ALLOCATING AUTHORITY BETWEEN LAWYERS AND THEIR CLIENTS AFTER *McCOY v. LOUISIANA*

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In May 2018, the U.S. Supreme Court issued its opinion in the case of McCoy v. Louisiana*, holding that defendants have a constitutional right to maintain their innocence at trial. Under* McCoy*, lawyers may not concede their clients' guilt during trial when their clients insist on maintaining innocence, even if doing so would be a reasonable tactical decision. In this paper, we show how the case implicates an array of common problems concerning lawyer-client disagreement, and we argue that the Model Rules of Professional Conduct offer deficient guidance in this area. In particular, in relying on lawyer withdrawal as a remedy for lawyer-client disagreement, the Model Rules neglect to recognize that lawyers may have an obligation to stick with their clients despite serious disagreements over aspects of the representation. The Rules also gloss over the considerable administrative burden associated with withdrawal. After delineating some problems with the Model Rules' approach to lawyer-client disagreement, we propose a set of revisions to the Model Rules that address the ethical and practical concerns we elaborate.*

Keywords: *ineffective assistance of counsel, Sixth Amendment, professional responsibility, lawyer-client relationship, Model Rules of Professional Conduct,* McCoy v. Louisiana

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INTRODUCTION

In May 2018, the U.S. Supreme Court issued its opinion in the case of *McCoy v. Louisiana*,[1] holding that defendants have a constitutional right to maintain their innocence at trial. The Supreme Court had previously recognized a defendant's right to plead guilty or not guilty. With the *McCoy* decision, it's now clear that lawyers may not concede their clients' guilt during trial when their clients instruct them not to, even if doing so would be a reasonable tactical decision from the lawyer's point of view.

Robert McCoy was charged in Louisiana state court with three counts of first-degree murder. He wished to contest his guilt in the capital trial despite overwhelming evidence against him. But McCoy's attorney, Larry English, conceded McCoy's guilt against his express objections, apparently in an attempt to maintain credibility or build rapport with the jury in anticipation of the sentencing phase.[2]

Although the dissenting opinion in *McCoy* portrayed the lawyer-client conflict in the case as an unlikely set of circumstances—"a freakish confluence of factors that is unlikely to recur"[3]—the case implicates broader and more common problems concerning lawyer-client disagreement, and how the law handles such disagreement.

For example, during oral argument, Justice Alito suggested that the trial court simply should have granted English's request to terminate the representation.[4] And, indeed, the main source of authority on the topic of lawyer-client disagreement, the American Bar Association's Model Rules of Professional Conduct, points to withdrawal as a possible solution for a lawyer in English's situation.[5] As the state's attorney noted in oral argument,

1. McCoy v. Louisiana, 138 S. Ct. 1500 (2018).

2. *Id.* at 1514.

3. *McCoy*, 138 S. Ct. at 1505 (Alito, J., dissenting).

4. Transcript of Oral Argument at 42, *McCoy*, 138 S. Ct. 16-8255 ("So, if English says to the judge, look, Your Honor . . . I don't want to be part of this farce . . . that has the predictable result of sending . . . my client to a death sentence, I want to withdraw, why shouldn't the judge let him withdraw?").

5. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2, cmt. 2 (2018) (suggesting that, if efforts to resolve disagreement are unavailing, "the lawyer may withdraw from the representation."); MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2018) (providing that "a lawyer may withdraw from representing a client if . . . the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement").

however, withdrawal has to happen "at the right time and under the right circumstances."[6] Perhaps English would have been permitted to withdraw had he made the request earlier in the course of representation, but it was neither unusual nor necessarily misguided under the circumstances for the trial court to insist that English continue to represent McCoy in this case.

The exchange between Alito and the state's attorney implicates a common and broader issue in lawyer-client decision making: in the face of persistent disagreement with a client—whether over the concession of guilt or any other matter that arises in the course of representation—how should the lawyer proceed?

The Model Rules offer insufficient guidance in this area and fail to reflect the everyday reality of lawyering. Courts are often reluctant to approve changes in representation once court proceedings have begun, mindful of the considerable administrative costs associated with such a change and the strategic incentives parties may have to delay proceedings. Accordingly, if an attorney wishes to ensure that a withdrawal request will be granted, they would have to make that request well before the trial is to begin. But in order to appreciate that withdrawal is ethically required, the attorney must be aware of an irresolvable, fundamental disagreement between them and their client. Effectively, then, given the realities of trial court administration, the Model Rules require attorneys to foresee any irresolvable, fundamental disagreement with their client at an early stage of the representation. This can be a formidable task.

The case of *McCoy* presents a particularly salient example of the legal and ethical challenges that attorneys confront when they disagree with their clients about some aspect of the representation. In the wake of *McCoy*, defense attorneys are on notice that it is unlawful for an attorney to override a client's wishes to maintain innocence at trial. The Supreme Court's decision resolves a modicum of the uncertainty surrounding the legal allocation of decision-making authority between lawyer and client. The Court has rarely addressed this topic, however, and the body of constitutional law is slim. The ABA has previously punted when confronted with the issue of which principles should guide the allocation of authority between lawyer and client, leaving it to the courts to resolve instead.[7] Given the

6. Transcript of Oral Argument at 41–42, *McCoy*, 138 S. Ct. 16-8255.

7. *See* Nancy J. Moore, *Why Is There No Clear Doctrine of Informed Consent for Lawyers?*, 47 U. TOL. L. REV. 133, 155 (2015) (asserting that "[t]he Commission must have hoped that

continuing deficit of judicial guidance, however, the legal community should work toward revising the Model Rules so that lawyers are better equipped to handle disagreements with clients, which inevitably arise in any legal practice.

In this paper, we describe how the current iteration of the Model Rules fails to adequately advise lawyers, like English, who disagree with a client on some aspect of the representation that does not fit squarely into the few enumerated types listed in the Model Rules. Part I of the paper discusses the relationship between *McCoy* and broader issues of lawyer-client disagreement and dispute resolution. Part II describes the conceptual difficulty of separating decisions concerning the objectives of representation from decisions concerning strategies, and the way in which the Model Rules rely on this distinction to provide guidance to attorneys on the appropriate allocation of authority between lawyer and client. Part III takes issue with the Model Rules' reliance on lawyer withdrawal as a remedy for lawyer-client disagreement. And Part IV suggests revisions to the Model Rules, which are meant to address the ethical and practical concerns that the earlier parts elaborate.

