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Ethical Considerations of Representing the Elderly

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Attorneys providing legal services to elderly clients often confront difficult ethical problems and dilemmas. They must sometimes choose between alternative courses which appear to violate generally recognized ethical precepts. They frequently encounter ethical issues on which little or no guidance is found in standard formulations on professional responsibility. Relevant published ethics opinions are not numerous and are often contradictory. Fortunately, many of the ethical problems and issues that arise in representing the elderly can be resolved or minimized if the circumstances and relationships that present them are anticipated and proper precautions are taken. Success in this regard requires a heightened sensitivity to such issues. Until more adequate direction is forthcoming from the profession, the attorney must resort to his own moral values and sense of professionalism for guidance.

This article identifies factors and relational settings which generate many of the ethical difficulties encountered in representing the elderly. It examines aspects of selected representation situations and discusses recurring issues in the context of existing guidelines. It does not treat the issues presented comprehensively and does not provide definitive answers or satisfy a desire for certainty. Hopefully, it will increase awareness of and sensitivity to ethical issues and assist in minimizing ethical dilemmas.

**Contributing Factors**

The age of a client is rarely of itself significant to the presence of ethical problems. However, factors other than age which are often present in legal service undertakings involving elderly individuals can contribute to the severity of ethical problems. For example, elderly clients are more likely to be heavily dependent upon family members or others for personal care and attention than other clients. Such dependence, often arising from deteriorating health, creates a potential for exertion of undue influence and an opportunity for overreaching. The attorney must determine whether services contemplated for the client are in fact desired by the client.

The elderly client is more likely to confront the attorney with needs and problems that are perceived as "family" problems or concerns. Often family members accompany the elderly individual to the initial meeting with the attorney. From previous relationships and dealings they may consider the attorney to be the "family" attorney. Some family members may in fact be current clients of the attorney or may have retained the attorney for services in the past. A particular approach to a problem may seem best for the family as a whole but may entail differing losses, gains, risks and opportunities among family members. For example, the granting of a durable power of attorney by an elderly client to a daughter may enable better management and conservation of assets for the benefit of the client and the family, but it entails a loss of client autonomy and a risk that the daughter may misuse the power to the detriment of the client and other family members who are ultimate objects of the client's bounty. Similarly, a transfer of assets by an elderly individual to a child made feasible by more liberal Medicaid rules may conserve assets within the family at the human cost of increasing the individual's dependence on others.

**The Question Of Capacity**

The elderly client is more likely to...
generate issues involving questionable legal capacity. Does the individual have capacity to perform the intended act, such as execution of a Will? Is there sufficient capacity to become a client? Is there sufficient capacity to give knowing consent to disclosure of confidential information or consent to representation that may entail conflicting interests of other clients? Is there a need for a formal guardianship, and if so, what role may the attorney play in procuring the required appointment?

**Model Code And Model Rules**

Standard formulations of rules of professional responsibility and conduct simply fail to address or address inadequately the role of the attorney who provides personal, financial and estate planning services to senior citizens and others. The Model Code of Professional Responsibility (Model Code), which was adopted by the American Bar Association in 1969 and is currently followed in a minority of states, deals almost exclusively with the advocacy role of the attorney in the context of litigation. The Model Rules of Professional Conduct (Model Rules), adopted by the ABA in 1983 to replace the Model Code and now followed in a majority of jurisdictions, acknowledges that attorneys sometimes function as advisors and intermediaries but nonetheless continues a primary emphasis on the advocacy role. The two model formulations have been amended significantly in a number of jurisdictions which purport to follow them, but the variations rarely address the role of the attorney as planner and counselor. Fortunately, there is a growing awareness of the need for the legal profession to provide more guidance on ethical issues confronting attorneys in the fields of estate planning and elder law.

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Many of the more difficult ethical issues involve such questions as who is the client, is multiple representation involved and if so, are impermissible conflicts present, is disclosure of information acquired in the representation permissible, and is the autonomy of the client sufficiently respected? Consider your role as an attorney in the following settings.

1. You have previously prepared Wills for Son and aged Father, a widower. Son consults you regarding Father’s increasing forgetfulness and failure to pay bills on time and asks your advice regarding creation of a joint bank account on which Son might draw for the purpose of paying Father’s bills. You answer Son’s questions and also discuss powers of attorney and revocable trusts as alternative arrangements. Son thanks you for your advice and says he will take Father to the bank and have Son’s name put on Father’s accounts also. You offer to explain to Father the implications of joint bank accounts and the other options discussed.

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Son declines your offer. Queries: In this situation, do you have any duties to Father? May you, without consent of Son, contact Father to explain how creation of a joint account with Son may undermine aspects of Father’s estate plan, which calls for equal treatment of his son and daughter?

