significantly altering the total mix of information made available to him by his attorney. Accordingly, the current Rule 1.4 should be revised as follows:

Proposed Revised Rule 1.4

A lawyer shall:

- (a) promptly inform the client of any material information relating to the representation.
 - (b) (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (c) A lawyer shall explain material information including a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Proposed subsection (a) incorporates the materiality standard into the communications Rule. Proposed subsection (b) is identical to current Rule 1.4(a).²⁰⁹ Proposed subsection (c) revises current subsection 1.4(b) to mandate explanation of all material information, as opposed to mere explanation of a matter.²¹⁰ Combined, subsections (a) and (c) ensure that material meta and set-up information will be communicated to clients, whereas subsections (b) and (c) mandate communications of material representation-specific information.

A new subsection, 1.0(o),²¹¹ will add a definition of materiality consistent with the Court's definition in *TSC Industries*.²¹² Further-

209. MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2007).

210. Whereas current subsection 1.4 mandates explanation of "a matter," *see* MODEL RULES OF PROF'L CONDUCT R. 1.4(b), proposed subsection 1.4(c) requires explanation of "material information including a matter." *Id.* at R. 1.4(c).

211. Rule 1.0 defines the terminology used in the Rules, and currently lists (n) terms of art. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0. A new definition of materiality is thus referred to as subsection 1.0(o).

212. *TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

more, the following proposed new comments will clarify the meaning of the proposed revised communications Rule.

PROPOSED ADDITIONAL COMMENTS TO RULE 1.4:

[i] Whether information meets the materiality requirement depends on the circumstances. Relevant factors include the nature and scope of the relationship and the client's level of knowledge and sophistication.

[ii] The timing and context of communication are also relevant in determining materiality. At the commencement stage of a relationship, information regarding the lawyer's qualifications is material. For example, in assessing the qualifications of a newly admitted and relatively inexperienced attorney, a reasonable client would want to know how many times the newly admitted attorneys had taken the bar exam before passing it, whereas the same information is not material for an experienced attorney. Similarly, a reasonable client would want to know when deciding whether to hire an attorney whether the attorney has been disciplined or found liable for malpractice, whereas when the relationship is ongoing, facts regarding the filing of new disciplinary complaints or of lawsuits seeking liability for malpractice may not be material unless they have consequences that can affect the representation of the client.

[iii] Information may become material depending on developments relating to the representation of a client. For example, the fact that a lawyer made a mistake in representing a client will ordinarily not be material. If the mistake, however, has consequences that materially affect the client's matter, the fact of the mistake becomes material, and must be disclosed to the client. Moreover, such a development also makes it mandatory to disclose to the client that the client may have a malpractice cause of action against the attorney. Similarly, general observations about how a lawyer may exercise her discretion about exceptions to confidentiality (a "Miranda" warning) are not ordinarily material. However, if developments in the representation lead the lawyer to entertain disclosure of confidential client information, then whether and how the lawyer plans to exercise her discretion to reveal confidential client information becomes material and must be communicated to the client promptly.

[iv] A lawyer may limit the scope of communications if the limitation is reasonable under the circumstances and the client gives informed consent. For example, a lawyer may not inform the client about pending discipline and malpractice liability if the information

has no material impact on the representation of the client and the client gives informed consent.

[v] Information about fees is usually material and must be communicated to the client, see Rule 1.5.

[vi] Information about resolution of possible disputes between attorney and client stemming from the relationship and the method by which such disputes are to be resolved is ordinarily material.

Jane Austen reminds us that all communications entail some inaccuracies and omit some relevant pieces of information. The proposed materiality-based rule respects Ms. Austen's wisdom. It rejects an "absolute and perfect candor" standard of communication as impractical and inefficient. The proposed rule also rejects the current Rules' approach to communications which institutes an asymmetric exchange of information and fails to live up to the promise of Rule 1.2—to adopt a client-centered vision and empower clients as principals in the attorney-client relationship. The proposed standard strikes an appropriate balance, ensuring that clients receive the appropriate quantity and quality of information from their attorneys.

