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Serving the Greater Good: Ethical Considerations in Representation of the Older Population

Jeffrey L. Carson & Brook H. Lester***

I. Introduction

The practice of law in general presents a never-ending quandary of potential ethical dilemmas. The fields of estate planning and elder law compound the potential situations due to the presence of clients who frequently present older in age and often with more physical and mental disabilities or even diminished capacity. These factors require advisors practicing in this area to carefully evaluate their level of competence, communication practices and service delivery models in the creation of the right framework and processes to protect the rights of their clients. Layered on top of these challenges also lies the contradicting matter of a client's autonomy. All of this creates a volatile mixture that can be a minefield for the unwary legal practitioner.

II. The Older U.S. Population

The U.S. population is aging at a quickening pace.[1] As the "Greatest Generation" passes away, the "Baby Boomers" are taking over the majority of the elderly population in the country.[2] Autonomy in decision-making is paramount to many in the older population. An adult's

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** Memphis, Tennessee.

[1] *See* Mark Mather et al., *What the 2020 Census Will Tell Us About a Changing America*, 74 Population Bulletin, June 2019, at 6 (citing Mark Mather et al., *Aging in the United States*, 70 Population Bulletin Dec. 2015, at 16, https://www.prb.org/wp-content/uploads/2016/01/aging-us-population-bulletin-1.pdf), https://www.prb.org/wp-content/uploads/2019/06/PRB-PopBulletin-2020-Census.pdf.

[2] *Id.*

> The number of people ages 65 and older in the United States has increased steadily during the past century, and growth has accelerated since 2011, when baby boomers first started to turn 65. . . . Between 2020 and 2060, the number of older adults is projected to increase by 69 percent, from 56.0 million to 94.7 million.

Although much smaller in total size, the number of people ages 85 and older is projected to nearly triple from 6.7 million in 2020 to 19.0 million by 2060. *Id.*

right to live consistent with personal values is a bedrock of a free society.[3] Whenever this autonomy is threatened, it is the legal advisor's duty to advocate on the individual's behalf while implementing the "least restrictive alternatives."[4] The duty to the older population is to do all that is possible to preserve the client's autonomy and independence. Yet there is an acknowledged battle between the client's right to autonomy and protection of this vulnerable population.[5] The struggle is recognized by the National Association of Elder Law Attorneys in an effort to build upon and supplement the minimum requirements of conduct set forth by state professional responsibility rules.[6] The lawyer's role is to maximize a client's ability to provide directions for their care in advance of the need while minimizing any obstacles interfering with the client's personal autonomy.

III. The Rules of the Road – ABA Model Rules and ACTEC Commentaries

A. Ethics in Theory and Practice

Representation of the older population is fertile ground for testing the resolve of any practitioner. Common themes arise in practice, such as complexities of the health care system, matters of cognitive ability and the issues introduced by the involvement of close family and caregivers.[7] The intertwining duties of preserving a client's autonomy, protecting the client's rights while following a client's directives, is enough to twist the most seasoned advisor into knots.

B. Communication and Confidentiality

MRPC 1.4: Communication

(a) A lawyer shall:

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3 *See* Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring).

4 *In re* Conservatorship of Groves, 109 S.W.3d 317, 329 (Tenn. Ct. App. 2003).

5 *Reporting of Suspected Elder Financial Exploitation by Financial Institutions: An update to the 2016 Advisory and Recommendations for Financial Institutions on Preventing and Responding to Elder Financial Exploitation*, Consumer Fin. Prot. Bureau 1, 4 n.7 (2019), https://files.consumerfinance.gov/f/documents/cfpb_suspected-elder-financial-exploitation-financial-institutions_report.pdf.

6 Gregory S. French et al*., Aspirational Standards for the Practice of Elder Law with Commentaries,* 2 NAELA J. 5, 6 (2005), http://www.naela.org/App_Themes/Public/PDF/Media/AspirationalStandards.pdf.

7 *See* Am. Bar Ass'n on L. & Aging, *Understand the Four C's of Elder Law Ethics*, Am. Bar Ass'n (2020), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-elderlaw-ethics-brochure.pdf.