The revisions proposed in Part IV aim to be responsive to (1) the principle of autonomy that the majority in *McCoy* prioritizes, (2) the dynamic and sensitive relationships between criminal defense attorneys and their clients, and (3) the administrative realities of trial courts. We would hope that attorneys and courts could rely on the Model Rules for ethically sound and practicable guidance in the domain of lawyer-client disagreement and dispute resolution, especially given the underdeveloped and opaque legal doctrine in this area.[8]

I. THE *McCOY* DECISION AND LAWYER-CLIENT DISAGREEMENT

McCoy v. Louisiana exemplifies the tension between the way the Model Rules prioritize client control over the "fundamental objectives" of

case law would eventually adopt more certain standards, which could then be incorporated into professional codes," but noting that "[u]nfortunately, that has not been the case.").

8. Although this paper focuses on criminal defense attorneys and their clients, and accordingly implicates constitutional concerns that do not affect the civil context, our main points should be generalizable beyond the criminal defense context.

representation and the supposed remedy of lawyer withdrawal in the event of disagreement, throwing into relief the deficiencies of Rule 1.2 and associated Rules in allocating decision-making authority between lawyer and client.

Robert McCoy was charged in Louisiana state court with three counts of first-degree murder. The evidence against McCoy at trial was strong—the Louisiana Supreme Court would later describe it as "overwhelming"[9]—but he continually insisted on his innocence. Although McCoy wanted to contest the charge at trial, his lawyer, Larry English, decided that McCoy's preferred defense would fail before a jury and that he could only hope to save McCoy's life by conceding his guilt.[10] English believed that by conceding his client's guilt, he would maintain credibility or build rapport with the jury, and would then be in a better position to plead for leniency during the capital sentencing phase to avoid a death sentence.[11]

McCoy vigorously objected to English's proposed tactic and moved to dismiss English two days before trial, but the judge denied his request as untimely.[12] At trial, McCoy interrupted English's opening statement when it became clear that the lawyer was going to concede McCoy's guilt, but the judge reprimanded McCoy for the "outburst."[13] English's strategy was ultimately unsuccessful, and McCoy was sentenced to death.[14]

McCoy challenged his conviction on grounds of ineffective assistance of counsel. In *McCoy v. Louisiana*, the Supreme Court addressed the constitutionality of English's maneuver. On May 14, 2018, the Court released its decision, holding that clients are entitled to lawyers who will maintain their innocence at trial if their clients direct them to do so. To act otherwise, the Court explained, would violate the client's Sixth Amendment right "'to have the *Assistance* of Counsel for *his* defence.'"[15] McCoy was awarded a new trial.

McCoy constitutionalizes a particular aspect of the lawyer-client relationship in the criminal defense context, adding the decision of whether or not to concede guilt to a small pool of rights that the Supreme Court has

9. Louisiana v. McCoy, 218 So.3d 535, 565 (La. 2016).
10. McCoy v. Louisiana, 138 S. Ct. 1500, 1506 (2018).
11. *Id.* at 1506, 1514.
12. *Id.* at 1506.
13. Louisiana v. McCoy, 218 So.3d at 605.
14. *Id.* at 608.
15. *McCoy*, 138 S. Ct. at 1505 (quoting U.S. CONST. amend. VI).

expressly assigned to either lawyers or their clients. Defendant-clients have the authority to decide whether to plead guilty, waive the right to a jury trial, testify on their own behalf, forgo an appeal, and now, assert and maintain their innocence.[16] Their lawyers, on the other hand, have authority over "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence."[17] The Supreme Court has explicitly allocated between lawyer and client some particularly salient decisions that must be made in the course of criminal representation. But lawyers and their clients confront many other decisions as well, and the applicability of constitutional precedent to these decisions remains unclear.[18]

The individual states and territories have developed rules of professional conduct, most of which simply absorb the ABA Model Rules of Professional Conduct, to help guide lawyers and courts on issues of professional responsibility and legal ethics. Lawyers' duties to their clients are largely governed, then, by state rules of professional conduct, which lawyers rely on for ethics guidance and which courts enforce. The primary rule at issue in McCoy's case was Rule 1.2, which governs the "Scope of Representation and Allocation of Authority Between Client and Lawyer."

II. THE PROBLEM OF ALLOCATING AUTHORITY BETWEEN LAWYERS AND THEIR CLIENTS

ABA Model Rule 1.2 looks good on paper. It purports to divide types of decision into two categories: decisions about the purposes or ends of representation, and decisions about the strategies or means used to pursue those ends. The Rule mandates that a lawyer abide by a client's instructions concerning the former category—"the objectives of representation."[19] The

16. *See, e.g.*, Jones v. Barnes, 463 U.S. 745, 751 (1983) (explaining that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal").

17. Gonzalez v. United States, 553 U.S. 242, 248 (2008).

18. As Eve Brensike Primus observes, in the wake of the Supreme Court's decision in *McCoy*, lower courts will have to address "what trial counsel's responsibilities are to support the client in making decisions about the 'objectives of his defense'": for example, "[p]erhaps trial counsel has a duty to inform a client about the elements of the crime so the defendant can decide if he is guilty or innocent." 72 STAN. L. REV. (forthcoming 2020), at 59–60.

19. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2018).

comments to Rule 1.2 explain, in a somewhat circular fashion, that "the client [has] 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."[20] Affording clients control over the objectives of representation comports with the idea that lawyers are agents who are hired to advance their clients' goals and, as such, may not redefine or alter those goals unilaterally.

Rule 1.2 and the associated comments suggest that, in the event of irresolvable, fundamental disagreement, a lawyer can and should withdraw from the representation.[21] Likewise, the client may terminate the relationship by discharging the lawyer, in which case the lawyer is obligated to withdraw.[22]

Outside the scope of these fundamental objectives, Rule 1.2 instructs that lawyers may make strategic decisions regarding the "means by which" the lawyer aims to achieve the client's objectives.[23] The Rule provides that a lawyer "shall consult with the client as to the means by which [the purposes of representation] are to be pursued," but implicitly leaves ultimate authority over these decisions to the attorney.[24] This, too, seems sensible, as lawyers bring to the lawyer-client relationship "special

20. MODEL RULES OF PROF'L CONDUCT R. 1.2, cmt. 1 (2018).

21. *Id.*, cmt. 2 (explaining that if "the lawyer has a fundamental disagreement with the client" and efforts to resolve the disagreement "are unavailing," then "the lawyer may withdraw from the representation"); MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2018) (providing that "a lawyer may withdraw from representing a client if . . . the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement").

