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WAIVING GOOD-BYE TO A FUNDAMENTAL RIGHT: ALLOCATION OF AUTHORITY BETWEEN ATTORNEYS AND CLIENTS AND THE RIGHT TO A PUBLIC TRIAL

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Courts and disciplinary agencies often have trouble defining exactly how the authority to make decisions should be allocated between an attorney and a client. In some cases, attorneys can make decisions without consulting the client, while in others the decision is reserved for the client. It is often said that the lawyer can make decisions as to tactics without consulting the client, while the client has the right to make decisions that relate to the objectives of the representation. However, this distinction is not always clear and has, at times, resulted in inconsistent holdings.

Even with that type of vague guideline, however, one would think that a decision that can affect the constitutional rights of the client would be one reserved for the client. Yet, that has not always been the case, and courts have not developed a consistent approach to the issue. While some courts have held that decisions that affect constitutional rights are for the client to make, others have suggested there are different levels of rights, some of which can be waived by attorneys without consulting the client. This inconsistency is particularly problematic as it relates to the right to a public trial.

Only a few courts have addressed the question of whether an attorney can decide to waive a client's constitutional right to a public trial without the client's consent, and most of their decisions are based on the notion that attorneys have the authority to make tactical decisions. None of them, however, has offered a convincing explanation as to why a tactical decision

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that affects a constitutional right should be considered to be a mere tactical decision (which the attorney would have the authority to make without the client's consent) as opposed to a decision that affects a fundamental right (which the attorney could not make without the client's consent).

Two recent cases have addressed the question and brought the issue back to the forefront. This essay explains the issue and addresses the need to develop a consistent approach to the subject. It concludes that courts should find that decisions that affect constitutional rights belong to the client and that it would be improper for an attorney to make such decisions without consultation.

THE LAWYER'S DUTIES AND THE ALLOCATION OF AUTHORITY TO MAKE DECISIONS

One of the most basic principles of the attorney-client relationship is that attorneys owe fiduciary duties to their clients. As part of those duties, attorneys assume all the traditional duties that agents owe their principals[1] and, thus, have an obligation to respect the client's autonomy to make decisions, at a minimum, as to the objectives of the representation.[2] Even in those rare circumstances where attorneys are allowed to use their own judgment to protect the interests of younger clients or clients with diminished capacity, it is clear that the lawyer's conduct should be guided more by respect toward the client's autonomy rather than by what the lawyer may think may be better for the client.[3] Thus, according to generally accepted notions of professional responsibility, attorneys should follow the client's instructions rather than substitute their judgment for that of the client.[4]

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1. STEPHEN GILLERS, REGULATION OF THE LEGAL PROFESSION 67 (2009); *see also* RONALD ROTUNDA & JOHN DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY, A STUDENT'S GUIDE, § 1.2-1.2(a), at 107 (2012) (the lawyer is the agent of the client, who is the principal).

2. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2012); ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.2-1.2(a), at 104-05 (lawyer is the agent (not the guardian) of the client; lawyer must "abide by the client's decisions concerning the objectives of the representation").

3. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14 (2012). On this point, the comment to Model Rule of Professional Conduct 1.14 states that "[i]n taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections." MODEL RULES OF PROF'L CONDUCT R. 1.14, cmt. [5] (2012). Thus, rules of professional conduct demand that, other than in some rare circumstances, attorneys for minors and those with diminished capacity abide by the same duties owed to an adult client. This is why in cases where lawyers are in doubt as to the best way to proceed, the suggested course of action is not to make decisions for the client but to ask for the appointment of a guardian other than the lawyers themselves.

4. *See, e.g.*, State v. Joanna V., 94 P.3d 783, 786 (N.M. 2004) ("Although counsel may advise the client on counsel's view of the client's best interests, counsel is ultimately required to advance the client's expressed wishes."); *see also* Annette R. Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 FORDHAM L. REV. 1955, 1959-60

A second element of the attorney's fiduciary duty to the client, which is also clearly expressed in generally accepted rules of professional conduct, is the duty to avoid conflicts of interest, which means to avoid situations where attorneys face a substantial risk that their duty to a client might be compromised.[5] Based on this principle, lawyers have a duty to make sure that neither the lawyers' own interests nor those of others "impede or compromise fulfillment of the lawyer's duties to the client."[6] This is so because allowing lawyers to operate under circumstances where there is a substantial risk that they would be tempted to violate their duties to their clients would damage the trust and confidence upon which the attorney–client relationship must be based and would endanger the adequacy of the representation.

Having said that, it is obvious that attorneys can't be expected to seek permission from the client before making all decisions related to the representation. After all, it is precisely because the client wants the lawyer to conduct the representation that the client hired the lawyer in the first place. Thus, the fact the client hired the lawyer, by itself, implies that the client cedes some level of decision-making authority to the lawyer. This view is also reflected in rules of professional conduct.[7]

With those general principles in mind, the drafters of the ABA Model Rules of Professional Conduct, upon which the rules of most jurisdictions are based, and of the Restatement of the Law Governing Lawyers, which is frequently used in support of court decisions, have attempted to provide some basic guidelines to help lawyers identify matters in which they need to obtain client consent before making a decision. Unfortunately, the guidelines are not entirely clear.

Absent a specific agreement between lawyer and client[8] and subject to the duty not to counsel or assist a client in criminal or fraudulent conduct,[9] Model Rule 1.2(a) states that "[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation," but that the lawyer shall abide by a client's decisions concerning the objectives of the representation and "shall consult with the client as to the means by

(1996) ("lawyers may not normally substitute their own opinions regarding the goals of representation").

5. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2012).

6. GILLERS, *supra* note 1, at 18.

7. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012) ("[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation"); *see also* ROTUNDA & DZIENKOWSKI, *supra* note 1, at 112 ("notion that a lawyer is impliedly authorized to take action to conduct the representation has always been assumed by lawyers and clients").

8. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) cmt. 3 (2012); *see also* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 21(1) (2000).

9. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2012).

which they are to be pursued."[10] Likewise, the Restatement states that lawyers may take lawful measures within the scope of representation that are reasonably calculated to advance a client's objectives as defined by the client.[11] Typically, courts and commentators have reduced this language to mean that a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued.[12]

Unfortunately, these statements are not always helpful.[13] As the comment to the 1983 version of the Model Rules explains, sometimes it is difficult to determine the distinction between objectives and means.[14] For this reason, both the Rules and the Restatement set some specific limits to the lawyers' authority to make decisions for the client. For example, in a civil case, a lawyer cannot take away from the client the right to decide whether to settle a claim.[15] Likewise, in a criminal case, the lawyer cannot decide for the client whether to agree to a plea offer, whether the client will testify in the client's own defense, and whether to waive a jury trial.[16] These decisions are specifically reserved for the client.