> *(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these rules*

MRPC 1.6: Confidentiality of Information

> *(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).*

It is important that an advisor communicate at a level the client can understand. A lawyer should be particularly aware of situations in which there is a fiduciary or multiple parties to the representation.[8] Often lawyers may default in communication with the individual that is most easy to deal with or with whom the lawyer has a closer relationship. Yet, the lawyer must communicate openly and transparently with all of the parties to the representation.[9]

A client should know that they have the right to exclude family and friends. If a client chooses to include family in the decision-making process, it does not relieve the lawyer's duty of confidentiality. It is well acknowledged a lawyer representing a compromised client has special duties under the Model Rules.[10] While there are times when confidentiality can be waived, lawyers cannot share client information with other family members without the client's approval. Further, it may take an order of the court to disclose certain confidential information.[11] When disclosure is required, following assertion of confidentiality and privilege, a lawyer should minimize the disclosure to only material that is responsive to such an order.[12]

There are other rules that may impact the lawyer's duties regarding a client's confidential information.[13] Additional key considerations on the topic of competency include meeting the needs of a client, the importance of facts, diligence and communication with the client, staff training and oversight and competence with technology.

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[8] *See* Am. Coll. of Tr. & Est. Couns., *ACTEC Commentaries on the Model Rules of Professional Conduct*, at 60-62, 86 (5th ed. 2016), http://www.actec.org/assets/1/6/ACTEC_Commentaries_5th.pdf [hereinafter *ACTEC Commentaries*].

[9] *Id.* at 87 (citing ABA Comm. on Ethics & Pro. Resp., Op. 08-450 (2008)).

[10] *See id.* at 78, 101 (citing Kutnick v. Fischer, 2004 WL 2251799 (Ohio Ct. App. 2004)).

[11] *See id.* at 90 (citing Mo. Bar Ass'n Legal Ethics Couns., Informal Op. 940013 (1994)).

[12] *Id.* at 100 (citing R.I. Sup. Ct. Ethics Advisory Panel, Op. 2013-05).

[13] I.R.C. § 7525(a) (confidentiality privileges relating to taxpayer communications with federally authorized tax practitioners); 31 C.F.R. § 10.72(d)(4)(ii)(A) (2020).

C. Diminished Capacity

MRPC 1.14: Client with Diminished Capacity

> *(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.*

Lawyers have special responsibilities in working with clients whose capacity for making decisions may be diminished.[14] Advisors must treat the impaired person with the same attention and respect to which every client is entitled. Meeting in private with the client when family members are present helps the lawyer ensure that the client understands the issues and is making his or her own choices. There will be times when a lawyer concludes a client does not have the legal capacity to execute a legal document, such as a power of attorney or a will.[15]

> When the lawyer reasonably believes that the client has diminished capacity [and] is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals that have the ability to take action . . . and . . . seeking the appointment of . . . a conservator or guardian.[16]

As the lawyer decides what steps to take, they should be guided by the client's wishes and best interests and do their best to intrude as little as possible in reaching the right decisions.

IV. Common Situational Pitfalls for Advisors and Practical Solutions

A. Agent Under Power of Attorney

While an extremely useful tool in the estate planner's toolkit, the power of attorney, in all of its permutations, is also frequently misused by those seeking to exercise undue influence on the elderly. The mental capacity required to execute a power of attorney equates to the mental capacity required to enter into a contract and the contracting party must

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14 *ACTEC Commentaries*, *supra* note 8, at 160.

15 *Id.* at 161.

16 Model Rules of Pro. Conduct r. 1.14(b) (Am. Bar Ass'n 1983).

know and understand the nature, extent, character and effect of the transaction.[17]

Whenever a legal advisor is faced with a client with diminished capacity, it is advisable to first determine whether there is a capable agent under a valid power of attorney. If one is found to exist, the advisor should determine whether the agent is competent to act. The document should be thoroughly examined to determine whether it provides sufficient powers for the agent to act under the circumstances. Only at this point can the advisor proceed to further the legal needs of the client under the authority of the agent.