22. MODEL RULES OF PROF'L CONDUCT R. 1.2(a), cmt. 2 (2018) (explaining that "[c]onversely, the client may resolve the disagreement by discharging the lawyer."); MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(3) (2018) (providing that "a lawyer shall . . . withdraw from the representation of a client if . . . the lawyer is discharged.").

23. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2018).

24. *Id.* Likewise, Rule 1.4, concerning lawyer-client communications, provides that "[a] lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished." MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (2018). The Comments to Rule 1.2, however, suggest that lawyers should defer to clients on some of the decisions regarding the "means" of the representation: "lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected." MODEL RULES OF PROF'L CONDUCT R. 1.2(a), cmt. 2 (2018).

knowledge and skill . . . particularly with respect to technical, legal and tactical matters."[25]

However, in practice, whether any particular decision falls into the first category of ends or objectives, over which the client has control, or the second category of strategic means, which the lawyer controls, is often uncertain.[26] The Model Rules themselves provide a few examples that accord with the Supreme Court's constitutional decisions: the client has a right to the final say over whether to settle, enter a plea, waive a jury trial, or testify.[27] The drafting Commission considered clarifying the group of decisions reserved to the client by adding some kind of "catch-all" phrase to the enumerated examples. However, "[t]he Commission could not agree as to which decisions to add to the list, and [chose not to] adopt any 'catch-all' phrase as an alternative approach to supplementing the existing list of important decisions that are the client's to make."[28] The current iteration of the Model Rules evinces no attempt, beyond the abstract objectives versus means distinction, to articulate parameters or principles that would help to distinguish the decisions reserved to the client from those within the attorney's discretion.

Moreover, the case law in this area represents a confounding patchwork of rules that are difficult to justify under a consistent set of principles. Some courts have held, for example, that clients have the power to

25. *Id.*

26. *See, e.g.*, Alberto Bernabe, *A Tale of Two Cases: The Supreme Court's Uneasy Position on the Proper Allocation of Authority to Decide Whether to Concede a Client's Guilt in a Criminal Case*, 43 J. LEGAL PROF. 53, 57, 58 (2018) (observing that "[u]nfortunately, the distinction between objectives and means is not always helpful" and that "new problematic cases [concerning this distinction] continue to arise."); STEPHEN GILLERS, REGULATION OF THE LEGAL PROFESSION: THE ESSENTIALS 80 (3rd ed. 2009) (explaining that "[t]he ends/means distinction [is not] truly workable."); Maeve Sullivan, McCoy v. Louisiana *and the Perils of Client Control of the Defense*, 96 DENV. L. REV. 733, 748 (2019) (arguing that the Model Rules do not "provid[e] a meaningful ends/means test" and "provide little guidance on where the veil between the two is drawn," and that "the lawyer's strategic choices are [often] so bound up in the client's substantive rights and trial objectives that it is impossible to draw neat lines as to where control should be ceded."); Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 14–15 (1998) (describing the ends/means distinction articulated in the Model Rules as vague and confusing).

27. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2018).

28. Moore, *supra* note 7, at 145.

waive presentation of mitigating evidence[29] or other types of defense to present at trial.[30] Other courts have held that decisions not to introduce mitigating evidence at sentencing are "tactical" and accordingly reserved to lawyers,[31] as are decisions to stipulate to matters that are easily provable and not "inherently personal."[32]

One method by which courts and scholars have attempted to clarify the scope of Rule 1.2 is to look to other bodies of law, as recommended in the comments to the Rule.[33] The most common and intuitive bodies of law to turn to for this purpose are constitutional law and agency law; these sources, however, are often unilluminating. Looking to constitutional law can be a circular exercise, since Sixth Amendment jurisprudence both informs and is informed by rules of professional conduct in its inquiries regarding ineffective assistance of counsel.[34]

Agency law would frame the lawyer-client relationship as a principal-agent one. But agency law is premised on principals' and agents' freedom to contract based on their interests, whereas rules of professional conduct have been specifically tailored to protect "the powerless and uninformed client."[35] Because the Model Rules are intentionally constructed to address the power imbalance between lawyer and client, drawing directly from agency law for guidance seems inappropriate and might produce undesirable results.

29. *See, e.g.*, State v. Hausner, 280 P.3d 604 (Ariz. 2012).

30. *See, e.g.*, State v. Debler, 856 S.W.2d 641 (Mo. 1993).

31. *See, e.g.*, Darden v. Wainwright, 477 U.S. 168 (1986).

32. *See, e.g.*, Poole v. U.S., 832 F.2d 561, 564 (11th Cir. 1987).

33. MODEL RULES OF PROF'L CONDUCT R. 1.2, cmt. 2 (2018) ("Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer.").

34. *See, e.g.*, Jonathan Barker & Matthew Cosentino, *Who's in Charge Here? The Ethics 2000 Approach to Resolving Lawyer-Client Conflicts*, 16 GEO. J. LEGAL ETHICS 505, 518 (2003) (observing that "[i]n criminal cases, courts have generally looked to Rule 1.2 in determining whether a lawyer's conduct constituted ineffective assistance of counsel."); Brief for Respondent at 35, McCoy v. Louisiana, 138 S. Ct. 1500 (2018) (No. 16-8255) (asserting that "[l]awyers' professional and ethical obligations inform the operation of the Sixth Amendment.").

35. *See* Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301, 301 (1998).

The difficulty of distinguishing means of representation from ends is exemplified by the circumstances of the *McCoy* case. McCoy viewed the decision of whether to concede guilt at trial as relating to a fundamental objective, while English viewed it as a tactical matter.

On the one hand, McCoy's view is compelling, and seems consistent with both the Model Rules and relevant case law. From the perspective of a defendant, a decision to maintain innocence with respect to any charge, even if the probability of success is miniscule, is a plausible "objective of representation."[36] Such a decision will likely involve normative judgments and personal concerns, and may implicate political or moral values. Accordingly, one might think that a lawyer who acts unilaterally in this domain violates the client's autonomy.[37]

On the other hand, English's perspective can also be supported by the text of the Model Rules and related case law. As the Brief for Respondent noted, the Supreme Court has held that the lawyer may decide "'to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial.'"[38] For English, the decision to concede guilt at trial was a tactical decision, a decision about trial strategy. Just as decisions about cross-examinations and witnesses tend to be, this was part of a longer-term strategic plan for the defense: from English's point of view, conceding guilt at trial would improve McCoy's chances of avoiding the death penalty at the sentencing phase. And McCoy's insistence on maintaining innocence was incompatible with English's strategic plan.[39]

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36. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2018) (providing that "a lawyer shall abide by a client's decisions concerning the objectives of representation").

