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Protecting the Interests of Older Clients in Multi-Generation Representations

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Protecting the Older Client in Multi-generation Representations

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I. Introduction

Estate planning is a field in which attorneys often represent members of the same family of different generations. This frequently leads to situations in which the family members have conflicting, or at least potentially conflicting, financial interests. Unfortunately, attorneys sometimes do not recognize the difficulties that such conflicting interests may cause until a full-blown fight develops between members of the family. At that point, the attorney may find himself open to a disciplinary complaint or a malpractice action, or, at the very least, a group of unhappy former clients.

Special concerns arise when one or more of the family members is in a declining physical or mental state as a result of aging. In that instance, an attorney must be even more sensitive to representing all of his clients zealously and avoiding conflicts of interest between his clients.

In a related vein, an attorney is often faced with a situation where an older person is brought to talk with the lawyer by a younger family member. Perhaps because of declining abilities, older clients are more likely than younger clients to be accompanied to the lawyer's office by family members.¹ These visits can raise issues of joint representation and loyalty to the client. Even when the situation is not technically a "multi-generation"

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1. Russell Carlisle, *Model Rule 1.6—Confidentiality of Information*, NAELA Q. (Winter 2001) (joint representation pervades the practice of elder law. In the elder law setting, the persons present at the initial conference almost always include other family members, either spouse or children).

representation, the issue of “multi-generation consultation” can also raise professional responsibility concerns. This last concept has not been the subject of much discussion in the extant literature, perhaps because it is only partly addressed by the Model Rules of Professional Conduct.²

This article will first examine the rules of professional conduct that govern multi-generation representation and representation of clients who may be impaired. It will then examine some of the case law dealing with situations in which multi-generation representation caused problems for both the attorney and the clients. Next, this article will explore the data about the aging process and loss of capacity with a focus on representing older clients. Finally, it will analyze several hypothetical situations with the goal of adequately representing clients’ interests while avoiding potential difficulties.

II. The Model Rules of Professional Conduct

Any plan for protecting the older client in a multi-generation situation must begin with an examination of the provisions of the Model Rules of Professional Conduct.³ As a result of “Ethics 2000,” the American Bar Association approved changes to the Model Rules of Professional Conduct.⁴ Most states that have adopted some version of the Model Rules of Professional Conduct have not yet reacted to the ABA’s recent suggested changes. This article will look at both the old and new rules as they relate to multi-generation representation.⁵

As is the case with so many ethical dilemmas, the Model Rules of Professional Conduct frequently do not provide any clear-cut answers to

2. See MODEL RULES OF PROF’L CONDUCT R.1.8(f) [hereinafter MODEL RULES] which provides: (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

MODEL RULES R.1.8 (2002).

3. Because the overwhelming majority of states have adopted some version of the Model Rules as the discipline rules that govern lawyers, the discussion on this article will be based on the Model Rules rather than the older Model Code of Professional Responsibility, including the Ethical Considerations and Disciplinary Rules.

4. A chart showing the state-by-state status of the Ethics 2000 changes *available at* http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.doc.

5. See *Id.* For a thorough state-by-state examination of the Model Rules, see GEOFFREY C. HAZARD, JR. & W. WILL HODES, *THE LAW OF LAWYERING, A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT*, Appendix 4 (2001). See also Dan W. Holbrook, *How the New Ethics Rules Affect Estate Planners*, 39 TENN. B.J. 31 (April 2003).

questions that arise during representation.⁶ In that instance, a lawyer must seek the best resolution under the Rules as they exist, remembering the admonition in the Scope of the Rules: “The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.”⁷ Similarly, the drafters of the Rules clearly did not intend the Rules to completely define an attorney’s duties.⁸ Rather, the drafters intended the rules to operate in a larger social and ethical context. Thus, an attorney must always look beyond the Rules in resolving difficult ethical dilemmas.

A. Diligent Representation

Each representation carries with it a basic duty of diligent representation.⁹ Perhaps because of its basic nature, this duty is seldom contemplated. When an older client is involved, however, the duty merits some examination.

Commentators frequently refer to representing older clients as involving a more “holistic” approach to the practice of law compared to the representation of younger clients.¹⁰ Such an approach may require a higher level of competence because of the great amount of trust that older clients tend to place in their attorneys. Similarly, attorneys representing older clients must become informed about legal principles governing capacity and competency. Then attorneys should take steps to ensure the work they perform for competent clients will not be successfully challenged.

Further, many attorneys agree that the substantive law governing many common issues faced by older clients is among the most difficult to master. Few would dispute that making sense of the Medicare and Medicaid statutes, regulations, and interpreting materials could consume a working lifetime.¹¹ Estate planning is perceived as a field with a long learning

6. See generally Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 *FORDHAM L. REV.* 1453 (1994).

7. SCOPE OF THE MODEL RULES ¶ 14 (2002).

8. SCOPE OF THE MODEL RULES ¶ 16 (The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law).

9. MODEL RULES R.1.1 (Competence); R.1.3 (Diligence).

10. See, e.g., Carlisle, *supra* note 1 (noting that in the last decade, thousands of attorneys have claimed a new lawyer identity, specializing in elder law as they embrace a different way to serve clients. The difference is found in the holistic, multidisciplinary aspects of engagement in the elder law specialization. It is a broader scope of engagement, creating pressure on the legal profession to expand its approach to client-lawyer relationships, especially when families are involved).

