

THE INFORMED CONSENT DOCTRINE: WHAT'S GOOD FOR THE PATIENT, IS GOOD FOR THE CLIENT

By David B. Parker and Diana Tsudik
PARKER MILLS & PATEL LLP

In the civil arena, an attorney is authorized to enter into binding stipulations in all matters of procedure, but may not enter into a stipulation that impairs “the client's substantial rights or the cause of action itself.”¹ We know from *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, that an attorney does not have the inherent right to stipulate that the client's dispute may be resolved in binding arbitration and thereby waive a constitutional right to jury trial. By contrast, lawyers do have authority to enter into stipulations involving extensions of time to respond to pleadings or discovery, and many other “procedural” matters. Of course, the question of inherent lawyer authority extends beyond stipulations to any other agreements, formal or informal, or even unilateral decisions, for example, to assert a position or not, or to waive a right or opportunity.

In whatever context, the distinction between “procedural” and “substantive” is often difficult to establish, requiring the measuring of an attorney's inherent authority to act against a client's right to control their case. Consider, by way of a recent example, a stipulation that lays the foundation for a summary, non-merits and punitive dismissal of a client's case. In such an instance, common sense and a measure of self-protection will almost certainly motivate a lawyer to obtain her client's consent before entering into such a stipulation. This article extends the issue of consent one step further, asking the question: Is mere consent in the face of what may be characterized as a “waiver”² of a client's substantive rights and which clearly involves a

set of risks, really enough to satisfy the attorney's professional duties to the client? Wouldn't a client's “informed consent” better serve to protect the client, and thereby the attorney? Strangely, the issue of informed consent has never truly been addressed by the Courts in the context of the lawyer-client relationship.³

A review of California case law addressing the issue of informed consent in the context of lawyer-client cases reveals a paucity of authority for the application of the “informed consent” doctrine to lawyers for purposes of the determining standard of care, fiduciary duties or lawyer authority. In fact, all of the decisions by the California Supreme Court⁴ and the Court of Appeals, revolve around the conflicts rules in the California Rules of Professional Conduct.⁵

¹ *Linsk v. Linsk* (1969) 70 Cal.Rptr.2d 272, 276.

² See, e.g., *People v. Moon* (2005) 37 Cal.4th 1, 20. “[T]he waiver of a constitutional right must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.” See also, *In re Walker* (1969) 77 Cal. Rptr. 16, 18-19. “The first requirement of any waiver of statutory or constitutional rights is that it be knowingly and intelligently made.”

³ The issue was ignored by the Court of Appeal in *Mileikowsky v. Tenet HealthSystems*, 128 Cal.App.4th 531 (2005) in a case where terminating sanctions were issued based on a stipulation entered into by a lawyer without the client's consent in fact, and the Supreme Court passed on review, notwithstanding various amicus briefs by various physician organizations.

⁴ See, e.g., *Fletcher v. Davis*, *supra*; *People ex rel Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135; *Flatt v. Superior Court* (1994) 9 Cal.4th 275.

⁵ Rule 3-310 rules call for “written informed consent” for purposes of seeking client consent to representation where actual or potential conflicts exist as between or among multiple clients, or with former clients, or with non-clients who pay the lawyer's fees. Such consent is also required where a trial lawyer anticipates being a material witness in a jury trial. Rule 5-210. Though the exact phrase is not invoked in Rule 3-300, it is apparent that the same standard applies, as the California Supreme Court recently noted in *Fletcher v. Davis* (2004) 33 Cal.4th 61, 69. Rule 3-310(A)(2) defines “written informed consent” as “the client's or former client's written agreement to the

Under the circumstances, shouldn't the Bar consider the development of Informed Consent Doctrine as applied to their medical brethren, especially since lawyers led the charge to create it in the first place?

The "informed consent" doctrine has been extensively developed in California⁶ as applied to physicians over more than three decades⁷ and has been extended to other areas involving fundamental personal rights.⁸ The California Supreme Court's seminal decision in *Cobbs v. Grant* (1972) 8 Cal.3d 229, establishing the Doctrine of Informed Consent and rejecting traditional standard of medical care as the defining measure for the physician's disclosure obligations when seek patient consent to an

representation following written disclosure." The term "disclosure" is defined in (A)(1) as "informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client." Finally, "informed consent of the client to the fee" is one of the factors relevant to determining whether a fee is "unconscionable" under Rule 4-200.