37. *See, e.g.*, *Poole*, 832 F.2d at 564 (explaining that "[c]ase law in this circuit suggests that where a defense attorney 'makes a tactical decision with constitutional implications,' a stipulation does *not* require the defendant's consent," but "[w]here an 'inherently personal right of fundamental importance is involved,' . . . the defendant's consent is required.") (emphasis added).

38. Brief for Respondent at 29, McCoy v. Louisiana, 138 S. Ct. 1500 (2018) (No. 16-8255) (quoting Taylor v. Illinois, 484 U.S. 400, 418 (1988)).

39. *See* Elizabeth M. Klein, McCoy v. Louisiana*'s Unintended Consequences for Capital Sentencing*, 71 STAN. L. REV. 1067, 1086, 1087 (2019) (explaining that "[t]o present a vigorous case of outright innocence at the guilt phase, only to turn around and ask for mercy in the event of a conviction, can undermine both the lawyer's and the client's credibility with the decisionmaker," and that "laying the groundwork for mitigation at the guilt phase is

In a somewhat conclusory and unsatisfying opinion, a six-Justice majority determined that the defendant has the prerogative "to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt."[40] The Court thereby elided the conceptual quandary presented by the objectives versus strategies distinction.

Admitting guilt was not an *objective* of the defense from Larry English's perspective; rather, it was a strategic decision, a means to the critical end of averting the death penalty. Accordingly, English and his supporters could agree with the Court that defendants have ultimate authority over the objectives of the representation without conceding that English's concession of guilt was unethical or unlawful.

The Court determined that conceding guilt is not a strategic choice, but a choice "about what the client's objectives in fact *are*."[41] Conceding guilt was, however, undoubtedly a strategic choice on English's part. Nevertheless, for McCoy, maintaining innocence may have been an objective of the representation, although English did not share or support that objective. With the *McCoy* opinion, the Court seems to be saying that whenever a defendant declares or conceives some decision as an objective, the defendant gets absolute authority over that decision. But that can't be right. After all, a client could insist that the color of the suit the attorney wears, or the writing style of the briefs, constitute objectives of the representation. Intuitively at least, the lawyer's professional and personal dignity and integrity are countervailing values here, and, in some cases where lawyer and client disagree on what the ends of the representation in fact are, the lawyer has to be ethically and legally permitted to deny the client's wishes or directives.

The Restatement of the Law Governing Lawyers takes a different approach than the Model Rules and describes decisions that are ultimately up to the client as those that "are so vital to a client that a reasonable client would not agree to abandon irrevocably the right to make the decisions with the help of the lawyer's advice."[42] Although this guidance is still vague, the introduction of the "reasonable client" concept helps to dispense

critical to avoiding a death sentence, but it will often—perhaps more often than not—conflict to some extent with a defense of outright innocence.").

40. McCoy v. Louisiana, 138 S. Ct. at 1505.

41. *Id.* at 1508.

42. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22, cmt. b (AM. LAW INST. 2000).

with scenarios where a client has patently unreasonable ideas about the ends of representation. Nevertheless, we suspect that reasonable people will often disagree about whether some decision is one over which "a reasonable client would not agree to abandon" control.

In light of the Restatement's approach, we might understand the *McCoy* decision as establishing the legal principle that it is *never* objectively unreasonable (or it is per se reasonable) for a defendant to maintain innocence and that, accordingly, lawyers do not have the authority to determine when such a decision is reasonable and when it is not. Under that understanding, though, *McCoy* does little to clarify means versus ends of representation as broader categories, and so does little to guide lawyers who disagree with their clients on points other than whether to concede guilt.

We believe that the conceptual difficulty of separating means from ends in the context of legal representation is responsible for much of the confusion and uncertainty, both in the Model Rules and judicial decisions, concerning the allocation of authority between lawyer and client. Nevertheless, our purpose in this paper is not to attempt to resolve the means versus ends conundrum.[43] Instead, we focus on what we view as a more pressing and tractable set of questions about dispute management: how and to what extent should lawyers attempt to resolve the disagreements they have with their clients?

III. THE INADEQUATE REMEDY OF LAWYER WITHDRAWAL

The Model Rules say very little about how lawyers are to manage disagreements with their clients, whether those disagreements are over means or ends. Rule 1.2 simply directs lawyers to "abide by a client's decisions concerning the objectives of representation" and to "consult with the client as to the means by which [those objectives] are to be pursued."[44] The

43. Some commentators have suggested that leaving the means/ends distinction unsettled is actually beneficial, since the uncertainty "should facilitate genuine dialogue and compromise in close decisions." Judith Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1052 (1984).

44. Cynthia Godsoe observes that Rule 1.2 neglects to instruct lawyers on how to resolve disagreements over the means of representation. *Disruptive Innovation in Criminal Defense*, 69 MERCER L. REV. 715, 736 (2018).

comments to Rule 1.2 provide that, in the event of lawyer-client disagreement, "[t]he lawyer should . . . consult with the client and seek a mutually acceptable resolution of the disagreement."[45] That would seem to go without saying.

But how should lawyers seek to resolve such disagreement? And at what point should a lawyer give up? The comments acknowledge that, "[b]ecause of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved."[46] The Rules rather bluntly instruct lawyers to withdraw from the representation if efforts to resolve a fundamental disagreement are unavailing.[47] Lawyer withdrawal, however, is an expensive and often inappropriate solution to conflicts between lawyers and their clients.

First, there is no guarantee that the replacement lawyer would not ultimately withdraw (or be discharged) for similar reasons as the first. Indeed, Larry English (whom McCoy's parents had engaged to represent him) was McCoy's second lawyer in this case. He discharged his initial lawyer, a public defender, on the grounds that his relationship with that lawyer had broken down irreparably.[48] As Justice Alito noted in his dissenting opinion, "If [McCoy] is retried, it will be interesting to see what [his] current counsel or any other attorney to whom the case is handed off will do."[49] "It is a safe bet," Alito further observed, "that no attorney will put on petitioner's [preferred] defense."[50]

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45. Model Rules of Prof'l Conduct R. 1.2, cmt. 2 (2018).

46. *Id.*

47. *See id.* and Rule 1.16. Rule 1.16 does instruct lawyers to "take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client" and "allowing time for employment of other counsel." But the Rules do not advise lawyers on just how much time may be necessary to enable the lawyer to withdraw and the client to obtain new counsel. Courts have denied attorney withdrawal requests in many cases. *See, e.g.*, Estate of Miolan ex rel. Maldonado v. State, 967 N.Y.S.2d 610, 612 (N.Y. Ct. Cl. 2013) (denying for insufficient cause attorney's motion to withdraw as plaintiff's attorney); Presley v. Williams, 395 N.Y.S.2d 92, 94 (N.Y. App. Div. 1977) (affirming lower court's denial of a lawyer's attempt to withdraw from representing a defendant). The Rule could reference some of these cases to help inform lawyers about trial court responses to withdrawal requests.