11. Judith Stein & Alfred J. Chiplin, Jr., *A Practical Guide to Medicare Hearings and Appeals*, 34 *REAL PROP. PROB. & TR. J.* 403 (Fall 1999) (noting that Medicare law is very complicated, and errors frequently occur).

curve because it requires at minimum a knowledge of probate, tax, family and property law.¹² On a given day, the attorney choosing to specialize in elder law may find herself confronted with questions involving not only these areas, but also housing law,¹³ employment law,¹⁴ insurance law,¹⁵ guardianship law and medical malpractice law,¹⁶ to name but a few.

B. Representing Clients with Potentially Diminished Capacity

The rule that addresses representation of clients with potentially diminished capacity is Model Rule 1.14. That Rule provides:

Client Under a Disability:

- (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.¹⁷

The drafters of the Model Rules recognized that aging might result in a loss of capacity. For example, the Commentary on the Rules provides:

[I]t is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.¹⁸

The post-2002 Rule makes a few semantic changes, like replacing "impaired" with "diminished," and also makes several substantive changes.¹⁹ The amended Rule alters subsection (b) and adds the following subsection (c) as follows:

12. See Charles P. Rettig, *Feature the Life and Death of Estate Taxes Recent Legislation Aims to Replace the Estate Tax with a Modified Carryover-Basis Tax Regime*, L.A. LAW. (Nov. 2001) (Income, gift, and estate planning during the next decade is made even more complicated by the anticipation that the estate tax will, in fact, not be repealed in 2010).

13. See, e.g., Lawrence A. Frolik, *Housing Choices and Older Clients*, PA. LAW. (Nov.-Dec. 2002).

14. See, e.g., Howard C. Eglit, *The Age Discrimination In Employment Act At Thirty: Where It's Been, Where It Is Today, Where It's Going*, 31 U. RICH. L. REV. 579 (1997).

15. See, e.g., Laura D. Hermer & William J. Winslade, *Access To Health Care In Texas: A Patient-Centered Perspective*, 35 TEX. TECH. L. REV. 33 (2004).

16. See, e.g., Timothy McIntire, *Is the Pain Getting Any Better? How Elder Abuse Litigation Led to a Regulatory Revolution in the Duty to Provide Palliative Care*, 11 ELDER L.J. 329 (2003).

17. MODEL RULES R.1.14 (2002).

18. *Id.* at cmt. 1.

19. MODEL RULES R.1.14 (2002).

- (b) When the lawyer reasonably believes that the client has diminished capacity, 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 or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

The post-2002 Commentary to the Rules adds a new section addressing "joint consultation."²⁰ The Comment states:

The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.²¹

This new Comment can be viewed in one of two ways: as a change in the interpretation owing to amendment of the Rules, or merely as a clarification of a principle already embodied in the rules before the changes of Ethics 2000. I suggest that the latter is the appropriate view, and should be noted even in states that have not adopted the amended rule language.

Under the pre-2002 Model Rule, the attorney is directed to "as far as reasonably possible, maintain a normal client-attorney relationship with the client."²² A normal relationship would assume the primacy of the client as decision-maker.²³ Thus, even if the client is accompanied by family members to the attorney's office, the attorney should not assume that the family members rather than the client are the ones making the decisions about the objectives of representation.

One possibility that any attorney representing an older client should consider is that if the older client loses capacity, it will be natural for other family members to want to consult with the attorney about the client's affairs. The attorney should take steps to ensure that the client's wishes are carried out with respect to this possibility. For example, it may be prudent

20. *Id.* at cmt. 3.

21. *Id.*

22. MODEL RULES R.1.14(a) (2002).

23. *See* MODEL RULES R.1.2 (2002) (setting forth role of client as deciding objectives of representation).

for the client to execute a durable power of attorney or nominate a guardian and make it clear that the client desires to waive any confidentiality strictures with respect to the attorney's future communication with that person.

In an extreme situation, the attorney might be approached by a family member seeking legal services on behalf of a person whose abilities are too impaired to allow formation of an attorney-client relationship. The Commentary to the Rules makes it clear that an attorney can render emergency legal services for a person who cannot enter into an attorney-client relationship.²⁴ The attorney can only render such legal services as are necessary to maintain the status quo or to avoid "imminent and irreparable harm."²⁵

C. Communication

If a client is to direct the objectives of representation, the attorney must communicate with the client about the law governing the matters at issue and the attorney's advice about how to address those matters. Accordingly, the Model Rules require communication between attorney and client.²⁶ Rule 1.4 of the pre-2002 rules provides:

- (a) An attorney shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) An attorney shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.²⁷

The post-2002 rule strikes subsection (a) after the word "shall," and adds the following language to better explain the nature of an attorney's duty to communicate with the client:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (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; and
- (5) consult with the client about any relevant limitation on the attorney's conduct when the attorney knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

The post-2002 rule retains subsection (b) with no changes.²⁸

24. MODEL RULES R.1.14 cmt. 6, 7 (2002).

25. *Id.*

26. MODEL RULES R.1.4 (2002) ("Communication").

27. *Id.*

28. *Id.*

In a representation involving an older client, the attorney must carefully examine the duty to adequately communicate with the client and take steps to ensure that the attorney is fulfilling the duty in each instance.²⁹ The Commentary notes that the diminished capacity of a client may have an impact on the duty to communicate.³⁰ Thus, the comment suggests that the normally required level of communication—that which would be appropriate for “a comprehending and responsible adult”—may not be required for a client with diminished capacity.³¹

In addition to capacity issues, an older client may simply have difficulty communicating because of hearing or vision difficulties. There are many anecdotes about the older client who could not read a document because the print was too small or could not understand what was going on at a meeting because people were speaking too softly or there was too much ambient noise in the room.³² An attorney should not assume that every older client has hearing or vision difficulties, but should watch for signs of trouble.

