1992

Ethical Considerations of Representing the Elderly

John E. Donaldson
William & Mary Law School

Repository Citation
https://scholarship.law.wm.edu/popular_media/299
Attorneys providing legal services to elderly clients often confront difficult ethical problems and dilemmas. They must sometimes choose between alternative courses that 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 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 or her own moral values and sense of professionalism for guidance.

This article identifies factors and relational settings that 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.
Factors Contributing To Ethical Problems

The age of a client is not of itself significant to the presence of ethics problems. However, factors other than age that 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 lawyer to be the “family” lawyer. 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 and gains and 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. (See 41 U.S.C. Section 1396p(c) for rules imposing limited disqualification for nursing home and similar coverage under Medicaid where certain assets transfers have been made within a 30-month period.)

The elderly client is more likely to generate issues involving questionable legal capacity. Does the individual have the 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
The comment to Model Rule 1:4 states that if a lawyer represents a guardian for a ward and is aware that the guardian is acting adversely to the ward’s interests, the lawyer may have an obligation to prevent or rectify the misconduct.

Who Is “the” or “a” Client?

Identification of who is “the” or “a” or a “former” client is required to apply Model Rules and Model Code provisions relating to preserving confidences, avoiding conflicts and maintaining duties of loyalty and communication. 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 “[w]here a lawyer has served a client over a substantial period in a variety of matters, the client may sometimes assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.” The “Scope” segment of the Model Rules notes that “whether a client-attorney relationship exists for any specific purpose can depend on circumstances and may be a question of fact.”

Usually the client is an individual paying the “fee.” However, in some circumstances a lawyer may represent a client whose fee is paid by another, perhaps a younger family member. In such a case, Model Code DR 5-107 requires consent of the client for acceptance of the fee from a third party and a determination by the attorney that such arrangement will not interfere with professional judgment on behalf of client. Model Rule 1:8 is to like effect. A lawyer may owe duties to a “third person” in some cases, if the formal client owes such duties. The third person may thus become a derivative client. (For a provocative discussion of ethical issues involving derivative clients in selected settings, see Hazard, “Triangular Lawyer Relationships: An Explanatory Analysis,” 1 Georgetown J. of Legal Ethics 15 (1987).) In a significant Arizona opinion the court held an attorney for a guardian had duties to an elderly ward and could be civilly liable for negligent failure to prevent or mitigate breach of fiduciary duty by the guardian. (Fickett v. Superior Court of Pima County, 27 Ariz. App. 793, 558 P.2d 988 (1976).) The comment to Model Rule 1:4 states that if a lawyer represents a guardian for a ward and is aware that the guardian is acting adversely to the ward’s interests, the lawyer may have an obligation to prevent or rectify the misconduct.

Should a similar obligation exist when an attorney represents others who have fiduciary duties to third persons that are not being observed? A Virginia legal ethics opinion concluded that a lawyer representing an attorney-in-fact had no such duty to the principal, who was not regarded as a client. (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.) However, a New Jersey ethics opinion held that an administrator of a decedent’s estate may be under a duty to reveal to the court and to other counsel information that the fiduciary had “borrowed” estate assets to meet personal needs. (New Jersey Ethics Op. 591 (October 1986).)

**Multiple Representation**

Ethical problems in representing the elderly arise when other family members are present or former clients. Under both the Code and Rules an attorney is to avoid representation of persons with differing interests unless satisfied that he/she can adequately represent each, and each consents after full disclosure. (See Model Code D.R. 5-105 and Model Rule 1.7.)

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 who also represents a younger family member should be especially sensitive to issues of undue influence and divided loyalty. In *Haynes v. First National Bank of New Jersey* (87 N.J. 163, 432 A.2d 890 (1981)), the court found a violation of the ethical standards under Model Code DR 5-105 relating to declining employment where the interests of another client may impair professional judgment. There, the younger family member (child) was a client of long standing, the elder (parent) sought the services of the attorney at the urging of the child, and the documents prepared benefited the child and her issue at the expense of the issue of a deceased sibling. 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, independent judgment on behalf of the elder. 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 that could be rebutted only by clear and convincing evidence.

It is unclear 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. That court recognized that the application of DR 5-105 to such situations had not been previously 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 of clients is subject to exceptions that vary among jurisdictions. Whether and under what circumstances there should be a “client fraud harming third parties” exception is a controversial ethical issue.
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 subjects should reach express understandings regarding the extent to which information received from one may be shared or considered in serving the other.

**Questionable Capacity**

Representation of individuals with questionable capacity is fraught with difficulty. (See Devine, “The Ethics of Representing the Disabled Client: Does Model Rule 1:14 Adequately Resolve the Best Interests/Advocacy Dilemma?,” 49 Mo. L. Rev. 493 (1984) and Smith, “Representing the Elderly Client and Addressing the Question of Competence,” 14 J. of Contemporary Law 61 (1968).) The Model Code and Rules provide only vague guidelines to 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/her 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 that 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 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 a guardianship proceeding. Legal ethics opinions 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. (Illinois Ethics Op. 89-12 (April 1990).) Likewise, in California an attorney may not institute proceedings to appoint a conservator on behalf of a client over the client’s objection, even though the attorney believes the best interests of the client require such appointment. Duties relating to loyalty, preservation of confidences and avoidance of conflicts preclude the institution of such proceedings. (California Ethics Op. 1989-112 (March 1990).)

In Cleveland, OH, 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 the appointment of a personal guardian would be adversarial and would place the attorney in a position of impermissible conflict with the client. (Cleveland (Ohio) Ethics Op. 89-3.)

In Kentucky, because a mentally incompetent client may lack capacity to discharge the attorney, a purportedly discharged attorney may in extreme cases seek the appointment of a conservator to protect the client, but may not him/herself serve as conservator. (Kentucky Ethics Op. 314 (November 1986).) In New York City a lawyer may disclose confidential information regarding a client’s alcoholism in a conservatorship proceeding, but should seek to have such disclosure done in camera.
and to have the file sealed. (New York City Bar Op. 87-7 (December 1987).) However, in Nassau County, NY, a lawyer who forms an opinion that a client in an estate planning engagement needs a conservator (forgetful, unkempt, dashing eyes, unusual dispositive scheme) may not inform family members of this conclusion because of the primary duty to preserve confidences. (Nassau (New York) Bar Op. 90-17 (May 1990).)

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 it is considered in the best interest of the client. (Florida Ethics Op. 85-4 (October 1985).) And in Virginia, an attorney may seek appointment of a guardian for a mentally disabled client when it is believed to be in his/her best interest without an apparent need to first confront the client on the question of his or her disability. (Virginia Ethics Op. 570 (April 1984).)

In Informal Opinion 89-1530 issued by the American Bar Association’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, where 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, concluded 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 construed Rule 1.6 in conjunction with Rule 1.14 so as to avoid internal inconsistency. The opinion recognized that a client’s disability may become so severe that the attorney no longer can respect the client’s autonomy. When this occurs and the client cannot adequately act in his or her own interest, the opinion found 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.”

Conclusions

Attorneys should be alert to the range of ethical issues they may confront in representing elderly clients and should be mindful of the setting and relationships in which they are more likely to arise. They should pay close attention to the question of “who” the client is. Ambiguities regarding who the client is 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 fiduciary 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 execute a durable power of attorney.

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.

John E. Donaldson is the Ball Professor of Law at the Marshall-Wythe School of Law, College of William and Mary.