Interpreting the meaning of the distinction between objectives and means and the nature of the type of decisions specifically reserved for clients, it has been argued that lawyers are entitled to make decisions in matters that do not affect the merits of the case or substantially prejudice the client's rights.[17] It is the client who has the right to make those types of decisions. In contrast, decisions as to whether and how to conduct a cross examination or voir dire or as to what trial motions to make and other "strategic and tactical" decisions are understood to be for the lawyer to make.[18] One court has explained this general principle this way:

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10. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012).

11. RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 20, 21(3) cmt. e (2000).

12. GILLERS, *supra* note 1, at 72 ("A handy test is to say that a lawyer, by virtue of retention, has the authority to choose the means for achieving the client's legal goal while the client has the right to decide on what the goal will be."); *see also* WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE 770-72 (Thomson/West ed., 3rd ed. 2007); ROTUNDA & DZIENKOWSKI, *supra* note 1, at 106; MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 66 (Matthew Bender & Co., Inc. ed., 3rd ed. 2004).

13. *See* LAFAVE ET AL., *supra* note 12, at 801-02 (discussing examples of cases where a decision as to "means" should belong to the client and why attempting to determine who has the authority to make decisions based on distinction between means and ends does not always work).

14. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt 1 (1983) (a clear distinction between objectives and means sometimes cannot be drawn); *see also* FREEDMAN & SMITH, *supra* note 12, at 55 (that the distinction between objectives and means sometimes cannot be drawn is an understatement).

15. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012); *see also* RESTATEMENT OF THE LAW GOVERNING LAWYERS §22 (2000).

16. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012).

17. ROTUNDA & DZIENKOWSKI, *supra* note 1, at 106-07.

18. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2012) (authorizing lawyers to grant reasonable requests regarding court procedures, settings, continuances, waivers of procedural

An attorney retained to represent a client in litigation is clothed with certain authority by reason of that relationship. "The attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action. . . . 'In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred, and among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client.' . . ."

The authority thus conferred upon an attorney is in part apparent authority—i.e., the authority to do that which attorneys are normally authorized to do in the course of litigation manifested by the client's act of hiring an attorney—and in part actual authority implied in law. Considerations of procedural efficiency require, for example, that in the course of a trial there be but one captain per ship. An attorney must be able to make such tactical decisions as whether to call a particular witness, and the court and opposing counsel must be able to rely upon the decisions he makes . . . In such tactical matters, it may be said that the attorney's authority is implied in law, as a necessary incident to the function he is engaged to perform. . . .

An attorney is not authorized, however, merely by virtue of his retention in litigation, to "impair the client's substantial rights or the cause of action itself." . . . For example, "the law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation . . . . Similarly, an attorney may not "stipulate to a matter which would eliminate an essential defense . . . . He may not agree to the entry of a default judgment . . . may not . . . stipulate that only nominal damages may be awarded . . . and he cannot agree to an increase in the amount of

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formalities, and similar matters which do not prejudice the rights of clients); *see also* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION, Standards 4-5.2(b) (2004).

> the judgment against his client. . . . Likewise, an attorney is without authority to waive findings so that no appeal can be made. . . ." . . . Such decisions differ from the routine and tactical decisions which have been called "procedural" both in the degree to which they affect the client's interest, and in the degree to which they involve matters of judgment which extend beyond technical competence so that any client would be expected to share in the making of them.[19]

The distinction between tactical and substantive matters may be a bit more helpful than the one between objectives and means, but it is still problematic. Because waiving a constitutional right[20] might be part of a tactical strategy, the question as to who has the authority to make the decision should not be analyzed by asking whether the decision was tactical.[21] The distinction between tactical and substantive decisions simply does not help clarify the issue in this context.

Jones v. Barnes[22] and *Taylor v. Illinois*,[23] two cases often cited to illustrate the U.S. Supreme Court's approach to the allocation of authority to make decisions within the attorney-client relationship, can also be used to illustrate this point. In *Jones*, a defendant sought a reversal of his conviction because his appellate attorney refused to argue as part of the appeal certain claims the defendant wanted to see argued.[24] A divided Supreme Court held, however, that the attorney had the authority to decide not to argue the claims because this was part of the strategy for the appeal.[25]

In *Taylor*, a defense attorney intentionally failed to disclose to the prosecution the identity of an alibi witness in violation of a state law that required it.[26] As a result, the trial judge did not allow the witness to testify.[27] After he was convicted, the defendant appealed arguing that he should not have suffered the consequences of the attorney's conduct because he had not been a part of the decision not to disclose the identity of

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19. Blanton v. Womancare Inc., 696 P.2d 645, 650-51 (Cal. 1985).

20. A waiver of a right involves "[t]he intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." BLACK'S LAW DICTIONARY 1580 (6th ed. 1990).

21. There are instances where courts have characterized decisions involving, or that at least could affect, a client's constitutional rights as "tactical." In Henry v, Mississippi, 379 U.S. 443, 451-52 (1965), for example, the United States Supreme Court found that a criminal defense attorney's decision not to object to the admission of certain evidence obtained in violation of the Fourth Amendment was part of a "strategic" trial plan.

22. Jones v. Barnes, 463 U.S. 745 (1983).

23. Taylor v. Illinois, 484 U.S. 400 (1988).

24. *Jones*, 463 U.S. at 745.

25. *Id.*

26. *Taylor*, 484 U.S. at 400.

27. *Id.*

the witness.[28] The Supreme Court, however, held against the defendant stating:

> Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval. . . . Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision 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.[29]

In both cases, the Court's decision was based on the notion that an attorney has the authority to make tactical decisions without the client's express consent and that the client is bound by those decisions. However, there are two other important aspects to the Court's position that are clearly articulated in *Taylor*. First, the Court recognizes that there are some basic rights that an attorney does not have the authority to waive.[30] Second, the examples listed by the Court – cross-examination, calling of witnesses, and trial strategy – again suggest that the rights that an attorney has the authority to waive relate to procedural aspects of litigation and not to constitutional rights.[31] In fact, neither *Jones* nor *Taylor* involved a waiver of a constitutional right.