Similarly, if the older client is accompanied by a younger family member to the attorney’s office, the attorney must be careful to communicate with the older client. It is sometimes easier to speak with the younger family member than the older client. Aside from possible hearing difficulties, the attorney may simply feel closer to the younger family member because of similar age and experiences. Nevertheless, the attorney must resist any temptation to marginalize the older client in conversations.

Closely tied to the idea that an attorney has a duty to communicate with the client is the idea that there are some circumstances in which the client must acquiesce to the attorney’s proposed course of action. For example, an attorney cannot enter a plea on behalf of a client or accept an offer of settlement on behalf of the client without the client’s consent.³³ The pre-2002 rules framed this idea by requiring that the attorney abide by the client’s wishes after “consultation,”³⁴ and included a definition of “consult.”³⁵ This language has been changed in the post-2002 rules, which now

29. See generally Maureen B. Collins, *Being Right versus Saying It Right*, 91 ILL. B.J. 577 (2003).

30. MODEL RULES R.1.4 cmt. 3 (2002).

31. *Id.*

32. For some very practical and useful suggestions about dealing with impaired clients, see Robert A. Kraft, *Accommodations for Diversity*, 21(1) G.P. SOLO 17 (2004).

33. MODEL RULES R.1.2(a).

34. See, e.g., MODEL RULES R.1.2(a) (addressing scope of representation); MODEL RULES R.1.7(a) (addressing consent to representation of conflicting interests).

35. MODEL RULES R.1.0(b) (“Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.”).

speak in terms of an attorney obtaining “informed consent.”³⁶ “Informed consent” is defined in the Rules.³⁷

Both the concept of consultation and the concept of obtaining informed consent requires two-way communication between attorney and client, and also requires the capacity of the client to consent. Declining ability can cause difficulties in both respects. The client with declining abilities may not understand what he is being told, and may lack the state of mind necessary for consenting to a course of action. Again, the attorney should not assume that all older persons have trouble in these respects, but should watch for difficulties.

D. Preserving Client Confidences

The duty to preserve the confidences of a client is perhaps the most well-known and often-discussed of an attorney’s professional responsibilities. In addition to serving the interests of the individual client, keeping a client’s confidences also “ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.”³⁸

To maintain the confidentiality of client information, pre-2002 Model Rule 1.6 provides:

- (a) An attorney shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) An attorney may reveal such information to the extent the attorney reasonably believes necessary:
 - (1) to prevent the client from committing a criminal act that the attorney believes is likely to result in imminent death or substantial bodily harm; or
 - (2) to establish a claim or defense on behalf of the attorney in a controversy between the attorney and the client, to establish a defense to a criminal charge or civil claim against the attorney based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the attorney’s representation of the client.

The post-2002 Rules allow disclosure of information relating to the representation of a client in two additional circumstances: (1) to secure

36. MODEL RULES R.1.2(c) (addressing allocation of authority between attorney and client); MODEL RULES R.1.7(b) (addressing consent to representation of conflicting interests).

37. MODEL RULES R.1.0(e) (“Informed consent” denotes the agreement by a person to a proposed course of conduct after the attorney has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”).

38. PREAMBLE TO THE MODEL RULES ¶ 8 (2002).

legal advice about the attorney's compliance with [the Rules of Professional Conduct]³⁹ and (2) to comply with other law or a court order.⁴⁰

The issues involved in maintaining client confidences may prove to be the most troubling of all for the attorney involved in multi-generation representations. The attorney may be presented with a happy, cohesive family at the initial consultation, and assume that there is a desire to "keep no secrets." The problem, of course, is that circumstances change. If the attorney is not taking steps to ensure that he is carrying out a client's wishes about keeping confidences, the attorney may come to a point where the declining abilities of the client may make it impossible to obtain informed consent for disclosure. Ironically, this will probably occur at the very time that the client's family members will approach the attorney to talk about the client's affairs. Whether the family members are themselves clients or not has little to do with whether the attorney can provide the requested information unless the client has previously agreed to disclosure.