2. Nephew consults you regarding his uncle and states that Uncle, who is in declining health, is willing for Nephew to handle all of Uncle’s affairs. He states that Uncle is familiar with powers of attorney. Nephew requests that you prepare a broad durable power of attorney under which Uncle appoints Nephew his attorney-in-fact. Because Uncle resides elsewhere, Nephew will arrange to have Uncle execute the instrument without Attorney’s direct supervision, and Nephew will pay your fee. Queries: May you prepare the instrument without first consulting Uncle regarding his wishes and the implications of executing the instrument? Does it matter if you suspect that Nephew plans to have Uncle reimburse the amount of your fee? If you subsequently learn that Nephew is abusing his powers under the instrument, what may you do? If Uncle were to ask you to assist him in revoking the instrument and in preparing another instrument appointing Niece as his attorney-in-fact, may you do so? Consider, as a variation, the ethical duties and problems that may arise if the instrument were prepared and executed as a consequence of a consultation with Uncle and Nephew jointly and Nephew agreed to pay your fee.

3. Client, whom you did not represent in the matter, was recently appointed guardian of the person and estate of aged Aunt, whose capacity is partially impaired. Client has retained you for assistance in discharging his duties as guardian. Queries: What, if any, duties do you have to the ward? Is there a possibility that you may be civilly liable to Ward for losses arising from breaches of fiduciary duty by Client if your closer attention to matters may have prevented or minimized the losses? Under what circumstances, if any, are you required to inform the court, the ward or others of knowledge you may acquire indicating malfeasance on the part of client?

4. You have represented Daughter and her husband for many years, providing them with estate planning services, business advice, etc. Daughter advises that her very wealthy aged mother has come to live with her following the death of her other child, Daughter’s sister. Daughter also advises that Mother’s Will and related estate planning instruments, which were prepared by an out-of-state attorney, unduly favor deceased Sister’s branch of the family in providing a per stirpes rather than per capita scheme of ultimate distribution to Mother’s grandchildren upon termination of certain trusts. Daughter has discussed the matter with Mother and Mother has agreed to major modifications along lines suggested by Daughter. Daughter would like to make an appointment for Mother to see you. Mother will become your client and will pay your fee for services rendered. You will, of course, be expected to interview Mother privately to confirm her wishes prior to drafting any instruments for execution by her. Queries: Can you properly accept Mother as a client and provide the services Mother apparently desires? Will your participation in the revision of her estate plan put the revised plan at risk in any way?

5. Husband and Wife are in their 70s and have been your clients for years. Husband is in declining health and is gradually losing his mental powers. It

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seems only a question of time before Husband will require the services of a nursing home. Their home is mortgaged and is titled in their joint names as tenants by the entireties. Most of their modest wealth consists of securities that he owns. Wife is concerned about "spousal impoverishment" and consults you regarding what should be done. You tell her of the advantage of using some of Husband's assets to pay off the mortgage (the home is an "exempt" asset under Medicaid) and suggest the need for Husband to execute a broad durable power of attorney making her his attorney-in-fact. She discusses the matter with Husband and the two later meet with you. Husband is confused. He clearly doesn't want to pay off the mortgage, he doesn't understand Medicaid and, notwithstanding your explanations, has no notion of what is meant by an exempt resource. However, he understands the need for someone to pay his bills, knows what powers of attorney are, and is willing to execute one. Wife confides that "if he will only execute the thing, I'll take care of the rest." Queries. May you try to pressure Husband to accept and implement your advice by using your considerable powers of persuasion and capitalizing on his confidence and trust in you? May you proceed with Husband's execution of the power of attorney knowing that Wife will probably use his assets to pay off the mortgage, notwithstanding his contrary wishes?

6. An elderly individual suffered a broken hip while being treated at a hospital and retained you to represent him in pursuing the tort claim. Over the course of several meetings with him at Sister's home, where he was recuperating, you noticed his attention span was weakening. At your last meeting he did not recognize you, and when you mentioned the case and the need to file suit if settlement negotiations failed, he told you to leave and not come back. Queries. What are your options in the continued representation of Client? May you, at Sister's request, seek to have Sister appointed guardian of the person and estate of client?

Who Is The/A Client?

In Situations 1, 2, and 3, above, most of the ethical issues turn on the question of just who, among the persons involved, is a client. However, neither the Model Code nor the Model Rules define the circumstances required to create an attorney-client relationship. The Comment to Model Rule 1:3 states that

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Attorneys providing legal services in settings involving the elderly must be sensitive to the possibility that overreaching and fraud may occur.

Representation

Ethical problems in representing the elderly arise when other family members are present or former clients. Both under the Model Code and Model Rules, an attorney is to avoid representation of persons with differing interests unless he is satisfied that he can adequately represent each and each consent after full disclosure. Ethics opinions issued by bar organizations addressing estate planning engagements (usually involving husband-wife situations) typically parrot the language of the Code or Rules and conclude that the attorney may go forward with concurrent representation of the family members. Few ethics opinions offer meaningful guidance in parent-child estate planning situations.