Gonzalez v. United States[32] provides another, and more recent, good example. In this case, the Supreme Court held that an attorney had the authority to decide, without consulting the client, whether to have a federal magistrate preside over the jury selection process in a criminal trial.[33] The Court rejected the argument that the statute allowing this (based on the consent of the parties) should be read to require the express consent of the defendant.[34] According to the Court, the case law holding that some basic trial choices are so important that an attorney must seek the client's consent to waive the client's rights did not bear upon the decision involved in the case because it was a tactical decision.[35]

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28. *Id.*
29. *Id.* at 417-18.
30. *Id.*
31. *Taylor*, 484 U.S. at 400.
32. Gonzalez v. United States, 553 U.S. 242 (2008).
33. *Gonzalez*, 533 U.S. at 242.
34. *Id.* at 247-48.
35. *Id.*

Thus, like *Jones* and *Taylor*, the Court used the notion of "tactics" as a way to delineate the limits of an attorney's authority to make decisions for the client. More importantly, though, the case can also be distinguished from a case involving a constitutional right. The Court's decision is based on the notion that an attorney should have authority to manage tactical decisions because the lawyer has the expertise necessary to make tactical trial decisions, whether "of the moment" or as part of a larger strategic plan. As the Court explained:

> Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial. These matters can be difficult to explain to a layperson; and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote. In exercising professional judgment, moreover, the attorney draws upon the expertise and experience that members of the bar should bring to the trial process. In most instances the attorney will have a better understanding of the *procedural* choices than the client; or at least the law should so assume.[36]

Again, as clearly articulated by the Court's language, the concern is on the *procedural* aspects of trial management: the need to make decisions in the middle of trial, the need to avoid delays and interruptions, the impracticality of having the attorney ask the client to consent to every decision that needs to be made, and the need to preserve a fair process.[37]

Thus, given the guidelines provided by rules of professional conduct, the Restatement, and the decisions in *Jones*, *Taylor* and *Gonzalez*, one would think that if a decision involves a fundamental right, it is the client who has the right to make the final decision. Such is the nature of decisions that affect the client's right to testify, to a jury trial, to appeal, to accept a plea bargain or an offer to settle a claim,[38] and, you would assume,

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36. *Id.* at 249-50 (emphasis added).

37. *Id.* at 249 (giving the attorney control of trial management matters is a practical necessity); *Taylor*, 484 U.S. at 418 (adversary process could not function effectively if every tactical decision required client approval); *see also* LAFAVE ET AL., *supra* note 12, at 800 (trial judge is hardly in a position to continually satisfy himself that the defendant was fully informed as to, and in complete accord with, his attorney's every action or inaction).

38. LAFAVE ET AL., *supra* note 12, at 776, n.18 ("Although not themselves involving such decisions, *Jones* and *Taylor* together characterize" the decisions on behalf of a criminal defendant to plead guilty or take action equivalent to pleading guilty, to waive the right to a jury trial, to waive the

to waive a constitutional right,[39] because a valid waiver to a constitutional right expressed by an attorney will be binding on the client. For this reason, one would think that an attorney would not have the authority to decide whether to waive the right without consulting the client.[40] Yet, because neither the ends/means distinction nor the substantive/tactical approach has been effective in helping courts solve the issue, doubts remain and new problematic cases continue to arise.[41]

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right to be present at trial, to testify, and to forego an appeal as "'fundamental decisions . . .' as to which 'the accused has the ultimate authority.'").

39. Townsend v. Superior Court, 543 P.2d 619 (Cal. 1975) (right to speedy trial).

40. Comment d to Section 22 of the Restatement notes that delegation of certain decisions regarding constitutional rights of a criminal defendant to a lawyer is not permitted. However, it does seem to limit those to three circumstances: whether to plead guilty, whether to waive jury trials, and whether to testify. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22 cmt. d (2000); *see also* ROTUNDA & DZIENKOWSKI, *supra* note 1, at 111 ("Lawyers do not always have the same discretion to waive their client's constitutional rights as they have to waive some other rights.").

41. A number of courts, including the U.S. Supreme Court, have held or suggested that an attorney can exercise the final authority to decide, among other questions, whether to attempt to prevent the prosecution from using unconstitutionally obtained evidence, whether to agree to having a federal magistrate preside over jury selection, whether to seek dismissal of an indictment on the basis of racial discrimination in the selection of the grand jury, whether the defendant should wear civilian clothes to a trial, whether to seek to strike a jury instruction, whether to cross examine a witness, whether to use peremptory challenges, whether to request or consent to a mistrial, whether to seek a continuance or change of venue, and whether to seek relief due to prejudicial pre-trial publicity. However, courts have been less clear on who has the authority to decide issues such as whether to accept a jury of less than twelve individuals, whether to rely on a partial defense, whether to stipulate to the introduction of prior recorded testimony on a critical issue, and whether to waive the right to a jury instruction on lesser included offenses. LAFAVE ET AL., *supra* note 12, at 779-83.

A different, and important, question that would have to be addressed in some cases is whether waiving a client's constitutional right without the client's consent should support a reversal of a conviction based on ineffective assistance of counsel. That question will depend on the interpretation of the type of decision at issue and the case law on ineffective assistance of counsel and is, unfortunately, beyond the scope of this essay. As a general matter, if the decision in question falls within those that clearly belong to the client, the attorney's conduct in failing to consult the client, or in making the decision for the client, is more likely to constitute ineffective assistance of counsel. That result, however, is not inevitable. Even if an attorney takes away the defendant's right to make a decision that should be for the client, the conviction will not necessarily be reversed. *See* LAFAVE ET AL., *supra* note 12, at 790-95, 804 (citing and discussing cases where failure to consult the client on decisions that belonged to the client was not found to constitute ineffective assistance of counsel). Also, even if the attorney's conduct is, in fact, considered ineffective assistance of counsel, the courts will not reverse a conviction unless the defendant can meet the standard set in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires the defendant to show that there is a reasonable probability that but for the attorney's conduct the verdict may have been different. This has been called a "prosecution-friendly" standard, as opposed to the more defendant-friendly standard used in cases in which the defendant alleges it was the prosecutor who violated the defendant's fundamental constitutional rights. *See* Timothy O'Neill, *Gideon's 50th anniversary deserves only two cheers*, THE CHICAGO DAILY LAW BULLETIN (August 14, 2013), *available at* http://news.jmls.edu/wp-content/uploads/2013/08/ONeill-Aug.-14.pdf. A recently decided case in the District of Columbia illustrates the point. In *Littlejohn v. United States*, No. 11-CO-820 (D.C. August 29, 2013), the court of appeals held that the defendant's attorney had validly waived the defendant's right to challenge the exclusion of certain members of the public from his trial. However, it also held that the defendant had not waived his claim that his trial counsel was ineffective for failing to object to the court's closure order. *Id.* And, in order to decide whether the defendant could support his argument of ineffective assistance of counsel, the court used