48. *McCoy*, 138 S. Ct. at 1507.

49. *Id.* at 1515 (Alito, J., dissenting).

50. *Id.* at 1516.

If defendants have a right to counsel who will *assist* them in pursuing their own objectives, and if, as the *McCoy* opinion insists, "[t]o gain assistance, a defendant need not surrender control entirely to counsel," then persistent disagreement between lawyer and client would not seem to justify withdrawal, at least not if that disagreement relates to the objectives of the representation.[51] This is because, according to the Supreme Court, a defendant has a right to a lawyer who will accept his objectives of representation. If lawyer and client disagree over the objectives, which was apparently the case in *McCoy*, then withdrawal might merely hand off the problem to the next lawyer hired or assigned to the case.[52] Assuming that the first lawyer's disagreement with the defendant was not a product of idiosyncratic personal values on the part of that lawyer, then the second lawyer is likely to disagree with the defendant for the very same reasons as the first. Of course, the defendant may opt to go pro se.[53] But giving a defendant the choice between acquiescing to a lawyer's vision of successful litigation and self-representation does not preserve the right to assistance of counsel, at least under the conception of that right embraced by the *McCoy* majority.

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51. *Id.* at 1508.

52. *See* Paul R. Tremblay, *On Persuasion and Paternalism*, 3 UTAH L. REV. 515, 520 n.20 (1987) (explaining that, under the Model Rules, "withdrawal may be an option for a lawyer who cannot maintain a continuing relationship with her client by reason of the latter's decreasing faculties," but "withdrawal . . . is not satisfactory from an ethical perspective. It may promote the lawyer's peace of mind, but it leaves unappealing consequences in its wake: either the client's cause is left abandoned (when successor counsel cannot be obtained), or the ethical problems are passed on to successor counsel, who repeats the process.")

53. The Supreme Court has held that the right to self-representation is included in the Sixth Amendment right to assistance of counsel. *See* Faretta v. California, 422 U.S. 806, 818 (1975) ("The right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged."). However, trial courts sometimes deny defendants' requests to represent themselves, and indeed the trial court in this case denied McCoy's request to proceed pro se, apparently on grounds of untimeliness. *See* Louisiana v. McCoy, 218 So. 3d 535, 560, 559 (La. 2016) (explaining that "[c]oming as it did moments after the trial court's ruling that the defendant could not discharge and replace Mr. English as his defense counsel, since the defendant's request to do so came just two days before trial, [McCoy's request to represent himself] was not urged 'in a timely manner'" and "[m]ost courts require the defendant to elect to represent himself in a timely manner.").

The *McCoy* decision accordingly leaves little room for permissible lawyer withdrawals. The Model Rules should be revised accordingly, to sideline and qualify withdrawal as a solution to lawyer-client disagreement.

Second, in practice, lawyer withdrawal is often costly and impracticable. Once a lawsuit has been filed or a charge brought against a criminal defendant, lawyers need permission from the Court to withdraw from a representation, which judges are reluctant to grant. Judges deny these requests for the sake of both administrative efficiency and justice: to prevent parties from using withdrawal as a delay tactic and to prevent a lawyer from harming clients who will not have time to find a replacement.[54]

In McCoy's case, McCoy and English did attempt to terminate the representation, but the Louisiana state trial court would not allow it. At first glance, one might think, along with Justice Alito,[55] that the trial court should have allowed English to withdraw and McCoy to retain alternative counsel. However, the trial court received the request just two days before the trial was scheduled to begin, and McCoy had already switched lawyers once.[56] Allowing him to seek alternative counsel would have delayed the trial and would have been administratively taxing. Courts have an obligation to dispense with justice expeditiously and to expend resources judiciously. Accordingly, the trial court may have been ethically permitted, if not required, to insist that English continue representing McCoy. Even in a case where a replacement could be secured with sufficient time for the new lawyer to prepare for trial, the original lawyer will likely have spent considerable time and resources to understand the facts of the case and the relevant law—a process that the new lawyer would, in large part, have to repeat.

For the Model Rules to have the results that the drafters apparently desired—that is, if lawyer and client have a persistent, fundamental disagreement, then lawyer withdraws and client obtains new counsel—a defense lawyer would need to detect, early in the course of representation, any irresolvable conflicts over fundamental objectives of the representation. Moreover, these conflicts would have to be unlikely to recur with a different lawyer.

54. *See Withdrawal, Discharge or Substitution of Counsel in Criminal Case as Grounds for Continuance*, AM. L. REP. 3d. at § 6 "Particular Factors Tending to Support Denial."

55. *See supra* note 4 and accompanying material.

56. *McCoy*, 138 S. Ct. at 1506.

As we discussed in Part II above, however, neither the Model Rules nor judicial decisions spell out what it means for a decision to represent a fundamental objective of the representation. And it may be difficult, to say the least, for lawyers and clients to determine, on a timeline that comports with the withdrawal policies of courts, which decisions are ultimately reserved for the client and which are strategic decisions that the lawyer may make unilaterally.

The Model Rules rightly encourage the kind of communication that may be necessary for lawyer and client to resolve disagreement as well as to understand the type of disagreement at issue. The Rules seem to be designed to facilitate and encourage a rigorous deliberative process—a process that may not leave enough time for withdrawal in the end. Scholars have argued that the haziness of Model Rule 1.2 serves to facilitate dialogue and collaboration between lawyer and client.[57] Productive dialogue—of the sort that would allow lawyer and client to either resolve disagreement or come to a mutual realization that their disagreement is fundamental and irresolvable—may well require a lengthy timeline. The lawyer and client would need to have the opportunity to get to know one another and build a trusting relationship.

A lawyer may have to thoroughly understand the nuances of a client's concerns about the representation to determine whether a particular decision so deeply implicates a client's values that it may be considered a fundamental "objective" of the representation. And, even if a lawyer knows that they have a conflict with a client over a decision ultimately reserved to the client, they should not necessarily accept the client's choice or else withdraw. Lawyers are permitted—indeed, encouraged—to counsel their clients about not only the legal implications of a decision, but also the moral, economic, social, and political implications.[58] If lawyers immediately acquiesced or withdrew whenever they disagreed with their clients over objectives of representation, clients would miss out on the opportunity to benefit from their lawyers' judgement and experience.