E. Conflicts of Interest

Model Rule of Professional Conduct Rule 1.7 addresses conflicts of interest. The rule is by no means a complete prohibition on representing conflicting client interests, but rather a cautionary rule setting forth the conditions under which an attorney may represent clients with conflicting interests. The pre-2002 Rule provides:

Rule 1.7: Conflict of Interest: General Rule

- (a) An attorney shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the attorney reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.
- (b) An attorney shall not represent a client if the representation of that client may be materially limited by the attorney's responsibilities to another client or to a third person, or by the attorney's own interests, unless:
 - (1) the attorney reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The post-2002 Rule states:

- (a) Except as provided in paragraph (b), an attorney shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent

39. MODEL RULES R.1.6(b)(2) (2002).

40. *Id.* at (b)(4).

conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to another client, a former client or a third person or by a personal interest of the attorney.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), an attorney may represent a client if:
- (1) the attorney reasonably believes that the attorney will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the attorney in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

The post-2002 Rules add a definition of "confirmed in writing."⁴¹ Some situations, like agreeing to representation of conflicting interests, are deemed to be of such great importance that the "informed consent" of the client must be confirmed in writing.⁴²

The threshold question under either formulation is whether there is a conflict of interest.⁴³ In the estate planning context, many attorneys simply assume that there are no conflicts of interest between various members of a family who are each disposing of their own assets. Other attorneys, however, take steps to avoid the difficulties that may ensue if family members stop behaving harmoniously.

If an attorney represents multiple members of a family, a court may later disqualify the attorney from any representation on matters related to the

41. MODEL RULES R.1.0(b) ("Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that an attorney promptly transmits to the person confirming an oral informed consent. Paragraph (e) contains the definition of "informed consent" as the agreement by a person to a proposed course of conduct after the attorney has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.") If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the attorney must obtain or transmit it within a reasonable time thereafter." The "writing" can be in electronic form. MODEL RULES R.1.0(n) (2002) ("Writing" or "written" denotes a tangible or electronic record of a communication or representation, including hand-writing, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.").

42. MODEL RULES R.1.7(b) (addressing representing concurrent conflicting interests); R.1.9(a) (addressing representing interests that conflict with interests of former clients).

43. See, e.g., Virginia Blackwell, *Conflicts of Interest When an Attorney Represents an Estate*, 27 J. LEGAL PROF. 141 (2003).

earlier representation. *In re Taylor*, the Texas Appeals Court disqualified an attorney who had rendered estate planning services to both spouses from later representing one of the spouses in a divorce action.⁴⁴ Thus, an attorney who decides to represent multiple family members may want to consider the potential for future disqualification.

III. Cases, Statutes and Ethics Opinions

A. Case Law

There is not much reported law addressing issues that arise in multi-generation representations that involve older clients. There are, however, a few decisions that give us insight into how courts might deal with these troubling issues.

For example, in 2000 the Wisconsin Court of Appeals decided *In re Guardianship of Lillian P. v. Cavey*.⁴⁵ Cavey, an attorney, represented both Lillian P, who was under guardianship, and her son, Lester P.⁴⁶ A guardian ad litem for Lillian moved to disqualify Cavey from representing Lillian.⁴⁷ The Wisconsin Court of Appeals held that a conflict of interest existed between Lillian and Lester, and concluded that Cavey must be disqualified from representing Lester because she was not competent to waive the conflict.⁴⁸

The facts that gave rise to the conflict in the court's view were that Lillian had been removed from her home and placed in protective care for her own well-being. Lester was living in the home rent-free and attempting to buy it at a price substantially less than the price that a buyer had offered for the house on the open market.⁴⁹ Although Lester claimed that he wanted to retain possession of the house in the hope that his mother could someday return to live there, the court found this possibility unlikely because of the mother's condition.⁵⁰ Thus, the court concluded that the son's true interest conflicted with the interests of his mother.

The case presented a fascinating ethical issue: whether a client who has been adjudged incompetent can consent to representation of conflicting interests by an attorney.⁵¹ In resolving this issue, the court first noted that there was substantial evidence of Lillian's dementia in the record.⁵² The

44. *In re Taylor*, 67 S.W.3d 530 (Tex. Civ. App. 2002).

45. 617 N.W.2d 849 (Wis. Ct. App. 2000).

46. *Id.* at 851.

47. *Id.*

48. *Id.*

49. *Id.* at 851-52.

50. *Id.* at 855.

51. *Id.* at 856.

52. *Id.*

court then opined that there was no evidence in the record to suggest that Lillian had made a knowing waiver of Cavey's conflict of interest.⁵³ Accordingly, the court found as a matter of law that because Lillian had been adjudicated incompetent, she was incapable of making a knowing and voluntary waiver to the representation of conflicting interests.⁵⁴

B. Statutes Requiring Mandatory Reporting of Abuse

Although not directly addressing multi-generation representation, there are mandatory reporting statutes in many jurisdictions that any attorney who represents older clients should consider. For example, an attorney must determine whether a duty exists in his jurisdiction to report suspected financial abuse.⁵⁵ Financial abuse is defined differently from state to state, and many states impose a mandatory reporting duty on one who has reasonable cause to suspect that an older person is being exploited.⁵⁶ In some states this duty is expressly made to override the attorney-client privilege,⁵⁷ whereas in other states the privilege may be used as a reason for not reporting the abuse.⁵⁸ It is easy to see how a representation involving multiple clients could lead to an attorney discovering what he believes is financial abuse of an older client.

C. Ethics Opinions

Many states have ethics opinions that address issues that may arise in the context of multi-generation representation.⁵⁹ One recent Formal Opinion of the Standing Committee on Ethics and Professional Responsibility of the American Bar Association addresses several important issues.⁶⁰

In Formal Opinion 02-428, the Standing Committee considered the ethical implications of a situation in which an attorney's client recommended

53. *Id.*

54. *Id.*

55. See generally Carolyn L. Dessin, *Financial Exploitation Statutes Impact on Domestic Relations Practice*, 16 J. AM. ACAD. MATRIM. LAW. 379 (2000) (contains a state-by-state examination of mandatory reporting statutes).