ALLOCATION OF AUTHORITY AND THE RIGHT TO A PUBLIC TRIAL

The Sixth Amendment to the Constitution of the United States grants criminal defendants the right to a public trial, and the United States Supreme Court has consistently held that the trial includes the jury selection process.[42] In fact, the right to a public trial is so fundamental to our system of justice that it is guaranteed to the defendant, the general public, and the press.[43] This is so because, as the Court has stated, the right to an open court in criminal proceedings is an effective restraint on possible abuse of judicial power.[44] The Court has also explained that conducting jury selection in open court permits members of the public to observe trial proceedings, promotes fairness in the judicial system,[45] encourages witnesses to come forward, and discourages perjury.[46] However, the right to a public trial is not absolute and, like most other constitutional rights, it can be waived.[47]

The fact that the right can be waived, however, does not explain how it must be waived for the waiver to be valid. While recognizing that a defendant's attorney is best equipped to make choices affecting conduct of the trial and relating to trial tactics, the Supreme Court has noted that for certain fundamental rights, the defendant must personally make an informed waiver.[48] Unfortunately, because tactical decisions often can affect fundamental rights, courts have had a difficult time separating these two principles.

As stated above, only a few courts have addressed the question of whether an attorney can decide to waive a client's constitutional right to a public trial without the client's consent. Courts that have held that an attorney can waive the client's right without the client's consent tend simply to repeat the notion that a defendant's counsel has the authority to

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the analysis developed in *Strickland*, although the court did conclude that the defendant would not have to show the element of prejudice usually required by the *Strickland* analysis. *Id.*

42. The Sixth Amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI; Presley v. Georgia, 558 U.S. 209 (2010); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

43. *Presley*, 558 U.S. at 213 (the right to a public trial is protected by the First and Sixth Amendments to the United States Constitution); Waller v. Georgia, 467 U.S. 39, 46 (1984) (right to public trial functions for the benefit of the accused and the public); *Press-Enterprise Co.*, 464 U.S. at 508 (conducting jury selection in open court permits members of the public to observe trial proceedings and promotes fairness in the judicial system); *In re* Oliver, 333 U.S. 257, 270 (1948).

44. *In re Oliver*, 333 U.S. at 270; Kleinbart v. United States, 388 A.2d 878, 881 (D.C. 1978) (right to a public trial has always been recognized as a safeguard against any attempt to employ the courts as instruments of persecution).

45. *Press-Enterprise Co.*, 464 U.S. at 508.

46. *Waller*, 467 U.S. at 46.

47. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982) (a judge may permit closure of a court room if the closure satisfies the necessary requirements).

48. For a discussion of the relevant cases, see LAFAVE ET AL., *supra* note 12, § 11.6(a), at 770-88.

make tactical decisions without the need for the client's consent, while courts that have held the opposite simply assert that an attorney does not have the authority to decide matters that affect a fundamental right without the client's consent.

In *Williams v. State*,[49] for example, the trial court excluded a criminal defendant's family from the courtroom during voir dire over the defendant's objection. After the defendant was convicted, the court of appeals held that the trial court's exclusion from the courtroom during voir dire of all members of the public, including Williams' family members, required reversal of the conviction.[50] It also held that Williams could not have been found to have waived his right to a public trial because, while fundamental constitutional rights such as the right to a public trial can be waived, "[a]n effective waiver of a constitutional right must be voluntary, knowing, and intelligent."[51] Thus, for the court, the key question was whether the decision to waive a right affected a fundamental right.[52] Given that it did, the decision belonged to the client.[53]

Likewise, in *Martineau v. Perrin*,[54] the First Circuit Court of Appeals held that although a criminal defendant can waive the constitutional right to a public trial, the waiver must be intentional and knowing.[55] The court did not elaborate on its conclusion beyond stating that it agreed with the petitioner that, since a constitutional right was involved, there had to be an intentional and knowing waiver.[56] In other words, for this court, the key was whether the right affected was not "fundamental" but "constitutional."

In contrast, other courts have held that an attorney can waive the right to a public trial without consulting the client. For example, without much explanation, two years after it had decided *Williams v. State*, the same court concluded in *Berkuta v. State of Florida* that *Williams* did not require that the right to a public trial, "like other fundamental rights such as the right to counsel and the right to a jury trial, be waived expressly and personally by the defendant on the record."[57] Thus, somehow the court decided there are some fundamental rights that are more fundamental than others.[58]

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49. Williams v. State, 736 So. 2d 699 (Fla. Dist. Ct. App. 1999).

50. *Williams*, 736 So. 2d at 703-04.

51. *Id.* at 704 (citing Tucker v. State, 559 So. 2d 218, 219 (Fla. 1990)).

52. *Id.*

53. *Id.*

54. Martineau v. Perrin, 601 F.2d 1196 (1st Cir. 1979).

55. *Martineau*, 601 F.2d at 1200.

56. *Id.* (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973); United States v. Christian, 571 F.2d 64, 68-69 (1st Cir. 1978); United States v. Lespier, 558 F.2d 624, 629-30 (1st Cir. 1977); Maynard v. Meachum, 545 F.2d 273 (1st Cir. 1976).

57. Berkuta v. State of Florida, 788 So. 2d 1081, 1082 (Fla. Dist. Ct. App. 2001).

58. *Id.* at 1081.