A lawyer and client may not fully recognize that they have an irresolvable, "fundamental disagreement" until it is too late to expect a trial court

57. *See, e.g.*, Maute, *supra* note 43, at 1061.

58. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2018) ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

to allow the client to seek alternative representation. This would seem to be what happened in the case of McCoy. Some early disagreements may appear superficial and resolvable, but turn out to be fundamental and persistent as communications between the lawyer and client reveal the depth and extent of disagreement. Other disagreements, however, may at first appear intractable but turn out to be resolvable through communication.

Some months before trial, English initiated discussions with McCoy about the idea of conceding guilt, but the two failed to converge on the issue, and shortly before trial was scheduled to begin, McCoy attempted to discharge English and replace him with new lawyers.[59] The court denied, as untimely, this request as well as McCoy's subsequent request to represent himself; English accordingly continued to represent McCoy despite their ongoing disagreement.[60] McCoy's case does not seem to be exceptional in this regard. Since 2000, the Louisiana Supreme Court alone has presided over at least eight capital appeals in which a lawyer wanted to concede the client's guilt and the client expressly objected to such a concession. In none of these cases did the lawyer withdraw and the client secure alternative representation.[61]

The Model Rules encourage lawyers to engage in dialogue with their clients and work toward resolving disagreements. At the same time, the Rules permit lawyers to withdraw in the event of fundamental, irresolvable disagreement. This guidance leaves lawyers, and their clients, in a precarious situation. We believe that the Rules should require lawyers to advise their clients on the likely outcome of a withdrawal or discharge attempt, and that the Rules should allow lawyers to withdraw as a response to lawyer-client disagreement only under limited circumstances.

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59. *McCoy*, 138 S. Ct. at 1506, 1506 n.2, 1513. According to the dissent, English first told McCoy about the idea of conceding guilt about eight months before trial (but the majority opinion expresses some doubt about this). The Louisiana Supreme Court's opinion indicates that "[t]he record clearly reveals the defendant's awareness of Mr. English's trial strategy, to avoid the death penalty by conceding guilt and seeking a life sentence, some eight months prior to [the month of the trial]." Louisiana v. McCoy, 218 So. 3d 535, 558 (La. 2016).

60. *McCoy*, 138 S. Ct. at 1506; Louisiana v. McCoy, 218 So. 3d at 560.

61. In four of these cases, the lawyers conceded the guilt of their clients despite their clients' objections. In the other four cases, the defendants ultimately represented themselves. *See* Amicus Brief of The Louisiana Association of Criminal Defense Lawyers and The Promise of Justice Initiative at 16–18, McCoy v. Louisiana, 138 S. Ct. 1500 (2018) (No. 16–8255), for a discussion of these cases.

The majority opinion in *McCoy* strongly implies that withdrawal is not an appropriate response to lawyer-client disagreement. The opinion does not indicate that the trial court should have permitted McCoy to secure alternative counsel, but rather suggests that McCoy had a right to the assistance of his existing counsel. This may seem to be an extreme reading of the decision; in our view, though, it is not only a faithful interpretation, but also makes for an ethically defensible approach to lawyer-client disagreement.

Although the trial court may have been right to deny McCoy's request to seek alternative counsel, it was mistaken to insist, when presented with the disagreement between English and McCoy, that English, as the attorney, would have to decide for himself whether to put on a defense or concede his client's guilt.[62]

An analogy to the medical context may help to illustrate the point. Suppose that a doctor believes her patient should undergo medical procedure X, since that procedure has the greatest chance of saving her patient's life. However, suppose further that the patient is opposed to procedure X, on religious or moral grounds, and expresses his opposition to his doctor. An alternative procedure exists, Y, which is less effective, but to which the patient has no objection, and he wishes to undergo that procedure instead of X. Most people would probably agree that the doctor should not subject her patient to procedure X, even if she is correct to think that this procedure is more likely than any alternative to save her patient's life—and even if she believes that saving her patient's life is of the utmost importance. Instead, she should use procedure Y, or then ensure that the patient has access to another physician who will do so. Simply withdrawing from caring for the patient would not seem to be an ethically permissible course of action for the physician. Sometimes professionals are ethically obligated to follow their clients' directives even when those directives conflict with what the professionals, in their expert opinions, believe to be best for their clients.

McCoy exemplifies the conflict between one actor's well-meaning paternalism and another's autonomy. English acted paternalistically when he

62. At a pretrial hearing, in response to English's request to withdraw from the representation, the trial court judge said the following to English: "'you are the attorney'" and "'you have to make the trial decision of what you're going to proceed with.'" Quoted in *McCoy*, 138 S. Ct. at 1506.

conceded McCoy's guilt despite McCoy's vociferous objections. English believed that a concession of guilt was in his client's best interests.[63] He assumed that McCoy's ultimate interest was in preserving his life, even if that meant conceding guilt and spending his life in prison. However, McCoy preferred to maintain his innocence, apparently even though that meant that he would most likely be sentenced to death.

In this case, the trial court may have erred in finding McCoy competent to stand trial.[64] And, even if it did not err under current legal standards, perhaps those standards ought to be revised so that fewer defendants of questionable mental competency are found competent to stand trial.[65] Nevertheless, the Supreme Court proceeded as though McCoy was mentally competent to make the autonomous decision to maintain his innocence, even if that meant a high probability of receiving the death penalty. We recognize that, especially in the criminal defense context, mental competence is often a spurious assumption. For the purposes of our argument here, however, we assume, just as the Supreme Court did, that McCoy was sufficiently mentally competent to make decisions about his defense, including the decision to insist on his innocence at trial.[66]

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63. *See* W. Bradley Wendel, *Autonomy Isn't Everything: Some Cautionary Notes on* McCoy v. Louisiana, 9 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 92, 126 (2018) (pointing out that "[s]ince trial courts are not protecting [defendants of questionable mental competency] from making disastrous decisions, a defense lawyer may feel isolated, as the only institutional actor looking out for the defendant's best interests.").

64. Wendel, *id.*, discusses this point at length.

65. *See Capital Punishment:* McCoy v. Louisiana*, Leading Case: 138 S. Ct. 1500 (2018)*, 132 HARV. L. REV. 377, 385 (2018), https://harvardlawreview.org/2018/11/mccoy-v-louisiana/ (maintaining that "[w]ith inconsistent and lax competency standards across jurisdictions, defendants incapable of rational participation in proceedings are regularly found competent to stand trial," and that, accordingly, in its *McCoy* opinion, the Supreme Court "could have increased pressure on states to bolster competency standards to ensure that defendants exercising *McCoy* rights have the mental competence to do so.").