5. The Proposed Rule in Action: Communications Regarding Malpractice Coverage

Must or should an attorney tell a client if she does not carry malpractice liability coverage? Must or should a lawyer advise a client if she falls out of coverage during the relationship? These interrelated questions have generated significant debate and regulatory reform in recent years.²¹³ Whether an attorney carries, or falls out of, malpractice coverage is a question involving meta facts. The difficulty experienced by the various jurisdictions in reaching a consensus answer stems from the fact that the issue is one of first impression—the Rules

213. No less than twenty-three jurisdictions have contemplated revising their communications rules to require disclosure of malpractice insurance coverage information to clients. The controversy resulted in a split among the jurisdictions. A minority, at least five jurisdictions, have revised their communications rule to explicitly require communications regarding malpractice insurance coverage to clients (Alaska, New Hampshire, Ohio, Pennsylvania, and South Dakota). A majority, at least fourteen jurisdictions, have revised their annual registration rules to require disclosure of malpractice insurance coverage information on the annual registration statement, but not directly to clients (Arizona, Delaware, Idaho, Illinois, Kansas, Massachusetts, Minnesota, Nebraska, Nevada, New Mexico, North Carolina, Virginia, Washington, and West Virginia). Finally, at least four jurisdictions are still contemplating changes (California, Michigan, New York, and Utah). See Am. Bar Ass'n Ctr. for Prof'l Responsibility, State Implementation of ABA Model Court Rule of Insurance Disclosure, http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf (last visited Feb. 4, 2008) for links to all states' rules of professional conduct.

simply do not regulate meta facts and offer no guidance regarding disclosure of malpractice coverage information.²¹⁴ The proposed materiality rule offers helpful guidance in resolving this thorny issue.

A straightforward application of the proposed materiality standard suggests that an attorney must inform a client that the attorney does not carry malpractice liability coverage if a reasonable client would find that information important when making a decision regarding the relationship.²¹⁵

Whether a reasonable client would find important the fact that an attorney does not carry malpractice liability insurance depends on the circumstances. On the one hand, whether an attorney carries malpractice coverage is relevant to the retention decision because it gives the client some assurance that should the lawyer act negligently the client may be able to collect damages.²¹⁶ The fact of coverage or lack

214. In 2002, the ABA Standing Committee on Client Protection contemplated a proposed Rule 1.4 change but abandoned it after a tepid response from state and local bar associations. *See* Am. Bar Ass'n Standing Comm. on Client Prot., Proposed Amendment to Rule 1.4 of the ABA Model Rules of Professional Conduct to Provide for the Disclosure of Lack of Professional Liability Insurance (Aug. 2002) (on file with author). Instead, in 2004, the Committee endorsed and the ABA approved a Model Court Rule on Insurance Disclosure, requiring not attorney disclosure to clients of malpractice information, but annual certification to the "highest court of the jurisdiction." *See* Am. Bar Ass'n, Model Court Rule on Ins. Disclosure, http://www.abanet.org/cpr/clientpro/malprac_disc_rule.pdf (last visited Feb. 4, 2008).