Other courts have decided the issue using similar language,[59] but the Supreme Court of Utah offered the best explanation in support of the view that an attorney has the authority to waive a client's constitutional right to a public trial without the client's consent in *State v. Butterfield*.[60] In that case, the trial court granted the State's motion to close a trial to the public based on the fact that the case involved a sexual crime and a fourteen-year-old victim.[61] The defendant's attorney did not inform his client of the request to close the proceedings and did not object to the motion, which was discussed in private by the prosecutor, the defendant's lawyer, and the judge.[62] Later, the motion was made in open court and neither the defendant nor his lawyer objected.[63] On appeal after his conviction, the defendant argued that his right to a public trial had been violated because, although his counsel did not object to the closure, a defendant must *personally* waive the right to a public trial.[64]

The Utah Supreme Court, however, held that the failure of a defendant and counsel to object to a closure order constituted a waiver of the defendant's right to a public trial.[65] Although this statement—and the facts of the case—did not mention the issue of whether the attorney could waive the right without the client's consent, the court's reasoning would support that conclusion because, in the end, the decision was based on a value judgment of the nature of the right to a public trial.[66] The court found that, although protected by the state and federal constitutions, the right was not as important as other rights:

> It is helpful to compare other rights that have been held to require a personal waiver by the defendant. Among these are the right to trial, which is waived by a plea . . . ; the right to be present at trial . . . ; the right to trial by jury . . . ; and the right to an interpreter at trial . . . . A unifying characteristic of these rights appears to be that they are of central importance to the quality of the guilt-determining process and the defendant's ability to participate in that process.

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59. *See* People v. Bradford, 929 P.2d 544, 570 (Cal. 1997) (no personal waiver by defendant is expressly required to waive the right to a public criminal trial under the California Constitution); People v. Vaughn, 821 N.W.2d 288, 297 (Mich. 2012) (right to public trial during jury selection is not within limited class of constitutional rights that require a waiver to be personal and knowing).

60. United States v. Butterfield, 784 P.2d 153 (Utah 1989).

61. *Butterfield*, 784 P.2d at 153.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Butterfield*, 784 P.2d at 156.

> We judge the right to a public trial to be of a different order. Certainly it is important in assuring that abuses by the state are not permitted to be hidden from public view. . . . On the other hand, the absence of the public in a particular case does not necessarily affect qualitatively the guilt-determining process or the defendant's ability to participate in the process. . . . Of course, it is possible that in a particular case the wrongful closure of a trial could have an adverse impact. . . . However, the mere possibility of such an instance does not seem to warrant the imposition of a requirement of a personal waiver of the right to a public trial in all cases. Such possibilities are better dealt with via an ineffective assistance of counsel claim.[67]

The most recent decision on the subject also follows this type of reasoning. In *Commonwealth v. Lavoie,*[68] the Supreme Judicial Court of Massachusetts was asked to consider whether a Superior Court judge properly denied a criminal defendant's motion for a new trial in which he claimed that his right to a public trial had been violated when his counsel failed to object to the exclusion of the public, including his family members, from the courtroom during jury selection.[69] The trial judge denied the defendant's motion, but the appeals court reversed, concluding that the defendant's right to a public trial had been violated.[70] On appeal, the state supreme court reversed, holding that counsel may waive a defendant's right to a public trial during jury selection without his client's express consent because that is a tactical decision.[71] This conclusion, therefore, introduces a third element to the analysis: whether the decision is tactical as opposed to whether the decision relates to a constitutional right or a fundamental right.

THE ANALYSIS USED FOR ALLOCATING THE AUTHORITY TO MAKE DECISIONS

It has been said that "[a] lawyer's reliance on the ends/means distinction to assume authority to make decisions without client consultation, even if technically correct so far as the ethics rules and agency law are concerned, can make for bad client relations."[72] It can also make for bad law.

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67. *Id.* at 156.
68. Commonwealth v. Lavoie, 981 N.E.2d 192 (Mass. 2013).
69. *Lavoie*, 981 N.E.2d at 194.
70. *Id.*
71. *Id.*
72. GILLERS, *supra* note 1, at 73.

As one would expect, the issue is straightforward when a case involves one of the rights or decisions enumerated in the Rules of Professional Conduct or the Restatement.[73] The problems arise when the cases involve other types of rights, and courts are left to decide the claims using the vague guidelines based on terms like ends, means, tactics, or substance.

For example, the court's reasoning in *State v. Butterfield* illustrates the problems in trying to decide the cases based on distinctions among different levels of constitutional rights. Likewise, the decision in *Commonwealth v. Lavoie* illustrates the inadequacy of attempting to use a tactics/means distinction to determine if the attorney's conduct violated his duty to the client.

In *Butterfield*, the court avoided the unworkable tactics/substance distinction in favor of one based on an evaluation of the importance of the decision, which is a good thing. However, it then decided that there are some constitutional rights that apparently deserve more protection than others. That is a bad thing.

What the court did in fact was compare those types of rights the decisions about which have been determined to be for the client to make with the decision to waive the right to a public trial, regardless of the fact that this is a constitutional right.[74] This, in essence, is based on the distinction that some courts have made between a mere constitutional right and a fundamental constitutional right, which the court defined as one that is "of central importance to the quality of the guilt-determining process and the defendant's ability to participate in that process."[75]

According to the court, while the right to accept a plea agreement, the right to decide whether to plead guilty, the right to a trial by jury, and the right to have an interpreter meet this requirement, the right to a public trial does not.[76] This approach was recently adopted by the Supreme Court of Michigan when, citing *Butterfield*, it held:

> While certain constitutional rights are preserved absent a personal waiver, those rights constitute a narrow class of foundational constitutional rights that "are of central importance to the quality of the guilt-determining process and the defendant's ability to participate in that process." Indeed, each of the foundational constitutional rights that are preserved absent a personal waiver necessarily implicates a defendant's *other* constitutional rights. For example, the purpose of the right to counsel "would be nullified by a determination that an accused's ignorant failure to

73. *See supra* note 41.
74. *Butterfield*, 784 P.2d at 156.
75. *Id.* at 156.
76. *Id.*

> claim his rights removes the protection of the Constitution" because it is counsel's responsibility to "protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights. . . ." Because the right to counsel "invokes, of itself, the protection of a trial court," preservation of the right does not require an affirmative invocation. Similarly, a waiver of the right to plead not guilty "would shut off the defendant's constitutional right to confront and cross-examine the witnesses against him which he would have an opportunity to do under a plea of not guilty." The right to a public trial is "of a different order" because the violation of that right "does not necessarily affect qualitatively the guilt-determining process or the defendant's ability to participate in the process."[77]

The problem with the reasoning in these cases is that it fails to recognize the value of the right to a public trial, as discussed by the U.S. Supreme Court's decisions on public trials, and the defense counsel's professional responsibility duties to a client. Taking those into account, the argument upon which the courts' analysis is based is less convincing.