56. See generally *Id.* See also Molly Dickinson Velick, *Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse*, 3 ELDER L.J. 165 (1995).

57. See TEX. HUM. RES. CODE ANN. § 48.051 (2000) (abrogating attorney-client privilege in this context).

58. See FLA. STAT. ANN. § 415.109 (West 2000); MONT. CODE ANN. § 52-3-811(3)(f) (2000).

59. See, e.g., New York Bar Association Committee on Professional Ethics Op. 746 (2001); Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Informal Opinion Number 2002-52 (2002).

60. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-428 (2002) [hereinafter ABA Op. 02-428].

that her uncle seek the services of the attorney in drafting a will under which the first client was a potential beneficiary.⁶¹ The committee began by noting that the attorney can only represent both clients if he can exercise independent professional judgment in the representation.⁶² The niece had offered to pay the attorney's fee for the uncle's estate planning services, and the committee noted that the requirements of Rule 1.8 must be met if one other than the client pays the attorney's fee.⁶³ Without much discussion, the committee concluded that Rule 1.7 was not implicated because the situation did not suggest that representation of either client would materially limit representation of the other.⁶⁴ The Committee cautioned that the attorney should communicate with both clients about the services he is currently performing for the other client, but saw no serious flaws in the proposed representation.⁶⁵

D. Malpractice Liability

In a case involving representation of clients from multiple generations of the same family, the attorney may be concerned that an action taken with one client may cost him the business of another client. Such concerns should not, of course, influence the attorney's judgment in the representations.

Even if the attorney represents only one generation of a family, he may be concerned that other family members will sue if they are unhappy with his work.⁶⁶ If the attorney has been negligent in preparing a will, some states allow disappointed beneficiaries to sue the attorney.⁶⁷ The possibility of avoiding strategies that are likely to engender displeasure among beneficiaries has been much discussed in the estate planning literature.⁶⁸

61. *Id.*

62. *Id.*

63. *Id.* at 2. See also MODEL RULES R.1.8(f). Post 2002 MODEL RULES R.1.8 provides in pertinent part:

(f) An attorney shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the attorney's independence of professional judgment or with the client-attorney relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

64. *Id.* at 3-4.

65. *Id.* at 5.

66. See generally Bradley E.S. Fogel, *Attorney v. Client—Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261 (2001).

67. See, e.g., *Creighton Univ. v. Kleinfeld*, 919 F. Supp. 1421 (E.D. Cal. 1995).

68. See, e.g., Howard M. Zaritsky, *Avoiding Malpractice Suits: The View from an Aisle Seat*,

In light of the growing trend to allow disappointed beneficiaries to sue the drafting attorney, one commentator has suggested that the specter of potential liability to beneficiaries may itself cause a conflict of interest.⁶⁹

IV. Representing Older Clients: Is Decline Inevitable?

The dramatic rise in the number of older Americans has raised increased concerns about caring for the legal and other needs of those citizens.⁷⁰ Many seem to assume that an older client will be more vulnerable to the overreaching of others and less likely to make intelligent decisions of a younger client. The good news is that for most older adults, such ageist stereotyping is proving untrue.

Studies have fairly consistently shown that aging does not bring inevitable mental decline.⁷¹ In fact, the percentages of older Americans suffering from serious enough dementia to cause difficulties with the activities of daily life are only about one percent at ages sixty-five to seventy-four, about seven percent at ages seventy-five to eighty-four and about twenty-five percent at age eighty-five and older.⁷²

Although an attorney should watch carefully for signs that any client is suffering from diminished capacity, he or she should be careful not to assume that anyone over age sixty-five is incapable of making informed decisions.⁷³ Though it is true that an older client is statistically more likely to have diminished capacity than a younger client, the majority of older clients retain their intellectual capabilities well into old age and perhaps until they die. Accordingly, attorneys must take care not to stereotype older clients as vulnerable without sufficient proof of diminished capacity.⁷⁴

25 EST. PLAN., Mar.-Apr. 1998, 144, at 144; Louis S. Harrison, *Defensive Strategies for Potential Will and Trust Contests*, PROB. & PROP. (Nov.-Dec. 1999) at 6, 7.

69. Fogel, *supra* note 66, at 265.

70. Approximately thirty-five million Americans are now age sixty-five or older. See Bureau of the Census, U.S. Dep't of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES 16, 37 (110th ed. 1990) (table no. 18, Projections of the Total Population by Age, Sex, and Race: 1989 to 2010). The number of Americans age sixty-five or older is projected to rise to forty million in 2010. *Id.*

71. See, e.g., H.B. GIBSON, *THE EMOTIONAL AND SEXUAL LIVES OF OLDER PEOPLE: A MANUAL FOR PROFESSIONALS* 55 (1992); Marie R. Haug & Marcia G. Ory, *Issues in Elderly Patient-Provider Interactions*, 9 RES. ON AGING 3, 6 (1987).

72. See Office of Technology Assessment, *Losing a Million Minds: Confronting the Tragedy of Alzheimer's Disease and Other Dementias* 12-16 (1987).

