Counseling Clients Who Weren't Born Yesterday: Age and the Attorney-Client Relationship

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Age and the attorney-client relationship

BY PAUL R. TREMBLAY

Ethical questions are inevitable when you represent older clients. The increasing infirmity and growing dependence on others that often accompany aging make it difficult for you to evaluate the client's capacity, judgment, and free choice. Family involvement in legal matters also raises questions about your allegiance and direction.

Accordingly, legal ethicists commonly treat elder law as a separate focus of professional responsibility.

As we explore one aspect of the Conover family’s story, keep in mind that ethics opinions and professional standards such as the ABA’s Model Rules of Professional Conduct and its
predecessor, the Model Code of Professional Responsibility, seldom offer definitive guidance. Lawyers have enormous discretion to make significant judgments amid ambiguous data.

Recognize what local substantive law permits you to do to accomplish your client’s goals. At the same time, consider what your advice and transactions will look like if they are challenged by a client’s relative or another party. Remember, protecting yourself is but a by-product of ensuring that your work for the client withstands scrutiny. Expect after-the-fact review of your work by the client’s family.

When discussing an older client who approaches you with family members, most elder-law ethicists pose the question: “Who among these people is my client?” More appropriate would be an ethical mandate that you explicitly and deliberately make the choice and guide your conduct in accordance with that election.

Most often, you can define precisely who your client is but you have an interest in not making that choice. An example is in order.

A case of Conovers

Maggie Conover may well need long-term care in the near future, and she might well want to do some planning around her income and assets in contemplation of possible Medicaid eligibility. Her most vulnerable asset is the marital home, where she lives.

Assume that after a divorce arrangement in which Maggie is awarded the home, Maggie and her daughter Mary call on you in an effort to have the house put in Mary’s name. Maggie will retain a life estate to foreclose the possibility of the home’s being used to satisfy any Medicaid obligations after Maggie’s death. Assume for the sake of the ethics discussion that this estate planning would be wise for Maggie. (In fact, proposed changes being debated in Washington might make this planning less helpful, but put that aside for the sake of this discussion.)

The real estate transfer benefits Maggie, as it satisfies her wish to leave her house to at least one of her children. At the same time, it gives Mary a terrific asset.

This is where ethics writers pose their question: “Who is your client?”

You might consider representing both women. Traditional ethics doctrine allows joint representation if no actual conflict of interest exists between the two parties and both consent after full disclosure of the consequences of sharing a lawyer. (See Model Rule 1.7(b); Model Code DR 5-105(c).) The above scenario offers no palpable conflict, and thus Maggie and Mary can give their informed permission for you to represent them both.

There are advantages to doing so. By treating the couple as joint clients, you have affirmed their connection and diminished the risk of dividing their allegiance to each other. This arrangement also protects Mary’s confidences as well as Maggie’s, at least from the outside world (though, importantly, not from each other). You might view it as “easier” to accept both women as clients and avoid making a choice.

A moment’s reflection, though, shows why this choice is hardly easy. To ensure informed consent, you must discuss the consequences of joint representation. Though Mary loses little by it—any lawyer has simply to deed the house to her—Maggie needs unfettered counsel. You must advise her of alternative dispositions, such as a trust arrangement or a deed that might leave the property to more than one of her children. She needs to understand what she gives up by not retaining individual counsel.

Of course, this conversation with Mom will sound pretty disloyal to Mary; almost as if you’re trying to talk Maggie out of giving Mary the home. A sensitive lawyer will understand and acknowledge this. Because this conversation has to occur before the women accept the joint representation contract, both you and Mary can test her feelings about a working relationship in which you are explicitly taking into account any tensions between daughter and mother.

If either woman chooses to forgo the joint arrangement after your warnings, you might not be able to represent either. By exploring in-depth the prospect of joint representation, you have developed a cognizable attorney-client relationship with both women—one that “counts” for conflict-of-interest purposes. What you’ve learned from each woman is also confidential, even before any agreement is reached, and that contributes to your not being able to choose one woman as your client.

