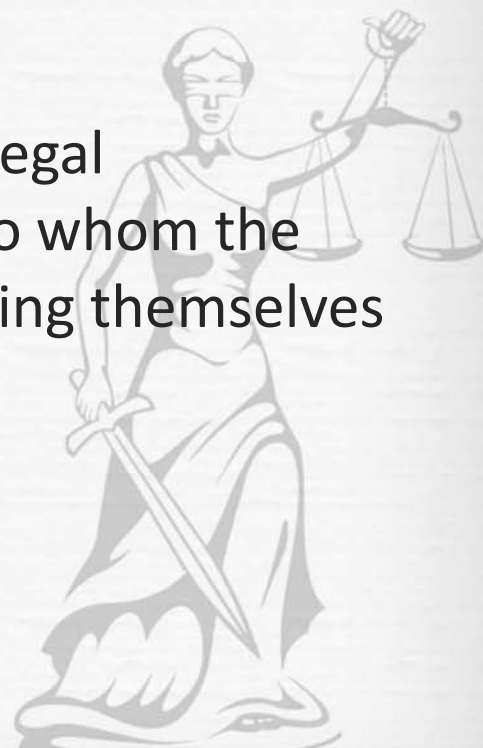




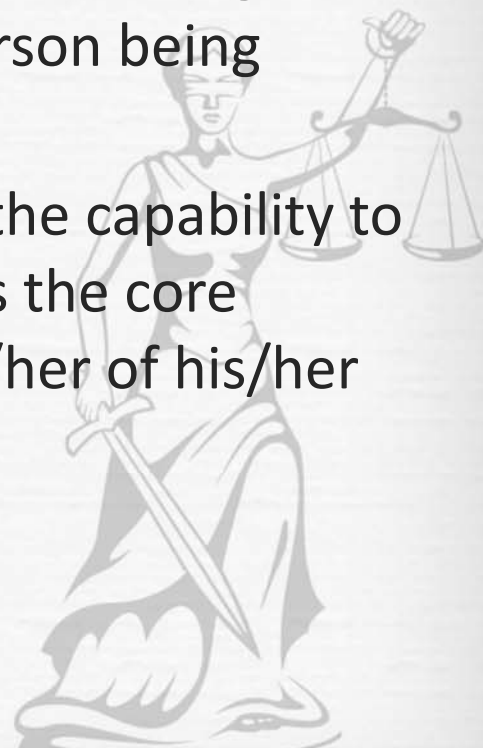
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**WHERE ARE THE BORDERS OF THE ACCEPTABLE LAWYER'S PATERNALISM?
A CLIENT'S INFORMED CONSENT IN BOSNIA AND HERZEGOVINA**

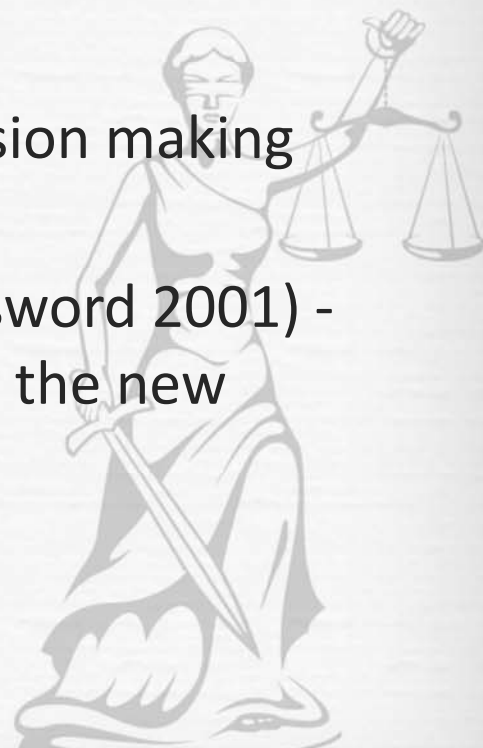
- ❖ Lawyers – protectors (upholders) of human dignity
- ❖ Lawyers defend “human dignity by giving the client voice and sparing the client the humiliation of being silenced and ignored”. (Luban 2005, p. 822)
- ❖ Audiatur et altera pars
- ❖ A crucial dignitarian idea connected with law (legal procedures) – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves (Waldron 2012, p. 210);



- ❖ A lawyer also could be the one who jeopardizes the client's dignity - the problem of lawyer's paternalism;
- ❖ Paternalism: "the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced" (Dworkin 1972, p. 11).
- ❖ Treating someone as a child, denying him/her the capability to make rational and adequate decisions, which is the core meaning of paternalism, means depriving him/her of his/her personal autonomy (his/her basic dignity).