73. See, e.g., Tracy L. Kramer, *Section 784.08 of the Florida Statutes: A Necessary Tool to Combat Elder Abuse and Victimization*, 19 NOVA L. REV. 735, 745 (1995) (suggesting the elderly need enhanced protection).

74. See, e.g., Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453 (1997). See also Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121 (1999) (discussing the impact of such stereotyping on the attorney-client relationship).

Nevertheless, an attorney must be sensitive to the possibility of diminished capacity in all clients. Certainly an older client is more likely to suffer from dementia than a younger client. Accordingly, the attorney must take whatever steps seem appropriate to represent older clients with diminished capacity.

One of the difficulties we face as attorneys is that the overwhelming majority of us lack any sort of medical training. Thus, we may feel woefully inadequate to the task of assessing client competency. The attorney's role in this area is not well-defined by the Model Rules of Professional Conduct. Should we question the competency of a client who makes unwise or destructive choices?⁷⁵ Is a client who changes a dispositive plan to favor one child over another the victim of undue influence? How should we draw the delicate balance between respecting personal autonomy and protecting the vulnerable client?⁷⁶

A lot of useful literature addresses assessments of client competence.⁷⁷ Most attorneys use this information only as a guide to seeking appropriate medical opinions regarding competence. The Model Rules of Professional Conduct contemplate this course of action.⁷⁸ Rule 1.14, discussed above in the context of representing clients with diminished capacity, allows an attorney to disclose confidential information when disclosure is necessary to protect the client.⁷⁹ Thus, under the pre-2002 Rules, an attorney can institute a guardianship proceeding or "take other protective action" when she believes that a client cannot protect his own best interests.⁸⁰ The post-2002 Rules make clear that an attorney can consult "individuals or entities that have the ability to take action to protect the client."⁸¹ The post-2002 Rules allow only as much disclosure of confidential information as is necessary to protect the client, making express an idea that is implicit in the pre-2002 Rules.⁸²

Further, the Commentary to the post-2002 Rules discusses the evaluation of client competency. It gives some guidance to the attorney in evaluating competency and also contemplates the use of medical professionals to evaluate competency. It states, in relevant part:

75. See Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 *FORDHAM L. REV.* 1101 (1994).

76. See, e.g., Steve Fox, *Is It Personal Autonomy or a Personality Disorder?* 3(1) *ELDER'S ADVISOR* (Summer 2001).

77. See, e.g., Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 *FORDHAM L. REV.* 1177 (1994).

78. See MODEL RULES R.1.14 (2002).

79. *Id.*

80. *Id.*

81. MODEL RULES R.1.14(b) (2002).

82. *Id.* at 1.14(c).

In determining the extent of the client's diminished capacity, the attorney should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the attorney may seek guidance from an appropriate diagnostician.

Although an attorney should not assume that old age brings a decline in competence, the attorney who represents older clients should consider that possibility and ensure that the vulnerable older client is receiving the protection he or she needs. This is an added burden on the attorney who must balance the sometimes conflicting interests of client personal autonomy and the attorney's belief that others—be they family members or medical professionals—should be involved in making decisions concerning the client's affairs. In one of the most dramatic understatements in the Commentary to the Model Rules of Professional Responsibility, a Comment to Rule 1.14 states: "The attorney's position in such cases is an unavoidably difficult one."

V. Hypothetical Situations

Because it is often difficult to discuss ethical issues out of a factual context, it is useful to consider several common but hypothetical situations. In each situation, a family conflict arises. For each situation, a course of preventative attorney representation will be suggested that could have either prevented or ameliorated the conflict.

A. Estate Planning

Perhaps the most common type of multi-generation representation comes in the estate planning context. It is not at all uncommon for an attorney to represent the members of several generations of a family in carrying out their estate plans. An attorney may represent a testator and one or more of her intended beneficiaries or the attorney may represent both the donor and donee of a gift.

1. DRAFTING A WILL

Where a family has a unified view of estate planning and similar dispositive intentions, one could suggest that there are no conflicts of interest.⁸³

83. See Fogel, *supra* note 66 at 264 ("In many cases, there is, of course, a close alignment between the interests of the beneficiaries and the interests of the testator. In these cases, the potential for conflict and the concomitant harm to the attorney-client relationship is minimized. Frequently, however, the interests of the testator and beneficiaries diverge.").

The safer path for the attorney, however, is to contemplate future conflicts of interest and prepare for them.

Consider a single father who has two adult children. The father draws a will dividing his estate equally between the two children. The children leave their estates partly to each other and partly to charities. If the same attorney draws all three wills, is there any problem under the Model Rules of Professional Conduct? Under the reasoning of Formal Opinion 02-428, probably not.⁸⁴

If the father later changes his will to disinherit one of the children, has a problem arisen? One could make the argument that the disinherited child needs to know this to protect his interests—perhaps he will choose to disinherit the child who was favored by the father. If there was no discussion of sharing information at the inception of the representation, the attorney may be faced with a difficult question of feeling that he must reveal information that he is not permitted to reveal.