215. While the current communications regime does not invoke the materiality standard, commentaries have resorted to the language of materiality in support of their respective positions. *See, e.g.*, Nicholas A. Marsh, Note, "Bonded & Insured?": *The Future of Mandatory Insurance Coverage and Disclosure Rules for Kentucky Attorneys*, 92 Ky. L.J. 793, 809 (2004) ("Ultimately, the court's decision will turn on whether an attorney's lack of malpractice insurance is information necessary to the client's decision regarding representation."); Mignone, *supra* note 79, at 1088 ("The client needs to make fully informed decisions, which includes information about whether an attorney has secured professional liability insurance. The attorney's greater access to knowledge obligates him to keep the client informed, and ultimately, protected.") (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (requiring attorneys to fully discuss matters with client because the client may not fully comprehend the extent of what he does not know)); Farbod Solaimani, Note, *Watching the Client's Back: A Defense of Mandatory Insurance Disclosure Laws*, 19 GEO. J. LEGAL ETHICS 963 (2006) ("It is safe to say that the average legal services consumer expects to be protected by insurance against damage caused by his lawyer's professional malpractice."); James E. Towery, *The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance*, 29 VT. B.J. 35, 36 (2003) ("The lawyer's lack of insurance is a material fact that the client is entitled to know. Disclosure of material information is an obligation stemming from a state endorsed monopoly over legal services.").

216. This is, of course, subject to the type of policy covering the liable attorney. Nicole Cunitz succinctly summarizes the two common varieties of liability insurance.

The first is an occurrence policy which protects the lawyer from acts and omissions for the duration of coverage regardless of when the claims are asserted. The second is a claims-made policy which protects the attorney only during the period

thereof may also allow the client to draw an inference regarding the lawyer's qualifications and professional record, assuming that failure to carry coverage may be the result of past negligence or discipline that render the premium prohibitively expensive.

On the other hand, the insights a client may gain from the fact of coverage or lack thereof are inherently uncertain and complex. First, even if the client prevails in a malpractice lawsuit against the attorney, he may not be able to collect against the insurance.²¹⁷ Most professional policies are "claims-made" based rather than "occurrence" based. In other words, the policies cover claims according to when the claim is made, not based on when the underlying conduct occurred. Consequently, a policy that is in place at the retention stage may not cover a claim made later on.²¹⁸ Second, whether an attorney carries malpractice coverage gives a client only limited information regarding the lawyer's qualifications. The lawyer may, for example, fail to carry malpractice coverage not because she has been found liable and cannot find an insurer, but rather because no coverage is available in the jurisdiction, no coverage is available given the subject matter of the representation, or the attorney cannot afford to purchase insurance.

Proposed subsection 1.4(c) addresses these concerns regarding the complex nature of information relating to malpractice coverage. In explaining to the client the consequences of whether or not the attorney carries malpractice coverage the lawyer will explain the nature of the coverage to the client to the extent reasonably necessary for the client to make an informed retention decision. Thus, arguing that "the rule would likely result in disseminating directly to clients, at considerable cost, information they are likely to misunderstand"²¹⁹ misses the point. If clients are likely to misunderstand the conse-

of coverage and only if the attorney had no knowledge of potential claims when he applied for coverage. This latter policy is the most common form of insurance coverage for lawyers.

Nicole A. Cunitz, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?* 8 GEO. J. LEGAL ETHICS 637, 648 (1995) (citing Robert T. Reid, *Lawyers' Malpractice Insurance Coverage in the United States*, 265 PLI/REAL 121 (1985)). Thus if an attorney has a claims-made policy, but falls out of coverage, a client may not be able to collect even if the claim relates back to when the lawyer was covered.

217. Rodney Snow, *Is Mandatory Disclosure in Your Fee Letter That You Do Not Carry Malpractice Insurance a Sound Idea?* 18 UTAH B.J. 12 (2005).

218. See Cunitz, *supra* note 216, at 648. Moreover, even if a policy is in place, a client may not be able to collect against it because professional liability policies typically set limits for coverage. When informing the client whether the lawyer carries coverage, the lawyer will explain the applicable limits pursuant to proposed subsection 1.4(c).