- ❖ Traditional model of counseling – an absence of meaningful interchange between lawyer and client; clients should be passive and delegate decision-making responsibility to their lawyers (Dinerstein 2004, p. 151);
- ❖ Dominant paternalistic approach
- ❖ Client-centered counseling - fosters client decision making (enhances client's autonomy and dignity);
- ❖ “Dignity as empowerment” (Bayleveld, Brownsword 2001) - the basis of the client-centered counseling and the new model of the lawyer-client relationship;

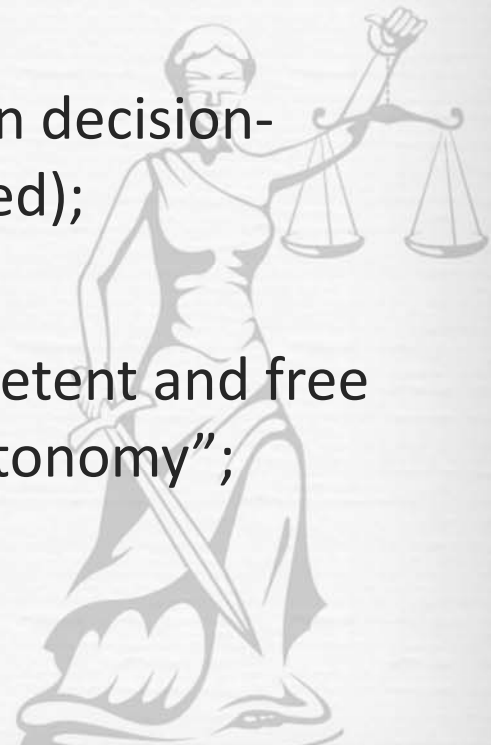




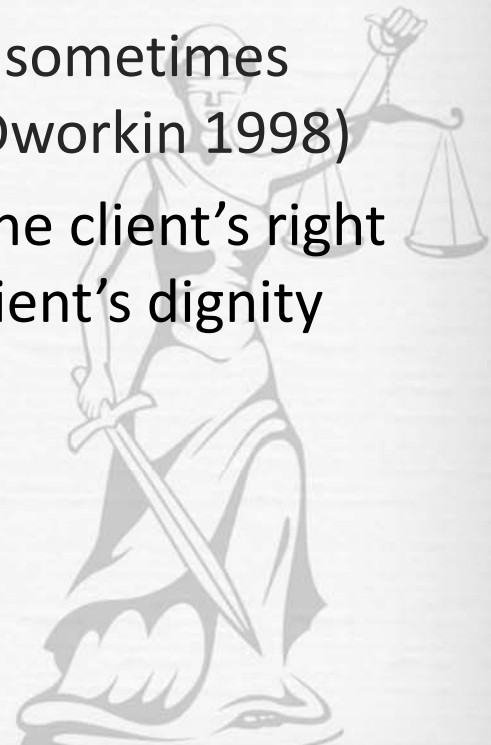
- ❖ “Dignity as constraint” (Janus-face of human dignity); e.g., lawyers’ right to refuse representation;



- ❖ Threats to dignity within lawyer-client relationship (beside lawyer's paternalism):
- ❖ Lawyer's moral indifference; lawyers as "an amoral technicians" (Wasserstrom 1975, p. 6);
- ❖ Risk of self-instrumentalization
- ❖ Client's passivity (need of active participation in decision-making; otherwise, clients dignity is undermined);
- ❖ Inflorescent dignity (Sulmasy 2013);
- ❖ Problem of "botched autonomy": when "competent and free agents act in ways that fail the standards of autonomy"; (Barilan 2011, p. 496)



- ❖ The inevitability of paternalism (Wasserstrom 1975)
- ❖ Soft (weak) and hard (strong) paternalism
 - Soft paternalism: the person for whom we acting paternalistically is in some way incompetent;
 - Hard paternalism: the view that paternalism is sometimes justified even if the action is fully voluntary; (Dworkin 1998)
- ❖ The appropriate regulation and realization of the client's right to informed consent as the guarantee of the client's dignity protection;



- ❖ Rejection of hard paternalism (a competent client has a last word) doesn't mean the negation of the lawyer's morally active and responsible role;
- ❖ On the other hand, the client's right to active participation in decision-making is at the same time his/her responsibility.



International codes

- ❖ Code of Conduct for European Lawyers, International Principles on Conduct for the Legal Profession (IBA, 2001), Recommendation No. R (2000)21 of the Council of Europe's Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, Basic Principles on the Role of Lawyers (UN, 1990)
- ❖ No explicit guidelines
- ❖ The client's right to be informed about the progress of the matter with which his/her lawyer has been entrusted (Code of Conduct for European Lawyers, Rule 3.1.2);



The Code of Professional Responsibility (ABA, 1969)

- ❖ “In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.”

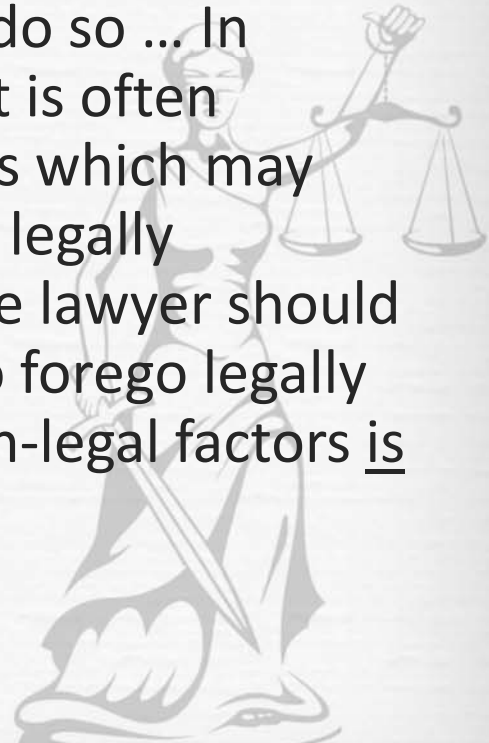
Ethical Consideration 7-7



The Code of Professional Responsibility, 1969)

- ❖ “A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so ... In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible ... In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.”