This dilemma is best addressed as a preventive matter. At the outset of representation, the attorney should get a clear directive from each client about what information will be shared and what information will be kept confidential. This is especially important when an older client with potentially diminishing capacity is involved. When younger family members become concerned about the older person's declining abilities, they may wish to consult with the attorney to ascertain whether their older relative's legal affairs are in order, and the attorney will not be able to share the information unless a prior agreement has been made.⁸⁵

2. POSSIBLE MISUSE OF A DURABLE POWER OF ATTORNEY

In addition to planning dispositive arrangements for clients, attorneys also may find themselves involved with multiple generations of clients in transactions involving durable powers of attorney. These situations can raise even more difficult questions than the typical estate planning scenario, because they often involve shared or substituted decisionmaking by one other than the older client.

A. The Initial Consultation and Drafting

Imagine that three years ago an attorney has drafted a financial durable power of attorney for Frank, then age seventy-five. Frank has three adult children: Alice, now age thirty-six; Bruce, now age thirty-four; and Charles, now age thirty-two. Alice has been estranged from her father and

84. ABA Op. 02-428, *supra* note 60. For a discussion of this Formal Opinion, see *supra* notes 61-65.

85. See MODEL RULES R.1.6 (2002).

brothers for about five years. Bruce is estranged from Charles, but has been in touch infrequently with his father and Alice. Charles brought his father to the attorney, attended the discussions regarding the durable power of attorney and is named as agent under the durable power. Assume that the durable power includes an unlimited power to make gifts to Frank's "issue."

At this point in the scenario, has the attorney taken any action that is problematic? Perhaps. First, from the facts as given, it is not entirely clear who the client is. Clearly, Frank is a client. Is Charles also a client? The attorney needs to decide who is seeking representation, and then determine whether he can represent their interests under the Rules.

In this situation, the attorney could take the position that Frank is his client and Charles is not. If the attorney takes this position, he must be careful to ascertain that he is carrying out Frank's wishes.

Alternatively, the attorney could view this as a joint representation of both Frank and Charles. In that instance, the attorney should take steps to ascertain whether representation of both Frank and Charles would result in representation of conflicting interests.⁸⁶ If he concludes that their interests conflict, he must consider whether he believes that he can represent both clients despite the conflict.⁸⁷ He must obtain consent from both clients to the representation.⁸⁸ He should also address with both clients the issue of information-sharing and confidentiality.

B. Subsequent Use of the Power

Suppose that Charles asks to meet with the attorney several years later. He tells the attorney that Frank's health is failing, and he frequently seems disoriented. He explains that he moved Frank from Frank's apartment into Charles's house so that he could better care for him. He also tells the attorney that he has been making significant annual gifts to himself because, in his words, "that's what my father would have wanted." He is concerned because he has received a letter from both Alice and Bruce demanding to see their father's financial records and threatening to institute a guardianship proceeding. He believes that his father would be devastated by a guardianship proceeding and he asks for your help.

The first issue that the attorney must consider: who is his client. Clearly, because he drafted the power of attorney for Frank, Frank is (or perhaps was) his client. Whether Charles is also the attorney's client is unclear from the facts. It seems clear that Charles is now seeking advice as a client

86. See MODEL RULES R.1.7 (2002).

87. *Id.*

88. *Id.*

of the attorney. The conflict analysis is similar at this juncture with one important difference: if the attorney decides that Frank and Charles's interests conflict, Frank may no longer have the capacity to consent to the representation.⁸⁹ This situation could have been prevented by a conversation about this possibility at the outset of the attorney's representation of Frank. Granted, hindsight is twenty-twenty, but it is relatively easy to foresee a situation like this occurring.

VI. Conclusion

Any representation of multiple generations requires an attorney to take steps to ensure that the interests of all involved are adequately represented and that the attorney is protected from later complaints. This situation requires even more forethought and care when one or more of the clients involved is an older client, especially an older client who may be suffering from some diminished capacity.

Even if multiple family members are not the attorney's clients, an attorney may conclude that family involvement in a representation is the best course. In that instance, the attorney must be careful to comply with his professional responsibilities in seeking to protect the client's interests.⁹⁰

Practicing estate planning attorneys frequently complain that the rules are overly restrictive concerning multiple generation representations. They contend that the Model Rules were drafted primarily with litigation in mind, and assume a contentious foundation for any matter. That model is not an appropriate one for the estate planning setting.

In a scenario involving a happy, cohesive family, this position may be well-founded.⁹¹ There are many benefits to having a single attorney coordinate the estate plans of an entire family.⁹² First, the attorney will have access to information that allows her to see "the big picture." The attorney can put each family member's situation in the context of the extended family as a whole, which often offers more creative solutions to estate planning issues. Second, the attorney will have a certain degree of background knowledge when preparing each successive family member's estate plan. This knowledge base can result in a significant savings in attorney

89. *Id.*

90. See also Jennifer Tulin McGrath, *The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples*, 27 SEATTLE U. L. REV. 75 (2003).

91. See generally RESTATEMENT (THIRD) THE LAW GOVERNING ATTORNEYS § 130 (concerning multiple representation in a nonlitigated matter).

92. See ABA Op. 02-428, *supra* note 60, at n. 2 ("Considerable efficiency is gained through having one attorney or firm manage the legal affairs of all family members. The firm learns about family businesses, assets, documents, and personalities and thus is able to provide quality representation requiring less time.").

time and fees for the clients. Third, the attorney can see potential problems that develop if one or more family members have significant changes in personal situations. For example, a divorce of one family member might terminate gifts to the ex-spouse in that person's will, but might not negate gifts in another family member's will. The attorney who has drafted the Wills of multiple family members would see this situation. Fourth, the attorney who has planned the estates of multiple family members may be able to offer the best informed advice if the tax law changes or if one of the family members voluntarily changes his or her dispositive plans.