These courts' analyses are based on whether the right at issue is "of central importance to the quality of the guilt-determining process."[78] There should be no question that the right to a public trial meets this element. The right to a public trial has its roots in our English common law heritage,[79] and the Supreme Court has held that inherent in this heritage is the presumption of openness of judicial proceedings.[80] Also, as the Court has explained, "[t]he Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open,"[81] and openness was regarded as an important aspect of the process itself.[82] According to the Court, "public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system"[83] because, as Justice Brennan explained in a concurring opinion, "[p]ublicity serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process."[84] His view, which the Court later adopted,[85] was that "[o]pen trials play a fundamental role in furthering the efforts of

77. *Vaughn*, 821 N.W.2d at 297-98.

78. *Butterfield*, 784 P.2d at 156.

79. For a discussion of this history, see Richmond Newspapers v. Virginia, 448 U.S. 555 (1980).

80. *Richmond Newspapers*, 448 U.S. at 573.

81. *Id.* at 575.

82. *Id. See supra* text accompanying notes 42 through 46.

83. Press Enterprise Co. v. Superior Court (II), 478 U.S. 1, 12 (1986).

84. *Richmond Newspapers*, 448 U.S. at 593 (Brennan, J., concurring).

85. *See Press Enterprise Co.*, 464 U.S. at 508 (openness creates confidence that standards of fairness are being observed and enhances basic fairness of criminal trials).

our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence."[86] In other words, unlike what the supreme courts of Utah and Michigan held in *Butterfield* and *Vaughn*, the view of the U.S. Supreme Court is that the right to a public trial is "of central importance to the quality of the guilt-determining process."[87] In addition, a number of courts, including the U.S. Supreme Court, have specifically emphasized the importance of openness to a defendant's family members.[88]

Also, if the Michigan Supreme Court is correct when it states in *Vaughn* that it is counsel's responsibility to "protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights,"[89] then one must ask what is the proper way for an attorney to meet that responsibility. Because that responsibility must be met by making important decisions that affect the client's constitutional rights, as discussed above, it would not be proper for the attorney to make decisions about matters that affect the client's rights without consultation. Doing so would be inconsistent with duties included in rules of professional responsibility and would nullify the role of counsel, which is what the court in *Butterfield* claims to be worried about. In other words, the best way to "protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights"[90] would be to do the opposite of what the courts in *Butterfield* and *Vaughn* suggest: to explain those rights to the client and allow the client to determine whether it would be best to waive them. Simply stated, the basis for the decision in *Butterfield* and similar cases actually points to the conclusion that the decision to waive a constitutional right should belong to the client.

Attempting to avoid this last problem (taking a position inconsistent with principles of professional responsibility), in *Commonwealth v. Lavoie*,[91] the court's conclusion that an attorney can waive a defendant's constitutional right without the client's consent is based on the mere assertion that waiving the client's constitutional right to a public trial was a tactical decision. This way the court can conclude that the attorney's

86. For this reason, although the right to a public trial is not absolute, "it is only under the most exceptional circumstances that limited portions of a criminal trial may be closed even partially to the public." *Richmond Newspapers*, 448 U.S. at 593. *See also* Tinsley v. United States, 868 A.2d 867, 873 (D.C. 2005); *Waller*, 467 U.S. at 45 (the circumstances under which the right to an open trial may give way will be rare and the balance of interests must be struck with special care).

87. *Butterfield*, 784 P.2d at 156.

88. *In re Oliver*, 333 U.S. at 272 ("[A]n accused is at the very least entitled to have his friends, relatives and counsel [present at trial]."); *Littlejohn*, No. 11-CO-820 (D.C., August 29, 2013) (citing *Tinsley*, 868 A.2d at 873) (presence of family and friends at trial is particularly important).

89. *Vaughn*, 821 N.W.2d at 298 (quoting Johnson v. United States, 304 U.S. 461, 465 (1997)).

90. *Id.*

91. *Lavoie*, 981 N.E.2d 192.

responsibility to protect the client's interests is not affected because his conduct was within his authority to act for the client. The problem with this approach to the issue, however, is that it is based on a flawed interpretation that ultimately contradicts the fundamental basis of the allocation of authority within the attorney-client relationship and may result in a conflict of interests.

In *Lavoie*, when the jury selection for the defendant's trial began, court officers excluded his family from the courtroom.[92] The defendant's attorney did not object.[93] After his conviction, the defendant moved for a new trial, arguing that his right to a public trial under the Sixth and Fourteenth Amendments to the United States Constitution was violated when the court officers closed the courtroom to the public during the voir dire.[94] The judge, who had not been aware that the officers had excluded the defendant's family, conducted an evidentiary hearing during which the defendant's lawyer testified that "it was not his usual practice to object when court officers cleared the court for jury selection because he was aware that space was often insufficient, and he did not want to interfere with court officers who he perceived engaged in a difficult job."[95] The attorney also explained that he thought the defendant's family members "could present a distraction."[96]

After the hearing, the judge concluded that the two-day closure of the courtroom violated the defendant's Sixth Amendment rights, but denied the motion for a new trial because, among other things, "defense counsel's failure to object to the closure was a reasonable tactical decision."[97] On appeal from the judge's ruling, a divided appeals court reversed, concluding that the defendant's right to a public trial had been violated.[98] Subsequently, on appeal from that ruling, although it agreed that the defendant's constitutional right had been violated, the state supreme court reversed.

The defendant's argument was simply that he had not waived his right to a public trial because it was improper for his attorney to waive his constitutional rights without ever discussing the issue with him.[99] The court, however, concluded that counsel may waive, with or without the defendant's express consent, the right to a public trial during jury selection

92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 195.
96. *Lavoie*, 981 N.E.2d at 195.
97. *Id.* at 196.
98. *Id.*
99. *Id.*

"where the waiver is a tactical decision as part of counsel's trial strategy."[100]

The court offered no explanation to support its conclusion that a tactical decision that affects a constitutional right should be considered to be a mere tactical decision (which the attorney would have the authority to make without the client's consent) as opposed to a decision that affects a fundamental right (which the attorney could not make without the client's consent).[101] The court simply repeated the conclusion that the defendant counsel's waiver of the defendant's right to a public trial during jury selection was a tactical decision, which is in defense counsel's purview to manage the conduct of the trial.[102]

Nor did the court explain exactly why the decision was, in fact, tactical. The attorney gave several different reasons for his decision not to object to the closed proceeding, and the only one that sounded tactical was that the family members could present a distraction.[103] The other reasons were the attorney's own personal or professional interest in not interfering with the court personnel.[104] Yet, the court did not consider the possibility that allowing the attorney to use his own interests as a deciding factor to waive a client's constitutional right might constitute a conflict of interest.