219. George A. Berman, *Mandatory Insurance Disclosure: A Solution in Search of a Problem*, 49 B.B.J. 31, 32 (2005).

quences of malpractice coverage insurance the solution ought to be to make sure clients' possible misapprehensions are corrected, not to paternalistically fix the problem by not disclosing material information to them. The Court's language in *Basic* is instructive on this point:

It assumes that investors are nitwits, unable to appreciate—even when told—that mergers are risky propositions Disclosure, and not paternalistic withholding of accurate information, is the [desirable] policy The role of the materiality requirement is not to “attribute to investors a child-like simplicity, an inability to grasp the probabilistic significance of negotiations . . . but to filter out essentially useless information that a reasonable investor would not consider significant, even as part of a larger mix of factors to consider in making his investment decision,” regarding the relationship.²²⁰

Similarly, for lawyers to assume that clients are unable to comprehend and appreciate the consequences and meaning of complex malpractice coverage information, even when offered a detailed explanation pursuant to proposed Rule 1.4(c), would constitute unacceptable paternalistic withholding of material information.

To be sure, informing the client about whether the attorney carries malpractice liability coverage at the outset may have a chilling effect on the relationship because it highlights the possibility of a contentious dispute between attorney and client. Such a disclosure might also suggest the possibility that the attorney may be negligent or incompetent, and to some extent, “poison” the lawyer-client relationship by forcing attorneys to disclose at the outset whether they have a certain amount of insurance, thus compromising trust.²²¹ Such a chilling effect is certainly not in the best interest of the attorney nor of the client, as it may make it harder to establish the trust and loyalty in the relationship essential for an effective representation. Nonetheless, the information is material and must be communicated to the client. The chilling effect malpractice coverage information may have on the relationship is nothing more than an analogous example of the complex information the Court was considering in *Basic*.

While communications regarding malpractice coverage will generally be material, under some circumstances such information will not be covered by proposed Rule 1.4. For example, an attorney who has sufficient assets to cover possible liability need not communicate

220. *Basic, Inc. v. Levinson*, 485 U.S. 224, 234 (1988) (internal citations omitted).

221. Christopher Lilienthal, *Mandatory Disclosure of Legal Malpractice Coverage is Proposed by High Court's Disciplinary Board*, PA. L. WKLY., Aug. 15, 2005, at 1; Mignone, *supra* note 79, at 1107–08 (“Debates of the late 1970s focused on how disclosure to clients creates mistrust and jeopardizes the relationship . . .”).

failure to carry, or falling out of, coverage because the information is not material. Similarly, a large law firm which decides to self-insure its own attorneys and has sufficient funds to do so need not communicate lack of insurance to the client.

Once again, the Court's analysis in *Basic* is highly relevant here. Applying the Court's probability-magnitude test for materiality in the context of preliminary merger talks,²²² in order to assess the probability that malpractice information will be material, a fact-finder will need to look to indicia of client interest. For example, the court may examine whether the client is likely to file a malpractice lawsuit given the nature of the relationship between attorney and client, or whether the client is likely to succeed in a malpractice lawsuit given the elements of the cause of action. The *Basic* Court, however, found that:

To assess the magnitude of the transaction to the issuer of the securities allegedly manipulated, a factfinder will need to consider such facts as the size of the two corporate entities and of the potential premiums over market value. No particular event or factor short of closing the transaction need be either necessary or sufficient by itself to render merger discussions material.²²³

A fact finder assessing the magnitude of malpractice information to the client can consider such facts as the size of the policy limits relative to the size of client's claim. Analogous to the Court's analysis, no particular event or factor relating to the attorney-client relationship need be either necessary or sufficient by itself.

In conclusion, mandating disclosure of malpractice information regardless of its materiality, a course adopted recently in several states,²²⁴ constitutes unnecessary overreaching regulation. A materiality-based communications rule, in contrast, strikes the appropriate balance between providing clients with information relevant to their exercise of informed judgment as principals in the relationship and allowing lawyers to exercise professional judgment and withhold disclosing useless information. In the context of malpractice coverage information, the proposed materiality communication rule will generally mandate disclosure to clients. Unlike a rule mandating such dis-

222. See *Basic*, 485 U.S. at 238 ("Under such circumstances, materiality 'will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.'" (quoting *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968) (en banc))).