Thus, the benefits of representing multiple family members can easily outweigh the burdens of such representations. There is a concern, however, that when one or more of the persons represented may be suffering from declining capacity, the attorney must exercise a greater degree of care to ensure that the suffering client is not victimized by other family members.

It is interesting at this point to consider exactly what "victimization" means in this context. Most people feel that their money should ultimately pass to their children. People with families tend to view their accumulations of wealth in dynastic terms—the assets belong to the "family" rather than to the individual. When pressed, a client may say that he views his assets as belonging to him and his spouse, but also secondarily to his children, and perhaps even to more distant descendants. In light of this dynastic view of assets, it is difficult to characterize a child's desire for his parents' money as predatory behavior or the child's steps to get the assets as "victimization."

The difficult question to be addressed, then, is where to draw the line between "normal" family interactions involving family assets and inappropriate predatory behavior. It seems appropriate to characterize transactions that are not the product of free will as victimization, and to allow other transactions that are the product of free will to proceed. In the context of representing an older client when other family members are involved, this will require the attorney to be certain that the older client's free will is not being overborne by that of other family members, but will respect the free, although perhaps unsavory, choices made by older clients.

The Restatement (Third) of the Law Governing Attorneys offers some guidance about multiple representations in the estate planning area. Section 130 provides:

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, an attorney may not represent two or more clients in a matter not involving litigation if there is a substantial risk that the attorney's representation of one or more of the clients would be materially and adversely affected by the attorney's duties to one or more of the other clients.

One of the comments to section 130 provides a series of useful illustrations:

Assisting multiple clients with common objectives, but conflicting interests. When multiple clients have generally common interests, the role of the attorney is to advise on relevant legal considerations, suggest alternative ways of meeting common objectives, and draft instruments necessary to accomplish the desired results. Multiple representations do not always present a conflict of interest requiring client consent (see § 121). For example, in representing spouses jointly in the purchase of property as co-owners, the attorney would reasonably assume that such a representation does not involve a conflict of interest. A conflict could be involved, however, if the attorney knew that one spouse's objectives in the acquisition were materially at variance with those of the other spouse.

Illustrations:

1. Husband and Wife consult Attorney for estate-planning advice about a will for each of them. Attorney has had professional dealings with the spouses, both separately and together, on several prior occasions. Attorney knows them to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Attorney may represent both clients in the matter without obtaining consent (see § 121). While each spouse theoretically could make a distribution different from the other's, including a less generous bequest to each other, those possibilities do not create a conflict of interest, and none reasonably appears to exist in the circumstances.
2. The same facts as in Illustration 1, except that Attorney has not previously met the spouses. Spouse A does most of the talking in the initial discussions with Attorney. Spouse B, who owns significantly more property than Spouse A, appears to disagree with important positions of Spouse A but to be uncomfortable in expressing that disagreement and does not pursue them when Spouse A appears impatient and peremptory. Representation of both spouses would involve a conflict of interest. Attorney may proceed to provide the requested legal assistance only with consent given under the limitations and conditions provided in § 122.
3. The same facts as in Illustration 1, except that Attorney has not previously met the spouses. But in this instance, unlike in Illustration 2, in discussions with the spouses, Attorney asks questions and suggests options that reveal both Spouse A and Spouse B to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Attorney has adequately verified the absence of a conflict of interest and thus may represent both clients in the matter without obtaining consent (see § 122).

The views expressed in the *Restatement* seem consistent with the views of most estate planners that it is most often not inappropriate for one attorney to represent both spouses in the estate planning context.⁹³ Although the safer course might be to insist that the client's consent to joint representation of

93. See generally Barbara Freedman Wand, *Ethical Issues in Representing Husbands and Wives in Estate Planning*, 2(2) ELDER'S ADVISOR (Fall 2000).

potentially conflicting interests. In most situations such consent is probably not required because the family is harmonious and the couple's interests are not adverse.

Naturally, the addition of other family members to the attorney's representation complicates matters. If one believes anecdotal evidence, it is far more likely to find family disharmony regarding dispositive plans between siblings than between spouses. Sibling rivalry frequently does not stop at attainment of adulthood, and many horror stories are told regarding the "competition" of siblings for their parents' assets.

The attorney who chooses to represent clients of multiple generations of the same family can take several paths. He can simply conclude that no conflicts exist or are possible because each client is simply disposing of his or her own assets and can do so in any way that he or she chooses. Although this approach is attractive in its simplicity, it may prove to be the worst approach for the attorney if a conflict arises.

A better approach is to inform fully each client about the potential for future conflict and obtain the informed consent of each client to the representation. This agreement would not have to include the complete sharing of information about all of the clients' affairs. For example, a parent might not want his children to know the details of his estate plan. The most important aspect of this early discussion of information sharing and confidentiality is that the client should understand and communicate what his options and choices are. Thus, the client should be informed about and given the opportunity to consent to disclosure of confidential information in the event that the client becomes incapacitated. Ultimately, careful communication with the client is the single best way to protect the interests of an older client in a situation involving multi-generation representation.