EC 7-8



Model Rules of Professional Conduct, ABA

- ❖ “Subject to paragraphs (C) and (D), a lawyer shall abide by a client’s decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.” (Rule 1.2 a)

“A lawyer shall:

- 1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required;



- 2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- 3) keep the client reasonably informed about the status of the matter;
- 4) promptly comply with reasonable requests for information ...” (Rule 1.4 a)

“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

(Rule 1.4 b)



Client's informed consent in Bosnia and Herzegovina

- ❖ Bosnia and Herzegovina (BH), as a complex state community, consists of two entities: Republic Srpska (RS) and the Federation Bosnia and Herzegovina (FBH).
- ❖ Lawyer's professional associations are organized at the entity level (the Bar Association of Republic Srpska and the Bar Association of the Federation Bosnia and Herzegovina)
- ❖ Traditional model of lawyer-client counseling



Republic Srpska

- ❖ Code of Lawyer's Ethics (adopted by the RS' Bar Association):

During the realization of his/her professional duties, a lawyer shall act only when he/she is authorized by his/her client.

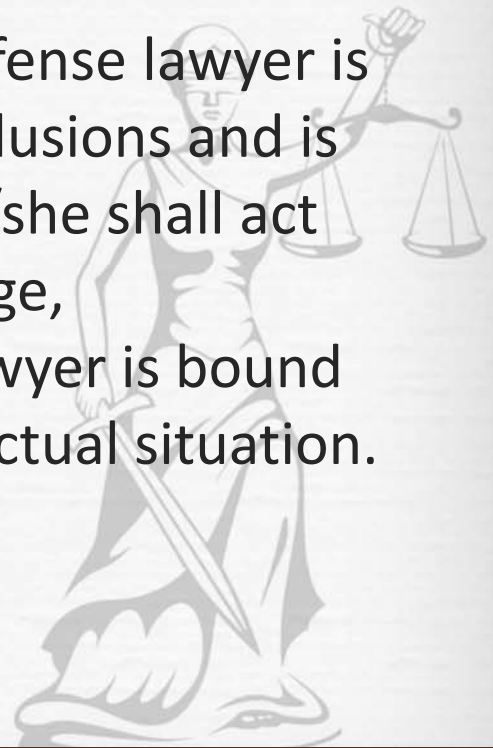
(Article 3.2)



Federation of Bosnia and Herzegovina

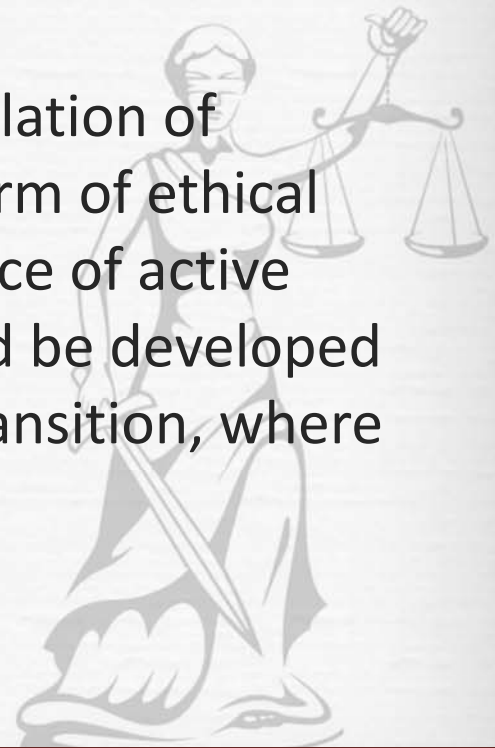
- ❖ Code of Lawyer's Ethics (adopted by the Bar Association of the Federation of Bosnia and Herzegovina):

Defense in criminal proceedings: A criminal defense lawyer is independent in legal argumentations and conclusions and is not bound by the defendant's instructions (he/she shall act according to his/her own conscience, knowledge, responsibility and professional expertise). A lawyer is bound by his/her client's instructions regarding the factual situation. (Article 4.5)



Conclusion:

- ❖ Protection of client's dignity requires respect for client's autonomy and his/her decision making role (necessity of client's active participation in decision-making, as the client's right and responsibility);
- ❖ In Bosnia and Herzegovina, more detailed regulation of client's position is necessary (at least, in the form of ethical guidances); client's awareness of the importance of active engagement in decision-making process should be developed (this is particularly important in countries in transition, where culture of participation is not strong enough).



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