66. And, in any event, there is good reason to believe that lawyers should not be making competency determinations and overriding a client's wishes whenever they determine that those wishes are a result of mental incompetence. This idea is reflected in the doctrine of presumed competence, which provides that "it is not permissible ethically or legally for one person (the lawyer) unilaterally to usurp the authority of another (the client) without either that person's consent or court permission." Tremblay, *supra* note 52, at 517. As Tremblay explains, one might think that "[b]ecause a finding of incompetence is equivalent to a deprivation of rights that ordinarily requires court approval," a "lawyer may not make such a determination [in the absence of judicial process]." *Id.* at 539. And, as Katherine Kruse argues, "The very process of determining how much autonomy to allow [clients of

In any event, even if McCoy was mentally incompetent such that he could not understand that if he insisted on his innocence he would likely be sentenced to death, we can imagine a defendant who knows he has no good defense, does fully understand his sentencing odds, and wants to maintain his innocence anyway. As Ginsburg explained in the Court's majority opinion,

> Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration.[67]

In the medical profession, it is relatively well established that the patient has a right to refuse any treatment on offer.[68] And the choice should not be between accepting treatment X and giving up the right to care altogether. Likewise, in the legal context, a defendant should be able to refuse a particular course of action regarding the representation even when, from the perspective of the attorney, following the defendant's directives would go against the defendant's best interests. And a defendant should be able to so refuse without giving up the right to representation entirely. This means that lawyers will sometimes have to fight for ends that they would not endorse in their own personal or professional judgment.

IV. TOWARD NEW AND IMPROVED MODEL RULES

Courts rely on the Model Rules to inform the development of legal doctrine in areas that overlap with professional ethics, including the

questionable mental competency] can result in 'circular lawyer-centric thinking' in which the lawyer abides by the client's choices as long as the lawyer agrees with them and uses the client's disagreement about the client's interests as evidence that the client lacks competency to make an informed decision." Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 145 (2010).

67. *McCoy*, 138 S. Ct. at 1508.

68. *See, e.g.*, Charles Weijer et al., *Bioethics for Clinicians: 16. Dealing with Demands for Inappropriate Treatment*, 159 CANADIAN MED. ASS'N. J. 817, 818 (1998) ("The right of the patient to refuse an unwanted medical intervention, even a life-saving treatment, is a well-established ethical and legal dictum in medicine.").

constitutional right to assistance of counsel.[69] The revisions we suggest are meant to catch the Rules up to current constitutional jurisprudence in the wake of the *McCoy* decision and to help address problems that *McCoy* left unresolved. Ideally, an improved iteration of Rules 1.2 (governing the allocation of authority between lawyer and client) and 1.16 (governing lawyer withdrawal and discharge) would influence the development of Sixth Amendment jurisprudence going forward.

A. Limitations on Withdrawal

First, the Model Rules need to get up to speed and properly caution lawyers that withdrawal is only a very limited remedy to lawyer-client disagreement.

Currently, the comments to Rule 1.2 advise the profession that, if a "lawyer has a fundamental disagreement with [his or her] client, the lawyer may withdraw from the representation"; alternatively, "the client may resolve the disagreement by discharging the lawyer."[70] In turn, Rule 1.16, which addresses lawyer withdrawal in more detail, allows that "a lawyer may withdraw from representing a client if . . . the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."[71]

The Rules' reliance on withdrawal as a solution to lawyer-client disagreement is questionable as a matter of professional ethics, and the *McCoy* decision makes apparent that a resort to withdrawal may not be constitutionally acceptable either.

As we argued in the Part III, because defendants have a right to assistance of counsel, lawyers may withdraw from representation as a result of lawyer-client disagreement if and only if (1) the disagreement is a result of an interpersonal conflict and is unlikely to recur with another lawyer, and (2) the withdrawal is timed such that the client will have sufficient time to secure alternative counsel. When the client's explicit objective or the means necessary to attain it are in deep tension with the lawyer's personal value

69. *See, e.g.*, Nix v. Whiteside, 475 U.S. 157 (1986) (citing common understandings of professional ethics to construe a lawyer's Sixth Amendment duties when a client intends to present perjured trial testimony).

70. Model Rules of Prof'l Conduct R. 1.2, cmt. 2 (2018).

71. Model Rules of Prof'l Conduct R. 1.16(b)(4) (2018).

system, for example, that tension may produce a disagreement of the type that is unlikely to recur with a new lawyer.

However, the initial lawyer's value system would have to be sufficiently atypical such that the next lawyer who comes along would be unlikely to disagree with the client for the same reasons as the first. For example, an opposition to the death penalty (which may make a lawyer averse to fighting for a defendant's absolute innocence in a capital case when chances of acquittal are low) would not justify withdrawal. If such an opposition did warrant withdrawal, then a defendant aiming for complete acquittal where that result is highly improbable may well be effectively deprived of his right to assistance of counsel, since many defense attorneys are fundamentally opposed to the death penalty.[72]

The Model Rules should clearly communicate these ethical complications surrounding withdrawal. Rule 1.2 might expressly provide, for example, that lawyers often have a professional responsibility to acquiesce to a client's wishes even if they fundamentally disagree with the client.

B. Lawyer-Client Dispute Resolution

The drafters of the Model Rules were understandably wary of wading too deeply into lawyer-client negotiations about objectives and strategy, as Rule 1.2 implicates a complex patchwork of legal doctrine and context-sensitive ethical tradeoffs. Negotiations over objectives will inevitably vary based on the client's attitude, the relationship between the lawyer and client, the points over which the lawyer and client disagree, and many other factors.

The Model Rules should, however, direct lawyers to initiate conversations about objectives, possible means of attaining those objectives, and the consequences of persistent lawyer-client disagreement, early in the course of representation. As currently drafted, neither Rule 1.2 nor the accompanying comments provide guidance to lawyers about the appropriate timeline for these conversations.

72. Although we were not able to find any studies that surveyed criminal defense lawyers for their views on the death penalty, the U.S. National Association of Criminal Defense Lawyers (NACDL), a professional bar association with 40,000 attorney members, including private criminal defense lawyers and public defenders, has taken an unequivocal stand against capital punishment. *See NACDL on the Death Penalty*, https://www.nacdl.org/Landing/DeathPenalty (last visited Mar. 3, 2020). And we suspect that the great majority of criminal defense lawyers are strongly opposed to the death penalty.