Family influence

Now suppose a variation on the case above. Say Maggie and Mary come to you together and make clear from the start that they want to hire you “for Maggie.” They do not even consider the possibility of your working for Mary; it is, after all, Maggie’s property that needs to be transferred. But they tell you that Mary is getting the property and that Mary will pay you.

As a matter of professional ethics, there is no question that you may proceed under these circumstances and that your full allegiance is to Maggie. This allegiance includes counseling Maggie about alternative dispositions of the property that might leave Mary out altogether.

Again, you must warn Maggie about your role and the absence of a role for Mary even if she pays. (See Model Rule 1.8(f); ABA Inf. Op. 679 (1963).) Mary will have no right to know what you and Maggie discuss, except to the extent that Maggie chooses to tell her. You may even use Mary’s funds to arrange a transfer to a different person.

A prudent lawyer will relay this information to Mary as well as to Maggie, and be wary of the influence of Mary’s payment on Maggie. Model Rule 1.8(f)(2) prohibits a lawyer’s proceeding under a third-party-payer arrangement if “interference with the lawyer’s independent professional judgment” will result.

The given scenario plainly invites that kind of interference. Be mindful of how the arrangement will look to a judge listening to Mary’s plea that you exploited her funds and her trust.

What if you were worried that Maggie was not thinking clearly about what she wanted to do? This variation introduces perhaps the most gnawing of elder-law ethics questions: arriving at decisions for and with clients of disputed decision-making capacity.

Two tasks confront you: first, to dis-
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cern how much paternalist liberty the profession gives to lawyers who represent clients exhibiting some disability and second, to make a judgment about when that liberty is warranted.

The first inquiry is the easier to address, if only because the ABA has taken a stab at articulating standards for lawyers to follow. Model Rule 1.14 contains two fundamental truths applicable to representation of a "client under a disability." First, Rule 1.14(a) stresses that the lawyer is to maintain as normal a relationship with the client as possible, notwithstanding the disability. Second, if "the lawyer reasonably believes that the client cannot adequately act in the client's own interests," the lawyer has permission to act in a paternalist fashion, even unilaterally so. The attorney may even seek guardianship for the client.

In Informal Ethics Opinion 88-1530, the ABA has interpreted the paternalist function to imply discretion to reveal confidential information necessary to accomplish the paternalist aims—even though Model Rule 1.6 does not otherwise include any such explicit exceptions to confidentiality.

I interpret the permitted paternalist function as "substituted judgment" rather than "best interests": A paternalist lawyer will not use an objective standard to accomplish what he or she sees as best for the client, but will instead use a client-based subjective standard to do what the "competent" client would have wanted.

Frankly, Model Rule 1.14 understates the difficulty a lawyer faces in acting on the rule, especially when a lawyer needs to act in a unilateral fashion to protect a client. Even though they are criticized for exercising too much control over client affairs, lawyers are unaccustomed to acting without at least nominal client consent. To do so feels wrong: it feels like a malpractice claim waiting to happen, regardless of ABA permission.

Back to Maggie and Mary to see how a lawyer might act consistent with Rule 1.14. Suppose Maggie comes with Mary to your office for Medicaid planning. It is agreed that her house will be transferred to all her children (with Maggie retaining life estate, etc.). Again, assume for now that this is wise estate planning.

After the appropriate papers are executed but before they are recorded, Maggie demands that her cable repairwoman's name be added as a grantee. This woman had just fixed a connection at Maggie's house and was a delightful visitor, and Maggie now wants her to share one-fifth of the remaining interest in the home.

Is this an "incompetent" decision entitling you to override Maggie's consent? The question to ask is this: Does the quality of decision making seem impaired as opposed to the result that Maggie wants?

Determining capacity has been explored at length in both medical and legal ethics fields. The consensus is that one must respect eccentric, unusual, or imprudent decisions as long as they are the product of some reflective process. A decision that appears to be the result of an impaired process, on the other hand, is not a true "decision" and has less presumptive weight. In all cases a strong presumption exists that a chosen action is knowing and competent.