The court clearly recognized that the decision in the case depended on an understanding of the allocation of authority to make decisions within the attorney-client relationship, and it understood the basic principles related to the allocation of authority. The court explained that an attorney is best equipped to make choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance because they depend upon "tactical considerations."[105] But, as the court explained, in order to preserve the basic rights of the accused, when it comes to fundamental rights, it is the defendant who has the right to decide to waive the defendant's rights.[106] The court also understood that a criminal defendant has a constitutional right to a public trial, which includes the jury selection process and that in this case that right was, in fact, violated.[107] Yet, even after finding that the defendant's constitutional right had been violated, the court was satisfied with concluding that an

100. *Id.* at 198.
101. *Lavoie*, 981 N.E.2d at 192.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 196-99.
106. *Lavoie*, 981 N.E.2d at 192.
107. *Id.*

attorney could make the decision to waive a client's constitutional right without consulting the client.[108]

Like in so many other cases, the court's decision was based on the claim that the attorney's decision was tactical. The problem with this type of reasoning, however, is that an attorney can always claim a decision was tactical.[109] Isn't it a tactical decision to decide whether to plead guilty to avoid a trial, or whether to waive the right to a jury trial, or whether a defendant should testify? If so, then the attorney should be able to decide without consulting the client on how to plead for the client, whether to waive a jury trial, or whether the defendant should testify.[110] Yet, we know the attorney cannot do that. These are all tactical decisions, but the attorney cannot make the decision without consulting the client. What we can't seem to be able to explain is why.[111]

This is why basing the analysis on whether the decision is tactical is unworkable.[112] Court opinions, including those of the Supreme Court, that emphasize the strategic or tactical element of the decision at issue fail to distinguish among the different types of decisions. In one way or another, all decisions involve tactical or strategic considerations.[113]

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108. *Id.*

109. A public defender from Connecticut has summarized this concern in his blog as follows: "I'll bet you a box of Krispy Kreme donuts this attorney, when seeing a copy of the motion raising this claim, thought: 'oh crap, I never even thought of that!' And if you've practiced criminal law for longer than a second, you've already run into some CYA lawyer who's told you to claim it was a tactical decision, no matter what." *See It's not like you knew you had that right anyway*, A PUB. DEFENDER (Feb. 18, 2013), http://apublicdefender.com/2013/02/18/its-not-like-you-knew-you-had-that-right-anyway/.

110. *See* Brown v. Artuz, 124 F.3d 73 (2d Cir. 1997) (recognizing an argument that would place defendant's decision to testify within counsel's control because it is a strategic or tactical decision); U.S. v. Teague, 953 F.2d 1525 (11th Cir. 1992) (if it were true that the mere fact that the decision on whether defendant should testify involves strategy mandates that the decision rest with defense counsel then the decision to waive a jury trial would logically also rest with the defense).

111. LAFAVE ET AL., *supra* note 12, at 796 ("While the rights subject to defendant's 'personal choice' clearly are 'fundamental,' the [U.S. Supreme] Court has not explained why various rights subject to counsel's authority are not equally fundamental. . . . If the fundamental nature of a right is measured by its importance, its historic tradition, or its current status in constitutional or state law, [other] rights would appear to be on the same plane.").

112. GILLERS, *supra* note 1, at 80 ("The ends/means distinction . . . has never proved truly workable. For example, the decision whether a criminal accused will testify is, strictly speaking, a decision about means toward the end of an acquittal, yet it is a decision for the accused."); *see also Gonzalez*, 553 U.S. at 256 (Scalia, J., concurring) (the tactical vs. fundamental approach is vague and derives from nothing more substantial than the Supreme Court's say-so).

113. Supreme Court Justice Antonin Scalia agrees. In his concurring opinion in *Gonzalez*, he stated: "What makes a right tactical? Depending on the circumstances, waiving *any* right can be a tactical decision. Even pleading guilty, which waives the right to trial, is highly tactical, since it usually requires balancing the prosecutor's plea bargain against the prospect of better and worse outcomes at trial." *Gonzalez*, 553 U.S. at 256 (Scalia, J., concurring); *see also* LAFAVE ET AL., *supra* note 12, at 796-97 ("In sum, just as the fundamental rights characterization could be applied to many of the rights subject to counsel's control, so could the characterization of a decision as strategic and requiring counsel's expertise be applied to certain basic determinations subject to defendant's control.").

The end result of the analysis of the courts that have decided that an attorney can waive the client's constitutional rights without consultation is that, unless the case involves one of the decisions specifically mentioned in the Rules or Restatement, a lawyer's authority to decide would always control regardless of whether the decision would prejudice the client's substantial rights, because the lawyer could always claim, or a court could always find, that the decision was part of a tactical maneuver. Yet, it must be presumed that the drafters of the Rules of Professional Conduct did not intend to deprive a client of the chance to make decisions about a fundamental right.[114] Otherwise, the underlying premise of the Rules of Professional Conduct and the Restatement would be irrelevant. That would not be a good result.

This undesirable result can and should be avoided by reading "objectives" to include any decision affecting the merits of the cause or substantially prejudicing a client's rights.[115] In this way, a decision involving a client's constitutional right has to be considered to be for the client regardless of whether it can be considered to be tactical, unless it is a decision that needs to be made "in the moment" and does not allow for a reasonable opportunity for consultation, such as raising an objection in the middle of a trial. Most issues that could affect a constitutional right, however, will not fall into this category. Also, this would eliminate the dubious distinction between mere constitutional rights and fundamental constitutional rights.[116]

There is, on the other hand, an alternative solution to the problem, proposed by Supreme Court Justice Antonin Scalia in his concurring opinion in *Gonzalez*. His suggestion must be noted, and then rejected. In short, his position is as follows:

> . . . I would not adopt the tactical-vs-fundamental approach, which is vague and derives from nothing more substantial than this Court's say-so. . . . What makes a right tactical? Depending on the circumstances, waiving *any* right can be a tactical decision. Even pleading guilty, which waives the right to trial, is highly tactical,

114. FREEDMAN & SMITH, *supra* note 12, at 67.

115. *Id.* at 66.