The Rules should also instruct lawyers to address disagreements in a non-coercive way. Specifically, the Rules should prohibit lawyers from using the possibility of withdrawal as leverage over their clients. Lawyers should be realistic with clients about the difficulties that substitute counsel might bring, but not belabor these difficulties such that the client may be coerced into adopting the lawyer's preferred approach. Avoiding such coercion is of course a complex and case-specific matter, but the ABA could make progress by acknowledging this risk and advising lawyers to be mindful of it.

Moreover, the Rules should instruct lawyers to inform their clients that the lawyer may not abandon the representation in the event of persistent disagreement, but rather that clients have a right to define their own objectives and to counsel who will assist them in the pursuit of those objectives. The majority in *McCoy* emphasized the importance of preserving client autonomy if the Sixth Amendment right to the *assistance* of counsel is to remain a personal right of the accused.[73] Ensuring that defendants are informed of their entitlements under the Sixth Amendment should help prevent coercive situations where a defendant acquiesces to the lawyer's approach just because the defendant fears having to proceed without counsel in the alternative.

If fundamental disagreements about objectives are recognized late or prove intractable, then the lawyer may have to adopt the client's approach, even if that approach conflicts with the lawyer's own professional judgment or personal conscience. The Model Rules should make these professional responsibilities apparent.

C. Examples and Illustrations

We believe that the Model Rules governing the allocation of authority between lawyer and client would benefit from examples and illustrations. The current iteration of these rules trade in abstractions and generalities, and portray withdrawal as a neat and tidy solution to lawyer-client disagreement. The Rules could include brief summaries of real or stylized

73. McCoy v. Louisiana, 138 S. Ct. 1500, 1509 (2018) ("When a client expressly asserts that the objective of '*his* defense' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.") (quoting U.S. CONST. amend. VI). The opinion also cites ABA Model Rule 1.2(a) in support of the point ("a 'lawyer shall abide by a client's decisions concerning the objectives of the representation'").

cases: for example, where a lawyer withdrew and the subsequent lawyer had the same disagreement with the defendant, and where a lawyer attempted to withdraw but the trial court compelled the lawyer to continue with the representation. Such examples would help illustrate how attempting withdrawal is often a professionally irresponsible way to deal with lawyer-client disagreement.[74] The Rules could further illustrate the lawyer's professional responsibilities by drawing analogies (as we did above) to the medical context, where moral intuitions are often sharper and more pronounced.

Moreover, the Rules might provide model examples of lawyer-client dialogues in the comments, which would help lawyers to anticipate possible areas of disagreement and to navigate disagreement in a responsible way.[75] These dialogues could be similar to the illustrations currently provided in the Restatement (Third) of the Law Governing Lawyers, which uses hypotheticals to illustrate rules in areas such as the formation of a lawyer-client relationship.[76] The dialogues should be designed to illustrate, for example, how the possibility of withdrawal might be used to pressure a client into abandoning an objective that the lawyer personally finds morally problematic or foolish.

* * *

The *McCoy* decision represents an opportunity for the legal ethics community to rethink how lawyers and clients make decisions together.

74. As the New York Supreme Court has asserted, "It would be foolhardy to expect that most parties whose attorneys have successfully withdrawn will be able to obtain new counsel." Diaz v. New York Comprehensive Cardiology, PLLC, 982 N.Y.S.2d 880, 883 (N. Y. Sup. Ct. 2014). The court explained that "[w]hatever the basis of permitted withdrawal, and certainly where it is based on insufficient merit of the claim or defense, prospective new counsel will, understandably, be reluctant to accept the representation." *Id.* at 883–84.

75. See Jane Y. Kim, *Refusing to Settle: A Look at the Attorney's Ethical Dilemma in Client Settlement Decisions*, 38 WASH. U. J. L. & POL'Y 383, 414–15 (2012).

76. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (AM. LAW INST. 2000) ("Client telephones Lawyer, who has previously represented Client, stating that Client wishes Lawyer to handle a pending antitrust investigation and asking Lawyer to come to Client's headquarters to explore the appropriate strategy for Client to follow. Lawyer comes to the headquarters and spends a day discussing strategy, without stating then or promptly thereafter that Lawyer has not yet decided whether to represent Client. Lawyer has communicated willingness to represent Client by so doing. Had Client simply asked Lawyer to discuss the possibility of representing Client, no client-lawyer relationship would result.").

McCoy demonstrated how a lawyer's understanding of tactical decision making can tread on a client's autonomy in troubling ways. While it is valuable to assign certain decisions to clients, as the *McCoy* decision attempts to do, the problems of lawyer-client decision making cannot be resolved in this piecemeal way alone. The legal community may never arrive at compelling definitions of objectives and means of representation. Nevertheless, the Rules can do better to help lawyers make professionally responsible decisions when they disagree with their clients about critical aspects of the representation.

CONCLUSION

With the *McCoy* decision, the Supreme Court determined that defendants have the right to maintain their innocence and that defense counsel must respect that right—even if counsel reasonably believes that a concession of guilt would substantially reduce the chances of a death sentence. The Court's reasoning for this determination relies on the principle of autonomy, but the opinion does not explain how that principle or the specific holding of the case should be applied to other types of lawyer-client disagreement. Nor does the opinion address the dubious emphasis that the Model Rules place on withdrawal as a solution.

Accordingly, after *McCoy*, lawyers continue to lack adequate guidance on managing disagreement with their clients. The ABA can lead the way in addressing this guidance gap by developing its standards on lawyer-client disagreement and dispute resolution. As the largest organization of legal professionals in the United States and the profession's most substantial attempt at self-regulation, the ABA is well-positioned to make progress in this area.

Lawyers often disagree with their clients about some aspect of the representation; accordingly, lawyers continually have to manage the distribution of authority between themselves and their clients. In this paper, we delineated some of the weaknesses in the Model Rules governing the allocation of authority between lawyer and client. First of all, the language of the Rules suggests that objectives and strategies of representation are readily distinguishable when, in actuality, lawyers and their clients may disagree over not only objectives and strategies but also what constitutes an objective versus a strategy. Second, the Rules misleadingly advance

withdrawal as a relatively clean solution to lawyer-client disagreement. After describing some of the problems with the current iteration of the Model Rules, we proposed some changes in an effort to address the issues we identified.

We offer these proposals as a starting point for further development—and with the hope that both lawyers and courts will be able to rely on the Model Rules for effective guidance as they confront professional responsibility issues in the domain of lawyer-client disagreement and dispute resolution, especially given the patchy case law in this area.