The example of the cable TV repairwoman may well overcome the usual presumptions, in that it appears to be inconsistent with Maggie's long-held values and Maggie does not seem able to understand its import.

If you are persuaded that Maggie's action is not a "competent" one—that she does not fully appreciate its consequences—then you may first seek to persuade her to drop the cable person from her plans. (You can rely on family members such as Mary for guidance. But beware of family members' own interests affecting their judgments.) If unsuccessful, you may record the deed, even over Maggie's objections.

A fourth scenario demonstrates a lawyer's limitations. The facts are the same as above, but you've not yet executed the deed. This version removes your de facto authority because you cannot effect the real estate transfer without Maggie's signature. Not even Model Rule 1.14 would authorize a lawyer's coercive creation of a signature to a deed. Should you choose to be a paternalist in this setting (and whether you would depends in large part on Maggie's—not her family's—urgent need to accomplish the transaction), your only choice would be to recommend guardianship.

That process, clearly contemplated by the Model Rules, leads to several conundrums. It may be all right for you to recommend guardianship to family members and to represent the client/ward via the guardian if the guardianship proceedings are successful. But if you suggest a guardianship, you ought not to represent the ward in the disputed guardianship case itself. The prospect of your having suggested a guardianship at one moment and then actively opposing it next stretches the limits of lawyer flexibility.

A final variation best captures the real tensions here. Maggie and Mary approach you asking that the home be deeded to Mary. This is not the only alternative that will meet Maggie's Medicaid planning, but it is not unwise.

Maggie is frequently confused about the whole transaction. At times she is articulate and lucid; during these times she tells you that she wants to favor

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her daughter with the property. You are not convinced that this sentiment is free from Mary's influence, however, but you have no hard data to back up your suspicions.

At other times Maggie is far from articulate and lucid. She misunderstands the transaction, thinks her home is going to the state or to her deceased aunt, and on occasion states firmly that it is her house and she will own it until the day she dies. You are convinced that some estate planning is prudent.

Can you represent Maggie to effect the deed to Mary?

Though Model Rule 1.14 permits intervention, the rule cannot guide you on how to intervene. Consider the possibilities: If you do nothing, you invite Mary's disappointment (and perhaps that of other siblings). If you effect the deed to Mary, you risk a challenge from the excluded siblings questioning Maggie's capacity to deprive them of shares. If you effect a deed to the siblings, you act with the least apparent authority, disappointing Mary and likely probably Maggie as well.

To propose a guardianship as a way of obtaining a clearer line of authority seems unrealistic given Maggie's only occasional confusion—and given the enormous pressures on you not to "betray" a client except in the gravest emergency.

No pat answers

So what do you do? There is no clear answer. You have to act (or choose not to act) despite the absence of direction. Here is one proposal: You do not produce a deed to Mary without clarifying Maggie's values and previously expressed preferences. You seek more information. Test whether Maggie would be opposed to allowing you to talk to the excluded siblings. Her response might enlighten you about the quality of the family relationships.

You might contact Maggie's psychiatrist if she has one. Model Rule 1.14 allows that step, even, arguably, without Maggie's consent. (The doctor's code of ethics, however, might bar a nonconsensual conversation.)

The point is this: Ethics standards cannot tell you how to make complex judgment calls amid ambiguous and conflicting moral and tactical pressures.

You should not be penalized through malpractice or professional sanctions for an approach that is thorough, thoughtful, and as limited in its intervention as is reasonably necessary.

Bear these items in mind:

• A lawyer cannot always merely respond to a client's articulated wishes, for those articulations may not reflect actual preferences, and they may vary from moment to moment.

• A lawyer cannot always rely on the nearest proxy decision maker, for that proxy may have his or her own vested interests.

• A lawyer cannot always act unilaterally without regard to a proxy's or client's direction, because the lawyer often is the least informed player.

You may want to consider a combination of those items—client wishes, proxy input, and your own judgment—and hope that this multilayered approach will lead to the result closest to what your client would have chosen were she fully able to do so.

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