⁶ The concept of informed consent in refusing medical treatment goes back to the U.S. Supreme Court's decision in *Union Pacific Railway Co. v. Botsford* (1891) 141 U.S. 250, 251, and as applied to consent to medical procedures was first enunciated in an opinion authored by Justice Cardozo in *Schloendorff v. Society of New York Hospital* (1914) 211 N.Y. 125.

⁷ The seminal California case is *Cobbs v. Grant* (1972) 8 Cal. 3d 229.. The history of the concept as applied to California physicians is well summarized by this Court in *Conservatorship of Wendland* (2001) 26 Cal.4th 519. Over the years, the standard as been codified for various purposes, including the Lanterman-Petris-Short Act. See California Welfare & Institutions Code § 5326, which provides a check list of information which "shall be given to the patient in a clear and explicit manner." (See *In re Qawi* (2004) 32 Cal.4th 1, 18.)

⁸ Informed consent is applied to birth parents who give up their children for adoption, as noted by this Court recently in *Sharon S. v. Superior Court* (2004) 31 Cal.4th 417, 429, despite the fact that Family Code § 8604 does not qualify the term "consent".

invasive procedure, resonates when one considers the relationship of lawyer and client:

"Preliminarily we employ several postulates. The first is that patients are generally persons unlearned in the medical sciences and therefore, except in rare cases, courts may safely assume the knowledge of patient and physician are not in parity. The second is that a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment. The third is that the patient's consent to treatment, to be effective, must be an informed consent. And the fourth is that the patient, being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process, thus raising an obligation in the physician that transcends arms-length transactions.

From the foregoing axiomatic ingredients emerges a necessity, and a resultant requirement, for divulgence by the physician to his patient of all information relevant to a meaningful decisional process. In many instances, to the physician, whose training and experience enable a self-satisfying evaluation, the particular treatment which should be undertaken may seem evident, but it is the prerogative of the patient, not the physician, to determine for himself the direction in which he believes his interests lie. To enable the patient to chart his course knowledgeably, reasonable familiarity with the therapeutic alternatives and their hazards becomes essential." (Footnotes omitted.) (*Id.* at 242-243.)

Similarly, most clients are generally unlearned in the law and therefore utterly reliant on their attorney. Likewise, clients, no less than patients, have the right to exercise control over their case and thus, where client consent is required, it should be informed. As the *Cobb* Court wrote, the physician must "divulge... all information relevant to a meaningful decisional process...." It is no less the prerogative of the client "to determine for himself the direction in which he believes his interests lie."

An attorney seeking client authorization for a stipulation laden with risk must observe the distinction between his or her duty of disclosure and the client's right to make the ultimate

decision. Again, the Court's pronouncement in *Cobb* serves as a compass:

"A medical doctor, being the expert, appreciates the risks inherent in the procedure he is prescribing, the risks of a decision not to undergo the treatment, and the probability of a successful outcome of the treatment. But once this information has been disclosed, that aspect of the doctor's expert function has been performed. The weighing of these risks against the individual subjective fears and hopes of the patient is not an expert skill. Such evaluation and decision is a nonmedical judgment reserved to the patient alone." (8 Cal.3^d at 243).

In *Blanton*, in her concurring opinion, Chief Justice Bird urged the Court to address the broader issue of the "allocation of decision-making authority between client and attorney," acknowledging it was a "difficult problem." (38 Cal.3d at 653-54.) "Clear guidance on the scope

of an attorney's implied and apparent authority and the legal consequences of the allocation of that authority would benefit both attorneys and clients." (*Id.* at 654.) The same is no less true today.

While it is inevitable that a physician will at some time or another be a patient, it is not inevitable that a lawyer will at some time or another be a client. Perhaps if lawyers were forced to view matters from a client's vantage point, the Informed Consent Doctrine would have been extended to the legal profession some time ago. However, until such time that the Court extends the Informed Consent Doctrine to the legal profession, bringing parity among the professions, providing protection to clients and guidance to California trial lawyers and indeed the California Bar, lawyers are well advised to apply Informed Consent Doctrine as "the better practice." Who knows, one day it may well be the "standard of practice."