116. As Justice Scalia has stated, "[a]part from constitutional guarantee, I know of no objective criterion for ranking rights." *Gonzalez*, 553 U.S. at 256 (Scalia, J., concurring) (one would think that any right guaranteed by the Constitution would be fundamental); LAFAVE ET AL., *supra* note 12, at 796 ("While the rights subject to defendant's 'personal choice' clearly are 'fundamental,' the [U.S. Supreme] Court has not explained why various rights subject to counsel's authority are not equally fundamental. . . . If the fundamental nature of a right is measured by its importance, its historic tradition, or its current status in constitutional or state law, [other] rights would appear to be on the same plane.").

since it usually requires balancing the prosecutor's plea bargain against the prospect of better and worse outcomes at trial.

Whether a right is "fundamental" is equally mysterious. One would think that any right guaranteed by the Constitution would be fundamental. . . . Apart from constitutional guarantee, I know of no objective criterion for ranking rights. . . . The essence of "fundamental" rights continues to elude.

I would therefore adopt the rule that, as a constitutional matter, all waivable rights (except, of course, the right to counsel) can be waived by counsel. . . .

It may well be desirable to require a defendant's personal waiver with regard to certain rights. Rule 11(c) of the Federal Rules of Criminal Procedure, for example, provides that before accepting a guilty plea the court must "address the defendant personally in open court," advise him of the consequences of his plea, and ensure that the plea is voluntary. . . .

Even without such rules it is certainly prudent, to forestall later challenges to counsel's conduct, for a trial court to satisfy itself of the defendant's personal consent to certain actions, such as entry of a guilty plea or waiver of jury trial, for which objective norms require an attorney to seek his client's authorization. See, *e.g.*, ABA Model Rule of Professional Conduct 1.2(a) (2007) . . . But I know of no basis for saying that the *Constitution* automatically invalidates *any* trial action not taken by the defendant personally, though taken by his authorized counsel. I know of no way of determining, except by sheer prescription, which trial rights are *ex ante* and *by law* subject to such a limitation upon waiver. Assuredly the tactical-fundamental dichotomy does not do the trick. I would leave this matter of placing reasonable limits upon the right of agency in criminal trials to be governed by positive law, in statutes and rules of procedure.[117]

Justice Scalia is correct in concluding that the distinctions between ends and means, tactics and rights, and fundamental constitutional rights and non-fundamental constitutional rights do not help determine which

117. *Gonzalez*, 553 U.S. at 256-58 (Scalia, J., concurring).

rights can be waived by counsel without a client's consent.[118] Having concluded that, though, he suggests that the best approach would be to adopt a rule that counsel can waive all waivable rights (except the right to counsel) unless specific statutes or rules say otherwise.[119]

There are several problems with this suggestion. First, Justice Scalia's approach puts the emphasis back on the interpretation of rules of procedure or professional conduct, which simply takes the discussion back to the beginning and provides as little guidance as there was to begin with because, as discussed above, the statutes and rules available are inadequate. They don't provide a coherent analysis to help determine which rights counsel can waive without consultation. Also, and more importantly, Justice Scalia's approach would place defendants in danger of suffering the consequences of the conduct of their lawyers who could waive all their rights without consultation whatsoever.

It seems that Justice Scalia is concerned about holding that there is a constitutional right to make certain decisions. Yet, that has never been decided, nor was it the issue in *Gonzalez*. Also, Justice Scalia may be thinking that the Court's ruling creates the basis for arguing that any time an attorney makes a decision that belongs to the client, a court would have to reverse the conviction because of ineffective assistance of counsel. Yet, as discussed above, although the defendant could make the argument, that would not necessarily be the result. In such cases, courts use a "prosecution-friendly" standard that requires the defendant to prove that the attorney's representation was inadequate and that the inadequate representation resulted in prejudice, which is defined by a reasonable probability that, but for the attorney's mistakes, the verdict may have been different.[120]

CONCLUSION

According to some courts, an attorney can waive a client's constitutional right to a public trial without the client's consent if the attorney does so as part of a tactical decision. Yet, the decision to waive a public trial is no more tactical than the decision to waive a jury trial or to

118. In fact, Scalia suggested that any right guaranteed by the Constitution should be considered fundamental. *Id.* at 256.

119. *Id.* at 257.

120. *See supra* note 41. Justice Scalia's conclusion, however, is partially supported by the recently decided case *Littlejohn v. United States* discussed *supra* in note 41. In that case, the court held that if the defendant's right to a public trial has been violated and if the defendant's attorney's waiver of the defendant's right was ineffective assistance of counsel, then the defendant would not have to show that the attorney's conduct actually resulted in prejudice. The fact that prejudice would be presumed does not relieve the defendant from the requirement to show the attorney's conduct was ineffective assistance of counsel in the first place.

have criminal defendants testify on their own behalf. In all three cases, the decision affects the client's constitutional rights and, thus, the attorney should not be allowed to decide for the client without consultation.

Rules and doctrines related to professional responsibility should be based on the notion that attorneys should conduct their representation while being mindful of, and with the aim to protect, the interests of their clients. The analysis used by courts that hold that an attorney can make decisions related to, and that can prejudice, their client's constitutional rights without consent of their clients goes against this goal. In *Lavoie*, for example, the lawyer and the court seem to have given some weight to the attorney's concern that he did not want to interfere with the court officials. Thus, the lawyer was allowed to place his personal interest over that of the client in violation of the attorney's fiduciary duty.

Likewise, although Justice Scalia is correct in urging courts to eliminate the dubious distinction between mere constitutional rights and fundamental constitutional rights, because waiving a constitutional right involves a decision that will affect the rights of clients and may affect the merits of the cause or substantially prejudice a client's rights, the decision should be considered to be for the client regardless of whether it can be considered to be tactical, at least unless the decision is one of those rare ones that absolutely needs to be made "in the moment" and that would be too impractical to defer until after consultation with the client.

In deciding cases that ask the court to determine whether lawyers have overstepped their authority to make decisions, courts should look to the Restatement for guidance. It lists five criteria to help determine when an attorney is required to defer to the client: (1) how important the decision is for the client, (2) whether the client can reach an informed decision on authorizing the lawyer, (3) whether reserving the decision to the client would necessitate interrupting trials or constant consultations, (4) whether reasonable persons would disagree about how the decision should be made, and (5) whether the lawyer's interests may conflict with those of the client.[121] This approach will preserve the proper balance of allocation of authority to make decisions within the attorney-client relationship and protect the client's rights more effectively.

121. RESTATEMENT OF THE LAW GOVERNING LAWYERS §22, cmt. e (2000).