223. *Id.* at 239.

224. See *supra* note 213.

closure, however, the materiality-based rule will not mandate communication where the information will be useless to clients.²²⁵

Conclusion

Attorney-client communications have come along way, from no communications rule under the Canons, to fragmented sections referencing communications in the Model Code, to a short communications rule in the Model Rules, and finally the current, more detailed Rule 1.4. Moreover, given the Rules' general resistance to change,²²⁶ the fact that Rule 1.4 is an integral part of a greater asymmetric communications apparatus orchestrated by the Rules and the incremental nature of revisions to the Rules when they do occur,²²⁷ Rule 1.4 in its current format has probably gone as far as it ever will.

225. In recent debates across states contemplating revising their communication rules to require disclosure of malpractice coverage information, a seemingly compelling argument against requiring such disclosure has been that mandatory disclosure will effectively amount to requiring malpractice insurance. According to this argument, once clients obtain information about malpractice coverage, they will likely retain only lawyers who are covered by insurance. As a result, all lawyers will attempt to purchase insurance. The debate then quickly turns to whether requiring malpractice coverage is desirable and plausible. See Nancy Blodgett, *Forced Insurance: States Weigh Malpractice Rules*, 71 A.B.A. J. 37 (1985); Cunitz, *supra* note 216, at 646–57; Robert W. Martin, Jr., *Mandatory Legal Malpractice Insurance: Is It on the Horizon?* 25 VT. B.J. & L. DIG. 10 (1999); Lilienthal, *supra* note 221, at 1; Debra Cassens Moss, *Going Bare: Practicing Without Malpractice Insurance*, 73 A.B.A. J. 82 (1987); Ramos, *supra* note 139, at 1725–30; Solaimani, *supra* note 215, at 967–74; see generally Benjamin Franklyn Boyer & Gary Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835 (1978).

This critique fundamentally underestimates the power of effective attorney-client communications. It erroneously assumes that the practical consequence of mandating disclosure of material information (and thus in some circumstances of insurance coverage information) will lead clients to drop uninsured lawyers and consequently impose a de facto mandatory insurance requirement. The argument seems to treat clients, in the words of the Court, as “nitwits.” If clients drop uninsured lawyers because they reasonably believe insurance to be materially important, then lawyers ought to respect the judgment of clients in this regard. Furthermore, if clients decide not to retain uninsured lawyers because they misunderstand the implications of lack of insurance, then the lawyer did not adequately communicate and explain the issue to the client.

226. The ABA Model Code replaced the Canons in 1969 and was itself superseded by the Model Rules in 1983, fourteen years later. See *supra* note 7. The Model Rules were significantly revised after nearly twenty years by the Ethics 2000 reform. *Id.* It would seem then that another major reform of the Rules is not likely before the year 2020 or so.

227. Tellingly, the Chair's Introduction to Ethics 2000 states:

There was also a strong countervailing sense that there was much to be valued in the existing concepts and articulation of the Model Rules. The Commission concluded early on that these valuable aspects of the Rules should not be lost or put at risk in our revision effort. As a result, the Commission set about to be comprehensive, but at the same time *conservative*, and to recommend change only where necessary. In balancing the need to preserve the good with the need for improve-

Attorney-client communications, however, have not come far enough. In order to live up to the agency ideal of installing clients as principals who fully participate in and exercise authority over the relationship, and to sustain the legitimacy of the non-accountability principle, the Rules must abandon their one-way communications regime and adopt a communications rule that will mandate the disclosure of all material information relating to the representation. Such a rule will correct for the Rules' systematic failure to regulate meta and set-up facts and would ensure that clients receive all material facts necessary for the exercise of informed decision-making.

ment, we were mindful of Thomas Jefferson's words of nearly 185 years ago, in a letter concerning the Virginia Constitution, that "moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects."

Veasey, *supra* note 9 (emphasis added).