An attorney considering preparation of a Will for an elderly client and who also represents a younger family member should be especially sensitive to issues of undue influence and divided loyalty. Situation 4, while distinguishable, is close to the fact pattern in Haynes v. First National Bank of New Jersey. There, the court found the attorney to have violated the ethical standards under Model Code DR 5-105 relating to declining employment where the interests of another client may impair professional judgment. The court suggested that such "prophylactic" measures as full disclosure, full advice as to the nature of the conflict and the obtaining of knowing and intelligent waivers may not have been sufficient to overcome the conflict and permit the attorney to render unimpaired judgment on behalf of the client. The court also found from the confidential relationship existing between the clients, the confidential relationship between the attorney and the elderly client, and the breach of ethical duty by the attorney, that a presumption of undue influence in the preparation of the Will arose which could be rebutted only by clear and convincing evidence.

Whether other jurisdictions would construe the attorney's duty to avoid representation of clients with differing interests in estate planning engagements as expansively as did the Haynes court is unclear. That court recognized that the application of DR 5-105 to such situations had not previously been acknowledged within the profession. It declined to pursue sanctions against the attorney for that reason.

Preserving Confidences

The generally recognized duty of attorneys to preserve inviolate the confidences and secrets of clients is subject to exceptions that vary considerably among jurisdictions. One exception recognized in some jurisdictions involves confidences of clients of questionable capacity and is discussed in the next section. Whether and under what circumstances there should be a "client fraud harming third parties" exception is one of the most controversial ethical issues to confront the bar. Situations 2 and 3 posit circumstances in which a client has been or may be engaged in fraudulent conduct. Jurisdictions that follow the original 1969 version of the Model Code's DR 7-102 permit revelation of client fraud occurring in the course of representation where the client refuses to rectify the fraud. Jurisdictions that follow the ABA's 1974 amendment to DR 7-102 do not permit revelation of fraud when the information to be revealed is protected by a confidential communication. Those following Model Rule 1:6 in its present form permit revelation of confidential information with respect to certain threatened future criminal acts but not with respect to past fraudulent acts.

Attorneys providing legal services in settings involving the elderly must be sensitive to the possibility that overreaching and fraud may occur. Where the attorney can choose whether to represent the elderly individual or to represent others involved, choosing the elder as the client will generally present fewer ethical difficulties. Also, as in other estate planning engagements involving dual representation, the attorney who represents both an elderly person and another with respect to the same or related subject should reach express understandings regarding the ex-
tent to which information received from one may be shared or considered in serving the other.

Representation of individuals with questionable capacity is fraught with difficulty. Situation 5 presents a confused client in the context of concurrent representation of a spouse with seemingly differing interests. Notwithstanding the precepts of the Model Code and Model Rules, discussions with the parties geared to full disclosure of the implications of continued representation and the obtaining of knowing waivers may seem out of place. A suggestion that the parties employ separate counsel equates with abandonment of a family the attorney has served for years. Among the choices available to the attorney are: a) withdrawal and leaving the issue unresolved to the detriment of the family, b) attempting to pressure Husband into a course he does not desire to pursue, and the need for which he doesn't understand, and c) making a decision on behalf of Husband by enabling Wife to act on his behalf in ways contrary to his known wishes. Choice a) respects the autonomy of Husband as client and rejects the notion of the "family" as client. It is not professionally satisfying. Choices b) and c) diminish or reject the autonomy of Husband but in the mind of the attorney may advance his "real" interests.10