B. Fiduciary Duties: Personal Representatives and Trustees

The term "fiduciary" is an increasingly common term found in popular media, appearing frequently in the context of the U.S. Department of Labor "Fiduciary Rule" standard, which requires financial advisors "act in the best interests of their clients and put client interests above their own."[18] A fiduciary relationship is one "founded upon trust or confidence reposed by one person in the integrity and fidelity of another," the hallmark of which is an imbalance of power between the parties.[19]

While similar in context, the fiduciary duty of a lawyer to a client is a special relationship.[20] Lawyers who serve as fiduciaries may not collect compensation for both roles, unless specifically authorized by the court or following advance notice and no objection by the beneficiaries.[21] Other states permit the drafting lawyer to be named a fiduciary, so long

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17 Dickson v. Long, No. M2008-00279-COA-R3-CV, 2009 WL 961784, at *3 (Tenn. Ct. App. Apr. 8, 2009).

18 *Everything You Need to Know About the DOL Fiduciary Rule*, INVESTOPEDIA, https://www.investopedia.com/updates/dol-fiduciary-rule [https://perma.cc/N9J5-HSF4] (Dec. 19, 2019); *see also*, *Fiduciary Responsibilities*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/retirement/fiduciaryresp [https://perma.cc/M5XD-SSMP] ("[A]nyone who provides investment advice to a plan for compensation or has any authority or responsibility to do so are subject to fiduciary responsibilities.").

19 Penato v. George, 52 A.D.2d 939, 942 (N.Y. App. Div. 1976). *See generally* Foster v. Foster, 377 S.W.3d 497 (Ark. Ct. App. 2010) (illustrating the way the lawyer upheld a trusting relationship with the client throughout the entire representation in order to protect the client's best interest); Carlin v. Javorek, 42 So. 3d 820 (Fla. Dist. Ct. App. 2010) (ruling that a personal representative for an estate must not materially breach a fully executed settlement agreement); *In re* Sonder, 63 So. 3d 7 (Fla. Dist. Ct. App. 2011) (explaining that even after death, a fiduciary relationship continues, and in the reformation of a trust, the settlor's intent must not be compromised by the party seeking the reformation).

20 *See ACTEC Commentaries*, *supra*, note 8, at 136 (citing CAL. PROB. CODE §§ 10804, 15687 (West 2020)).

21 *Id.*

as the lawyer complies with the standards of MRCP 1.8.[22] Lawyers serving in an official fiduciary capacity can bring with it added expectations and dangers.

C. Court Appointed Conservators and Guardians

Most adults in the general population are fully capable of making their own choices. However, some matters involve people that are not capable of managing their own affairs, particularly the older population.

In situations where the adult has executed a power of attorney, the agent can act on their behalf. Where a power of attorney does not exist, then the court may appoint a guardian to act.[23] If family members or trusted advisors are not an option, state laws provide a mechanism for the appointment of a fiduciary to oversee the affairs of the incompetent. The court-supervised guardianship proceedings are often used by advisors as a "worst case scenario" as a motivating factor to convince reluctant clients to move forward with decision making and planning while there is still time.[24]

V. Conclusion

It has been said the practice of law is an art and a science.[25] Nowhere is this maxim more evident than in the practice of law with the older population. The challenges confronting the legal practitioner representing the interest of clients facing the issues of advanced age and the paradox of independence and diminished capacity are difficult for even the most seasoned of advisors. Guidance can be found in the Model Rules, the ACTEC Commentaries, the NAELA Aspirational Standards as well as various court decisions; however, nothing can serve as a true substitute for the patience and understanding required of a practitioner dedicated to serving a population in need of true compassion and competent representation. The opportunity to serve fellow citizens in true need of ethical guidance on issues of life and death is a higher calling that can certainly serve the greater good of society.

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22 *Id.* at 137 (citing Mo. Bar Ass'n Legal Ethics Couns., Informal Op. 970130 (1997)).

23 Tenn. Code Ann. §§ 34-1-106, -121 (2020).

24 *See In re* Estate of Stricklan, No. E2009-01086-COA-R3-CV, 2010 Tenn. App. LEXIS 410, at *5 (Tenn. Ct. App. June 28, 2010).

25 Basha Rubin, *Is Law an Art or a Science?: A Bit of Both*, Forbes (Jan. 13, 2015, 11:52 AM), https://www.forbes.com/sites/basharubin/2015/01/13/is-law-an-art-or-a-science-a-bit-of-both [https://perma.cc/64HC-H32M].