In Situation 6, the client is seriously incapacitated and seems to be unable to make rational decisions in a litigious setting. The Model Code and Rules provide only vague guidelines for the attorney. The Code, in EC 7-12 ("ethical considerations" under Canon 7) acknowledges "additional responsibilities" of the attorney when a client is unable to make considered judgments on his behalf. It states that where the client is under a disability a lawyer may be compelled in court proceedings to make decisions on behalf of the client, but the lawyer cannot perform any act or make any decision which the law requires to be performed or made by the client or a duly constituted representative. The Model Rules address the problem of client's capacity more broadly. Rule 1:14 directs the attorney to maintain "as far as is reasonably possible" a normal client-attorney relationship with the client whose ability to make "adequately considered decisions" is impaired. The Comment to the Rule states without elaboration that if the disabled person lacks a legal representative, "the lawyer often must act as de facto guardian." Under the Rule, "a lawyer may seek the appointment of a guardian or take other protective action with respect to the client, only when the lawyer believes the client cannot adequately act in the client's own interest." Neither the Rules nor the Comments thereto expressly address the apparent conflict between the need to maintain confidentiality with regard to information concerning the client's condition and the need to disclose such information to others in order to take such protective action as the initiation of guardianship proceedings. Published legal ethics opinions issued by state and local bar organizations, which generally are not authoritative, range from those exalting the importance of preserving confidences to those exalting the importance of promoting the best interest of the disabled client. In Illinois, an attorney may not seek the appointment of a guardian for a client if doing so would require revelation of confidential information.11 Likewise, in California an attorney may not institute proceedings to appoint a conservator on behalf of a client over the client's objection although the attorney believes the best interests of the client requires such appointment. Duties relating to loyalty, preservation of confidences and avoidance of conflicts preclude institution of such proceedings.12 In Cleveland, an attorney may seek the appointment of a guardian ad litem, but not a personal guardian, when an apparently incompetent client rejects a good settlement offer. Seeking appointment of a personal guardian would be adversarial and would place the attorney in a position of impermissible conflict with the client.13 In Kentucky, because a mentally incompetent client may lack the capacity to discharge the attorney, a purportedly discharged attorney may in extreme cases seek appointment of a conservator to protect the client, but may not serve himself as conservator.14 In New York City, a lawyer may disclose confidential information about a client's alcoholism in a conservatorship proceeding, but should seek to have such disclosure done in camera and to have the file sealed.15 However, in Nassau County, NY, a lawyer who forms an opinion that an estate planning client needs a conservator (forgetful, unkept, dashed eyes, unusual dispositional scheme) may not inform family members of his conclusion because of the primary duty to preserve confidences.16 In Florida, an attorney, after first expressing doubts to the client regarding competence, may, over the objection of the client, seek the appointment of a guardian if considered in the best interest of the client.17 And in Virginia, an attorney can seek appointment of a guardian for a mentally disabled client when believed it is in his best interest without apparent need to first confront the client on the question of his disability.18

In a recent opinion19 issued by the ABA's Standing Committee on Ethics and Professional Responsibility, the conflict between Rule 1.6 (preservation of confidences) and Rule 1.14 (authority to act as de facto guardian in certain situations) was resolved under a "best interest" approach. The opinion concluded that an attorney who, from observations of the client's aberrational behavior during the course of legal representation, reasonably suspects the possibility of medication abuse ethically may discuss the client's condition with the client's physician when the client refuses to discuss the matter and is incapable of giving a valid consent. The opinion, while acknowledging that the "sanctity of client autonomy" is the heart of the Model Rules, concludes that discussion with the physician is allowable under the express exception of Rule 1.6, which permits "disclosures that are impliedly authorized in order to carry out the representation ..." It construes Rule 1.6 in conjunction with Rule 1.14 so as to avoid internal inconsistency. The opinion recognizes that a client's disability may become so severe that the attorney can no longer respect the client's autonomy. When this occurs, and the client cannot adequately act in his own interest, the opinion finds that "Rule 1.14(b) permits a lawyer to seek the appointment of a guardian or to take other protective action ... (which) inevitably requires some degree of disclosure of information relating to the representation to third parties."20

Conclusion

Attorneys should be alert to the range of ethical issues they may confront in representing elderly clients and mindful of the setting and relationships in which they are more likely to arise. They should pay close attention to the question of "who" is the client. Ambiguities regarding who is the client should not be left unresolved. In family settings ethical issues may be minimized if the elderly member is routinely regarded as the principal client. Where representation involves persons in confidential or fiduciary relationships, the consequences of a party's breach of fi-
duciary duty or other overreaching behavior should be considered and the role of the attorney in such cases carefully assessed and, if feasible, discussed in advance. Ethical problems involving representation of clients with impaired capacity resist satisfactory resolution. Many can be avoided if the client can be persuaded while competent to anticipate the possible need for substitute decision-making and provide therefor by execution of a durable power of attorney. The apparent irrelevance of the Model Rules and Model Code to the role of the attorney in providing personal and estate planning advice to elderly individuals and to families coping with the problems presented by the needs of an aging member is a matter that needs attention. Hopefully, the organized bar will cooperate in more fully addressing the need for ethical guidance in this area.

FOOTNOTES
2. See 41 U.S.C. Sec. 1396p(c) for rules imposing limited disqualification for nursing home and similar coverage under Medicaid where certain asset transfers have been made within a 30-month period.
6. Virginia Legal Ethics Op. 1313 (Nov. 1989) held that where a lawyer prepared a power of attorney which was paid for and delivered to the attorney-in-fact and executed outside the state by the principal, who later revoked the instrument, the lawyer could not represent the principal against the attorney-in-fact without the consent of the latter in a proceeding regarding alleged abuse of the power. The attorney-in-fact was a former client and presumably the principal was not a derivative client.
8. See Model Code D.R. 5-105 and Model Rule 17.
11. See Devine, "The Ethics of Representing the Disabled Client: Does Model Rule 1:14 Adequately Resolve the Best Interests/Advocacy Dilemma?"

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